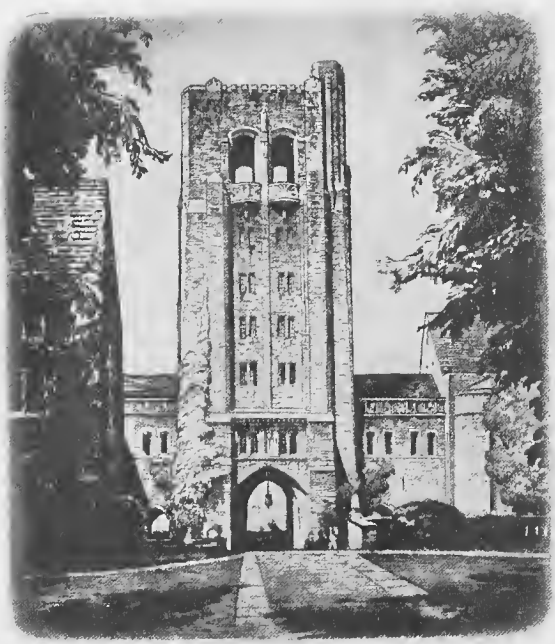
KF
670
T47



Cornell Law School Library

Cornell University Library
KF 670.T47
A practical treatise on title to real pr
3 1924 018 815 708
law



The original of this book is in
the Cornell University Library.

There are no known copyright restrictions in
the United States on the use of the text.

http://www.archive.org/details/cu31924018815708

A PRACTICAL TREATISE

ON

TITLE TO REAL PROPERTY

INCLUDING THE

COMPILATION AND EXAMINATION OF ABSTRACTS

WITH FORMS

By

GEORGE W. THOMPSON

Author of
A TREATISE ON WILLS

INDIANAPOLIS
THE BOBBS-MERRILL COMPANY
PUBLISHERS

B9697.

COPYRIGHT 1919
BY THE BOBBS-MERRILL COMPANY

CORNELL UNIVERSITY
FEB
25
1919
LAW LIBRARY

PREFACE

The law of real property may be said to be the backbone of American law. The estates and interests involved, both present and future, exhibit the most intricate of all questions known to the legal profession. Modern statutes and the standardization of deeds and other instruments relating to real estate have, in some degree, reduced the number of such questions; but they often arise when least expected and require the most careful and painstaking treatment.

Every transaction in real estate should be under the supervision of a competent legal adviser, and no title can be safely accepted without a proper examination. To facilitate such examination, counsel should be furnished, in proper form, all the record information which he is required to know concerning the title to the particular real estate in question. He should be familiar with the method of compiling such information, and insist on its proper and orderly presentation before he undertakes to apply legal principles to the various instruments and transactions in the chain of title.

Counsel often encounter trouble and embarrassment in the perusal of an abstract, owing to the confused and ambiguous manner in which the material parts of instruments are stated, and the illogical mode of arrangement sometimes adopted. Many advantages will result to the profession from observing a more careful and systematic preparation of abstracts of title by persons and corporations engaged in compiling them.

In this treatise the author has prepared for the special use of attorneys, as well as conveyancers, a practical guide to the proper preparation and examination of abstracts, together with an epitome of the law applicable to questions arising in the perusal of such documents. A general outline is given of the most approved methods of making indices and abstract books; a general scheme is given of arrangement or grouping of the various instruments and transactions forming the chain of title, and the

essential parts of instruments required to be noted are given, together with illustrative forms.

All instruments and transactions affecting the title to real estate are treated, not only with respect to their proper exhibition in the chain of title, but more particularly with reference to their legal effect and operation as muniments of title or incumbrances. Special care has been exercised to point out the numerous pitfalls in the chain of title, and to indicate a remedy for correcting or curing defects therein.

A digest of the statutes of the various states pertaining to the execution and acknowledgment of deeds and mortgages, the execution and probate of wills, and the law of descent and distribution has been included for the convenience of counsel not having access to the statutes of the various states. From the great number of decisions only those have been selected that best illustrate particular topics and indicate modern tendencies.

In the preparation of this work the author has combined his own experience with the experience of a number of eminent conveyancers and lawyers with whom he has been privileged to consult, and to whom he acknowledges many obligations for advice and suggestions.

GEORGE W. THOMPSON.

TABLE OF CONTENTS

CHAPTER I

ABSTRACTS IN GENERAL

SEC.
1. Abstracts defined.
2. Origin and history of abstracts.
3. The object of an abstract.
4. American and English methods distinguished.
5. General requisites of an abstract.
6. Sufficiency of abstract between vendor and vendee.
7. Abstract showing good title.
8. Period for which title should be shown.
9. Qualifications of abstracters.
10. Scope of abstracters' undertaking.
11. Relation of trust and confidence.
12. Who may make abstracts.
13. Compensation of abstracters.
14. Bond of abstracters.
15. Nature of abstracter's liability.
16. Liability for negligence or mistake.
17. Liability for failure to show liens or incumbrances.
18. Measure of damages against abstractee.
19. Actual damages sustained.
20. Limiting liability of an abstracter.
21. Liability of public officers examining title.
22. To whom an abstracter may be liable.
23. When right of action accrues.
24. Pleadings in action against abstracter.
25. Agreement to furnish abstract.
26. Duty to furnish abstract irrespective of agreement.
27. Contract by broker to furnish abstract.
28. Requiring abstracts of parties to real actions.
29. Abstract where records destroyed.
30. Property in the abstract.
31. Delivery of abstract.
32. Tender of abstract after expiration of agreed time.
33. Merger in deed of contract to deliver abstract.
34. Waiver of objections to title by taking possession.
35. Time in which to examine abstract.
36. Taxation of abstract books.

CHAPTER II

ESTATES, INTERESTS AND RIGHTS IN REAL PROPERTY

SEC.
40. Estates defined and distinguished.
41. General classification of estates.
42. Estates in fee simple.
43. Modified fees.

44. Conditional fees at common law.
45. Creation of fee simple estate by deed.
46. Creation of fee simple estate by will.
47. Limitations and restrictions in transfers of fee simple estates.
48. Estates in fee tail.
49. Life estates.
50. Estates for years.
51. Estates at will.
52. Estates at suffrance.
53. Estates from year to year.
54. Estates upon condition.
55. Estates upon limitation.
56. Estates upon conditional limitation.
57. Legal and equitable estates.
58. Uses.
59. Trusts.
60. Powers.
61. Easements.
62. Licenses.
63. Profits à prendre.
64. Curtesy.
65. Dower.
66. Homestead.
67. Widow's quarantine.

CHAPTER III

TITLE TO REAL ESTATE IN GENERAL

SEC.
70. Title defined and distinguished.
71. Various estates to which title relates.
72. Allodial titles.
73. Color of title.
74. Legal and equitable titles.
75. Complete, perfect, good and clear titles.
76. Bad, defective, imperfect, and doubtful titles.
77. Marketable titles.
78. Evidences of title.
79. Title insurance.

CHAPTER IV

METHODS OF ACQUIRING TITLE

SEC.
85. Title by descent and by purchase.
86. Title by descent based on laws of inheritance.
87. Common-law canons of descent.
88. Rules of descent under the civil law.
89. Consanguinity and affinity.
90. Fact of death.
91. Fact of intestacy.
92. Title by purchase classified.
93. Title by private deed.
94. Official grants.
95. Public grants.
96. Devise.
97. Title by estoppel in general.
98. Estoppel by record.
99. Estoppel by deed.

100. Estoppel in pais.
101. Relation.
102. Prescription and limitation.
103. Accretion and alluvion.
104. Title to riparian lands.
105. Dedication.
106. Confirmation.
107. Occupancy.
108. Abandonment.
109. Eminent domain.
110. Title and rights acquired by condemnation.
111. Escheat.
112. Confiscation.
113. Forfeiture.

CHAPTER V

THE PUBLIC RECORDS

SEC.
115. Public records generally.
116. Style of office under which recording is done.
117. What constitutes recording.
118. Object of recording acts.
119. Particular instruments which may be recorded.
120. Proper execution and acknowledgment as a prerequisite to recording.
121. Books in which instruments must be recorded.
122. Time of recording.
123. Time allowed by statute for recording deeds and other instruments.
124. Place of recording.
125. Effect of a record duly made.
126. The doctrine of notice.
127. Actual notice.
128. Implied notice.
129. Constructive notice.
130. Official tract indexes.
131. General index of records.
132. Whether the index is a part of the record.
133. Records of attachment and lis pendens.
134. Index of judgment records.
135. Tax records.
136. Records of vital statistics.
137. Abstracters' use of public records.
138. Loss or destruction of records.

CHAPTER VI

ABSTRACTER'S INDEXES AND REFERENCE BOOKS

SEC.
145. Importance of indexes and reference books.
146. The government tract book.
147. Surveyor's field notes.
148. Books of original entries.
149. Instrument number index.
150. The tract index.
151. Index of irregulars.
152. Index of tax sales.
153. Index of judgments.
154. Miscellaneous indexes and reference books.

CHAPTER VII

COMPILATION OF AN ABSTRACT

SEC.
160. Introductory remarks.
161. Scope and extent of the examination.
162. Preliminary sketch of chain.
163. Formal parts of the abstract.
164. The caption.
165. Arrangement of the abstract.
166. Synopsis of instruments and proceedings.
167. Fullness of synopsis.
168. Abstracter's notes.
169. Exhibiting instruments for reference.
170. Showing irregular instruments.
171. Showing mistakes made in transcribing instruments.
172. Abbreviations.
173. Preserving copy of abstract.
174. Abstracter's certificate.

CHAPTER VIII

BEGINNING OF TITLE

SEC.
180. Inceptive stages of title generally.
181. Source of title shown by complete chain.
182. Methods of transfer under government land laws.
183. Who may acquire title to public lands.
184. Power of congress to dispose of public lands.
185. Disposal of state lands.
186. Direct legislative grants.
187. Form and construction of direct legislative grants.
188. Abstracting legislative grant.
189. Confirmation acts and decrees.
190. Transfer by public sale.
191. Appropriation by private entry.
192. Nature of entryman's title.
193. Lands subject to entry.
194. Statement of the entry.
195. Receipts, certificates, etc., issued by register or receiver.
196. Pre-emption.
197. Pre-emptor's right or title.
198. Contracts and conveyances before entry.
199. Graduation acts.
200. Homestead and free grants.
201. Nature of rights acquired by homesteader.
202. Donations and bounty lands.
203. Land warrants and scrip.
204. Desert land entries.
205. Timber and stone lands.
206. Timber culture claims.
207. Swamp land grants.
208. School and university land grants.
209. Statement where title founded on school land grant.
210. Grants for internal improvement.

211. Initial statement of abstract where title based on grant for internal improvements.
212. Land grants to railroads.
213. Grant for public highway.
214. Private land claims.
215. Town site entry.
216. Initial statement of abstract where title obtained through town site entry.

CHAPTER IX

FEDERAL AND STATE PATENTS

SEC.
220. Patents in general.
221. Necessity of patent to pass title.
222. Form and requisites of patents.
223. Delivery, acceptance and recording of patents.
224. Validity of patents.
225. Patents issued after death of claimant.
226. Operation and effect of patents.
227. Construction of patents.
228. Conclusiveness of patents.
229. Rescission, cancelation and correction of patents.
230. Abstracting patents.

CHAPTER X

SURVEYS, PLATS AND SUBDIVISIONS

SEC.
235. Historical view of government land survey.
236. Laying off the land into townships.
237. Laying off the townships into sections.
238. Subdividing the sections.
239. Plats and subdivisions.
240. Maps and plats as evidence.
241. Effect of reference in descriptions to maps or plats.
242. Abstracting plat and subdivision.
243. Vacation of plat.
244. Dedication by maps or plats.

CHAPTER XI

ASCERTAINMENT OF QUANTITY OF LAND

SEC.
250. Computation of land areas and distances.
251. Tables of measure.
252. To find the area of a tract in shape of a parallelogram.
253. To find the area of a triangle.
254. To find the area of a trapezoid.
255. To find the area of a trapezium, or any other irregular polygon.
256. To find the area of irregular-shaped tracts.
257. Effect of the use of the words "more or less" in a description.

CHAPTER XII

THE FORMAL PARTS OF DEEDS

SEC.
260. Formal parts of a deed enumerated and described.
261. Names and descriptions of parties.
262. Grantors.
263. Grantees.
264. Designating nature and kind of conveyance.
265. Date of the deed.
266. Consideration.
267. Operative words.
268. Words of inheritance.
269. Description and boundaries.
270. Sufficiency of description.
271. Identification of description by act of the parties.
272. How description construed.
273. Recitals in deeds.
274. Habendum, or the estate created.
275. Exceptions and reservations.
276. Conditions precedent and subsequent.
277. Restrictions as to the use of land.
278. Covenants for title.
279. Defective covenants.
280. Signature to the deed.
281. Sealing.
282. Attestation.
283. Acknowledgment.
284. Examples of defective acknowledgments.
285. How acknowledgment shown in abstract.
286. Delivery.
287. Registration.
288. Correcting errors in record, and re-recording.
289. Ancient deeds.
290. Technical and particular words and phrases.
291. Repugnant or conflicting parts of a deed.

CHAPTER XIII

GENERAL CLASSIFICATION OF PRIVATE CONVEYANCES

SEC.
295. Modern kinds of deeds.
296. Indentures and deeds poll.
297. Construction of deeds.
298. Validity of conveyances.
299. Warranty deeds.
300. Abstracting warranty deeds.
301. Quitclaim deeds.
302. Abstracting quitclaim deeds.
303. Deeds with special warranties.
304. Statutory forms of deeds.
305. Common-law deeds.
306. Deed of release.
307. Deeds of confirmation.
308. Deeds of surrender.

309. Deeds of assignment.
310. Deeds of defeasance.
311. Conveyances to take effect in the future.
312. Deeds conveying base, qualified, and conditional estates or interests.
313. Conveyances with restrictive conditions and covenants.
314. Conveyances of land in the adverse possession of another.
315. Fraudulent conveyances.
316. Conveyances subject to incumbrance.
317. Dedicatory deeds.
318. Deeds creating resulting trusts.

CHAPTER XIV

SPECIAL CLASSES OF PRIVATE CONVEYANCES

SEC.
320. Conveyances for the sole and separate use of married women.
321. Deed to husband and wife.
322. Conveyances for married women.
323. Conveyance between husband and wife.
324. Acknowledgment by married woman.
325. Release of dower.
326. Conveyances creating estates in common and in joint tenancy.
327. Voluntary partition deeds.
328. Conveyances to and by partnerships.
329. Conveyances to private corporations.
330. Acknowledgment of corporate deeds.
331. Conveyances by public and quasi corporations.
332. Conveyance by private corporations.
333. Conveyances by charitable or religious corporations.
334. Conveyance of an expectancy.
335. Conveyance by attorney in fact.
336. Power of attorney to convey.
337. Ratification and revocation of powers of attorney.
338. Conveyances in trust.
339. Declaration of trust in deeds.
340. Revocation of trust.
341. Death, resignation, or removal of trustee.

CHAPTER XV

OFFICIAL CONVEYANCES

SEC.
345. Official conveyances generally.
346. Recitals in official deeds.
347. Sheriff's deed on execution sale.
348. Description of premises sold on execution.
349. Acknowledgment of sheriff's deed.
350. Construction and operation of sheriff's deeds.
351. Statutory sheriff's deeds.
352. Sheriff's deed in execution of decree.
353. Deeds by masters, commissioners and referees.
354. Powers and duties of trustees to make conveyances.
355. Trustee's conveyance of legal title.
356. Testamentary trust distinguished from power, charge, and estates on condition subsequent.

357. Trustees' deeds.
358. Mortgagee's deed under power of sale.
359. Executor's deed.
360. Administrator's deed.
361. Administrator with the will annexed.
362. Guardian's deed.
363. Fiduciaries purchasing at their own sales.
364. Caveat emptor as applied to judicial and ministerial sales.

CHAPTER XVI

ASSIGNMENTS AND BANKRUPTCY

SEC.
370. Assignments generally.
371. Voluntary assignments for the benefit of creditors.
372. Validity of assignments.
373. Formal requisites of assignments.
374. Assignee's title.
375. Construction, operation, and effect of assignments.
376. What laws govern.
377. Bankruptcy and insolvent laws.
378. Jurisdiction and procedure prior to adjudication.
379. Voluntary and involuntary bankruptcy.
380. The petition, process, etc.
381. Effect of adjudication in bankruptcy.
382. Procedure after adjudication.
383. Abstracting bankruptcy proceedings.
384. Deed of trustee in bankruptcy.
385. Discharge in bankruptcy.

CHAPTER XVII

CONTRACTS TO SELL AND CONVEY REAL ESTATE

SEC.
390. Land contracts and bonds for deed.
391. Relation of vendor and vendee under contract or bond for deed.
392. Title or interest of vendor and vendee.
393. Formal requisites.
394. Record of contract of sale.
395. Construction of the contract.
396. Abstracting the contract.
397. Assignment of contract.
398. Agreement as to title and its performance.
399. Forfeiture of contract of sale.
400. Title bond.
401. Agreement to devise real estate.

CHAPTER XVIII

LEASES

SEC.
405. Leases defined and distinguished.
406. Formal parts of leases.
407. Covenants in leases.
408. Assignments of lease.

CHAPTER XIX

MORTGAGES

SEC.
415. Definition, origin, and nature of mortgages.
416. Legal and equitable theory of mortgages.
417. Equitable mortgages.
418. Mortgages distinguished from other transactions.
419. Absolute deed as mortgage.
420. Equity of redemption.
421. Form of mortgage in general.
422. Description of the parties.
423. Description of the premises.
424. Description of the debt secured or obligation to be performed.
425. Covenants of a mortgage generally.
426. Special covenants and conditions.
427. Estoppel of mortgagor subsequently acquiring title.
428. Merger as applied to mortgages.
429. Payment or discharge of mortgage.
430. Purchase-money mortgages.
431. Mortgages of the homestead.
432. Mortgages of after-acquired property.
433. Record of mortgages.
434. Possession as notice.
435. Correction of errors in record and re-recording mortgage.
436. Assignment of mortgages and deeds of trust.
437. Form, requisites, and method of assignment.
438. Record of assignments of mortgages.
439. Equitable assignments of mortgages.
440. Abstracting mortgage and assignment of mortgage.
441. Trust deeds.
442. Power of sale in a mortgage or deed of trust.
443. Release or satisfaction of record.
444. Foreclosure by entry and possession.
445. Foreclosure by writ of entry.
446. Foreclosure by exercise of power of sale.
447. Foreclosure by equitable suit.

CHAPTER XX

WILLS

SEC.
450. Introductory remarks.
451. Nature of title acquired by will.
452. Wills and related words defined.
453. Distinguishing characteristics of a will.
454. Kinds of wills.
455. Codicils.
456. What laws govern devises.
457. Capacity to make a will.
458. Capacity to take under a will.
459. Construction of wills.
460. False, erroneous, conflicting, and repugnant descriptions.
461. Repugnant provisions and conditions.
462. Void conditions and provisions.
463. Operative words of a will.

464. Words of purchase and limitation.
465. Rule in Shelley's Case.
466. How particular words and phrases are interpreted.
467. Words passing real estate.
468. Estates in remainder.
469. Executory devises.
470. Gifts of the use, possession, rents, profits, and income of real property.
471. Devise to a class.
472. Devise of life estate with power of disposition.
473. Devise charged with payment of debts, legacies, and support.
474. Devise on condition precedent or subsequent.
475. Conditional limitations.
476. Gifts over on death of beneficiary or death without issue or heirs.
477. Conditions restraining marriage.
478. Conditions against alienation.
479. Devise to separate use of married woman.
480. Devises in trust.
481. Designation of the devisee.
482. Perpetuities.
483. Lapsed devises.
484. Equitable conversion.
485. Residuary devises.
486. Revocation of wills.
487. Form and language of wills.
488. Abstracting the will.
489. Method of abstracting will and proof of probate.
490. Example of an abstract of a will.
491. Probate of wills.
492. Effect of probate.
493. Probate of foreign wills.
494. Abstracting probate proceedings.

CHAPTER XXI

MISCELLANEOUS INSTRUMENTS AFFECTING TITLE

SEC.
500. General considerations.
501. Municipal ordinances.
502. Approval and publication of ordinances.
503. Operation and effect of ordinances.
504. Resolutions of municipal bodies.
505. Official certificates.
506. Easements and servitudes.
507. Party-wall agreements.
508. Letters, receipts and memoranda.
509. Affidavits.
510. Unrecorded evidence.

CHAPTER XXII

LIENS AND INCUMBRANCES

SEC.
515. Liens defined and classified.
516. Equitable liens generally.
517. Statutory liens.

518. Operations and effect of liens.
519. How liens exhibited in abstract.
520. Mortgage liens.
521. Dower rights as liens.
522. Judgment and execution liens.
523. Attachment not strictly a lien.
524. The lien of decedent's debts.
525. Liens arising under devises.
526. Liens for taxes.
527. Lien of municipal or corporation taxes.
528. Lien of officials' bonds.
529. Lease not strictly a lien.
530. Grantors' or vendors' liens.
531. Vendee's implied lien for purchase-money.
532. Liens arising under trusts.
533. Mechanics' liens in general.
534. Mechanics' liens of subcontractors.
535. Priority of mechanics' liens.
536. Estates or property subject to mechanics' liens.
537. Assignment of a mechanic's lien.
538. Assertion and enforcement of mechanics' liens.

CHAPTER XXIII

LIS PENDENS AND ATTACHMENTS

SEC.
545. The doctrine of lis pendens.
546. Proceedings to which doctrine applies.
547. Commencement and duration of lis pendens.
548. Elements necessary to constitute a lis pendens.
549. Statutory provisions for record.
550. Requisites of a valid notice.
551. Persons charged with notice.
552. Attachment.
553. Proceedings to procure attachment.

CHAPTER XXIV

JUDGMENTS AND DECREES

SEC.
560. Judgments in general.
561. Effect of judgments and decrees.
562. Lien of judgments.
563. Territorial extent of lien.
564. Duration of judgment lien.
565. Rank and priority of lien.
566. Property or interest liable to lien.
567. Docketing, indexing and recording judgments.
568. Requisites as to form of judgments.
569. Points to be noticed in the examination of a judgment record.
570. Judgment against deceased party.
571. Judgments against infants and insane persons.
572. Exemption of real estate from judgments.
573. Satisfaction and discharge of judgments.
574. Decrees in general.

575. Operation and effect of decrees.
576. Effect of decree in the absence of personal service.
577. Lien of decrees.
578. Form of decrees.
579. Abstracting the decree.
580. Effect of misnomer of parties generally.
581. Effect of error or omission of middle name or initial.
582. Doctrine of idem sonans.
583. Operation and effect of decrees of probate courts.
584. Foreign judgments and decrees.

CHAPTER XXV

JUDICIAL SALES

SEC.
590. Judicial sales defined and distinguished.
591. Validity and effect of judicial sales.
592. Purchaser's title under judicial sale.
593. Rights of purchaser at judicial sale.
594. Rights of grantee of purchaser.
595. Refusal to complete purchase.
596. Order confirming the sale.
597. Effect of confirmation.
598. Certificate of purchase at judicial sale.
599. Proof of title under judicial sales.
600. Presumptions pertaining to judicial sales.
601. Sales under orders and decrees of probate courts.
602. Probate procedure to sell real estate.
603. How probate sales shown in abstract.

CHAPTER XXVI

EXECUTION SALES

SEC.
610. Execution sales defined and distinguished.
611. Validity and effect of execution sales.
612. Title under execution sale.
613. When title vests in purchaser at execution sale.
614. The writ of execution.
615. Levy and return of execution.
616. Notice of sale.
617. Proof of publication of notice.
618. Effect of death of judgment plaintiff on defendant before execution.
619. Exemption of real estate from execution.
620. Effect of execution sale on dower rights.
621. Certificate of purchase at execution sale.
622. Assignment of officer's certificate.
623. Proof of title under execution sale.

CHAPTER XXVII

TAXES AND TAX TITLES

SEC.
630. Taxes and taxation in general.
631. Property subject to taxation.
632. The tax lien.
633. Tax titles.
634. Assessment of taxes.
635. Description of land in assessment roll.
636. The tax sale.
637. Collection by proceedings of forfeiture.
638. Who may be purchaser at tax sale.
639. Rights of purchaser at tax sale.
640. Redemption from tax sale.
641. Certificate of purchase at tax sale.
642. The tax deed.
643. Formal parts of the deed.
644. Tax deeds as evidence in support of title.
645. Legislation to strengthen tax titles.
646. Judgment for taxes.
647. Local assessments.

CHAPTER XXVIII

ACTIONS AND PROCEEDINGS AFFECTING TITLE TO REAL ESTATE

SEC.
650. Jurisdiction in general.
651. Legal or equitable jurisdiction.
652. Jurisdiction in rem. and jurisdiction in personam.
653. Probate jurisdiction.
654. Lands in another county or in several counties.
655. Lands in another state.
656. Jurisdiction of particular actions.
657. Record of equitable proceedings as notice.
658. Process.
659. Style and contents of process.
660. Service of the process.
661. Service by publication.
662. Return and proof of service.
663. Effect of appearance without process.
664. Reports of referees and masters in chancery.
665. Verdicts.
666. Abstracting equitable proceedings.
667. Injunctions.
668. Ejectment.
669. Action to quiet title.
670. Partition.
671. Action for specific performance.
672. Redemption by bill in equity.
673. Rescission and cancellation.
674. Foreclosure in equity.
675. Assignment of dower.
676. Divorce proceedings.
677. Condemnation proceedings.
678. Construction of wills.

CHAPTER XXIX

ADVERSE TITLE

SEC.
685. General considerations.
686. Instruments affecting title adversely.
687. Adverse possession in general.
688. Color of title.
689. Actual possession.
690. Constructive possession.
691. Tacking possessions.
692. How far possession is notice.
693. Estates or property subject to adverse possession.
694. Who may acquire title by adverse possession.
695. Adverse title against reversioners and remaindermen.
696. Title by adverse possession between cotenants and joint owners.
697. Persons under legal disability.
698. Adverse title against state or municipality.
699. Effect of adverse possession.
700. Evidence in support of title by adverse possession.

CHAPTER XXX

TITLE BY DESCENT

SEC.
705. General considerations.
706. Civil death—Casting descent by imprisonment for life.
707. Ancestors.
708. Ancestral estates.
709. When seisin of ancestor essential.
710. Per stirpes and per capita.
711. Taking by representation.
712. Issue.
713. Descendants.
714. Heirs.
715. Forced heirs.
716. Surviving spouse as heir.
717. Children and children's children.
718. Adopted children.
719. Illegitimate children.
720. Pretermitted children.
721. Posthumous children.
722. Property subject to descent.
723. Devolution of real property to heir.
724. What laws govern.
725. Lines of descent.
726. Computing degrees of kindred.
727. Descent of estates of minors not having been married.
728. Brothers and sisters.
729. Next of kin.
730. Kindred of the half-blood.
731. Inheritance by parents of intestate.
732. Inheritance by and through aliens.
733. Right of persons causing death of intestate to inherit his property.
734. Descent of estate of devisee who dies before testator.
735. Release of expectant share to ancestor.

736. Inheritance liable for debts of decedent.
737. Advancements.
738. Proof of heirship.
739. Proof of death of ancestor.
740. Proof of birth and legitimacy.
741. Abstract of descents.

CHAPTER XXXI

PERUSAL OF ABSTRACT AND OPINION OF TITLE

SEC.
745. Precautionary measures against insertion of pages after examination.
746. Perusing abstract.
747. Making memoranda.
748. Examining the muniments of title.
749. Beginning point of examination.
750. Printed copies of abstracts.
751. Government Land Receiver's receipt.
752. Patent from the federal government.
753. Patent from state government.
754. Private deeds.
755. Acknowledgments.
756. Official deeds.
757. Trust deeds and mortgages.
758. Deed of release.
759. Deed executed under power of attorney.
760. Dedications.
761. Sale under foreclosure.
762. Judicial sales.
763. Tax sales.
764. Sales by executors, administrators, and guardians.
765. Wills.
766. Descents.
767. Contract of sale.
768. Judgment liens.
769. Mechanic's liens.
770. Miscellaneous incumbrances.
771. Examination of matters in pais.
772. Examination of abstracter's certificate.
773. Opinion of title.

CHAPTER XXXII

DIGEST OF STATUTES PERTAINING TO EXECUTION AND ACKNOWLEDGMENT OF DEEDS

SEC.
780. Alabama.
781. Alaska.
782. Arizona.
783. Arkansas.
784. California.
785. Colorado.
786. Connecticut.
787. Delaware.

788. District of Columbia.
789. Florida.
790. Georgia.
791. Hawaii.
792. Idaho.
793. Illinois.
794. Indiana.
795. Iowa.
796. Kansas.
797. Kentucky.
798. Louisiana.
799. Maine.
800. Maryland.
801. Massachusetts.
802. Michigan.
803. Minnesota.
804. Mississippi.
805. Missouri.
806. Montana.
807. Nebraska.
808. Nevada.
809. New Hampshire.
810. New Jersey.
811. New Mexico.
812. New York.
813. North Carolina.
814. North Dakota.
815. Ohio.
816. Oklahoma.
817. Oregon.
818. Pennsylvania.
819. Rhode Island.
820. South Carolina.
821. South Dakota.
822. Tennessee.
823. Texas.
824. Utah.
825. Vermont.
826. Virginia.
827. Washington.
828. West Virginia.
829. Wisconsin.
830. Wyoming.

CHAPTER XXXIII

DIGEST OF STATUTES OF DESCENT

SEC.
835. Alabama.
836. Alaska.
837. Arizona.
838. Arkansas.
839. California.
840. Colorado.
841. Connecticut.
842. Delaware.
843. District of Columbia.
844. Florida.
845. Georgia.

846. Idaho.
847. Illinois.
848. Indiana.
849. Iowa.
850. Kansas.
851. Kentucky.
852. Louisiana.
853. Maine.
854. Maryland.
855. Massachusetts.
855. Michigan.
857. Minnesota.
858. Mississippi.
859. Missouri.
860. Montana.
861. Nebraska.
862. Nevada.
863. New Hampshire.
864. New Jersey.
865. New Mexico.
866. New York.
867. North Carolina.
868. North Dakota.
869. Ohio.
870. Oklahoma.
871. Oregon.
872. Pennsylvania.
873. Rhode Island.
874. South Carolina.
875. South Dakota.
876. Tennessee.
877. Texas.
878. Utah.
879. Vermont.
880. Virginia.
881. Washington.
882. West Virginia.
883. Wisconsin.
884. Wyoming.

CHAPTER XXXIV

DIGEST OF STATUTES OF WILLS

SEC.
890. Alabama.
891. Alaska.
892. Arizona.
893. Arkansas.
894. California.
895. Colorado.
896. Connecticut.
897. Delaware.
898. District of Columbia.
899. Florida.
900. Georgia.
901. Hawaii.
902. Idaho.
903. Illinois.
904. Indiana.
905. Iowa.

906. Kansas.
907. Kentucky.
908. Louisiana.
909. Maine.
910. Maryland.
911. Massachusetts.
912. Michigan.
913. Minnesota.
914. Mississippi.
915. Missouri.
916. Montana.
917. Nebraska.
918. Nevada.
919. New Hampshire.
920. New Jersey.
921. New Mexico.
922. New York.
923. North Carolina.
924. North Dakota.
925. Ohio.
926. Oklahoma.
927. Oregon.
928. Pennsylvania.
929. Philippine Islands.
930. Porto Rico.
931. Rhode Island.
932. South Carolina.
933. South Dakota.
934. Tennessee.
935. Texas.
936. Utah.
937. Vermont.
938. Virginia.
939. Washington.
940. West Virginia.
941. Wisconsin.
942. Wyoming.

CHAPTER XXXV

REGISTRATION OF TITLE UNDER TORRENS SYSTEM

SEC.
950. Origin and adoption of Torrens System.
951. Miscellaneous provisions common to all statutes.
952. Provisions as to which statutes vary.
953. Purpose and advantages of title registration.
954. General principles of registration.
955. Procedure for registration.
956. Notice and hearing.
957. Decree and certificate of title and incumbrances.
958. Conclusiveness of certificates.
959. Subsequent dealings with the land appear on the registry.
960. Acquiring title to registered land by adverse possession.
961. Transmission of title on death of owner of registered land.
962. Constitutionality of acts.

TABLE OF CASES

[*References are to Sections.*]

A

Abbott v. Frost, 185 Mass. 398 639
v. Holway, 72 Maine 298 311
v. Lindenbower, 42 Mo. 162 644
Abdil v. Abdil, 26 Ind. 287 660
Abeel v. Hubbell, 52 Mich. 37 52
Abel v. Abel, 201 Pa. 543 466
Aberaman Iron Works v. Wickens, L. R. 4 ch. 101 531
Abney v. De Loach, 84 Ala. 393 718
v. Ohio Lumber &c. Co., 45 W. Va. 446 330
Abraham v. Mayer, 7 Misc. (N. Y.) 250 121
Abrams v. State, 45 Wash. 327 111
Acer v. Westcott, 46 N. Y. 384 118, 129
Acker v. Trueland, 56 Miss. 30 66
Acord v. Western Pocabontas Corporation, 156 Fed. 989 669
Acreback v. Myer, 165 Mo. 685 66
Adair v. Craig, 135 Ala. 332 96, 453
v. Davis, 71 Ga. 769 123
v. Lott, 3 Hill (N. Y.) 182 64
Adam v. McClintock, 21 N. Dak. 483 427
Adams v. Adams, 154 Mass. 290 466
v. Akerlund, 168 Ill. 632 714
v. Betz, 167 Ind. 161 434
v. Buchanan, 49 Mo. 64 349
v. Buhler, 131 Ind. 66 116, 121
v. Burke, 3 Sawy. (U. S.) 415 202
v. Burton, 43 Vt. 36 62
v. Clark, 48 Fla. 205 66
v. Edgerton, 48 Ark. 419 120
v. Frothingham, 3 Miss. 352 227
v. Hartzell, 18 N. Dak. 221 376
v. Hayden, 60 Tex. 223 124
v. Hopkins, 144 Cal. 19 70
v. Kellogg, 63 Mich. 105 315
v. McIntyre, 22 N. Dak. 337 419
v. Medsker, 25 W. Va. 127 262, 280
v. Merrill, 45 Ind. App. 315 45
v. Parker, 12 Gray (Mass.) 53 437
v. Pratt, 109 Mass. 59 122
v. Ross, 30 N. J. L. 505 45, 48, 64
v. Valentine, 33 Fed. 1 277
Adams Express Co. v. McDonald, 21 Kans. 680 53
Addis v. Graham, 88 Mo. 197 138
Adee v. Campbell, 79 N. Y. 52 711
Advance Thresher Co. v. Esteb, 41 Ore. 469 433
Ætna Life Ins. Co. v. Corn, 89 Ill. 170 428
v. Broecker, 166 Ind. 576 416
v. Hesser, 77 Iowa 381 565, 567, 580
Ætna Ins. Co. v. Thompson, 68 N. H. 20 374
Ahern v. Freeman, 46 Minn. 156 118
Aiken v. Bridgeford, 84 Ala. 295 446
Akers v. Clark, 184 Ill. 136 462
Alabama Conference v. Price, 42 Ala. 39 601
Alabone's Estate, In re, 75 N. J. Eq. 527 484
Albany v. Lynch, 119 Ga. 491 536
Albee v. Vose, 76 Maine 448 87, 708, 727
Albin v. Parmele, 70 Nebr. 740 465
Albers v. Kozeluh, 68 Nebr. 522 594
Alcorn v. Morgan, 77 Ind. 184 406
Alden's Appeal, In re, 93 Pa. St. 182 63
Alderman v. New Haven, 81 Conn. 137 693
v. Wells, 85 S. Car. 507 630
Alderson v. Ames, 6 Md. 52 119
v. Alderson, 46 W. Va. 242 64
Aldridge v. Montgomery, 9 Ind. 302 730
Allemong v. Gray, 92 Va. 216 303
v. Alexander, 31 Ala. 241 719
v. Alexander, 156 Mo. 413 474
v. Howe, 85 Va. 198 590
v. Jackson, 92 Cal. 514 66
v. Jones, 64 Iowa 207 337
v. Mortgage Co. of Scotland, 47 Fed. 131 417
v. Owen County, 136 Ky. 420 575
Alexander's Estate, In re, 149 Cal. 146 477
Alexandria &c. F. R. Co. v. Alexandria &c. R. Co., 75 Va. 780 677
Alferitz v. Arrivillaga, 143 Cal. 646 93
Alford v. McCormac, 90 N. Car. 151 509
Algonquin Coal Co. v. Northern &c. Iron Co., 162 Pa. St. 114 689
All v. Day, 133 Mo. 337 710
Allaire v. Allaire, 37 N. J. L. 312 492
Allen v. Allen, 48 Minn. 462 263
v. Allen, 121 N. Car. 328 474
v. Allen, 13 S. Car. 512 737
v. Atkinson, 21 Mich. 351 35
v. Austin, 21 R. I. 254 65
v. Bartlett, 20 W. Va. 46 53
v. Cadwell, 55 Mich. 8 126
v. Clark, 7 L. T. N. S. 781 18
v. Craft, 109 Ind. 476 48, 466
v. De Groodt, 98 Mo. 159 695
v. Gates, 73 Vt. 222 434
v. Hawley, 66 Ill. 164 66
v. Hazen, 26 Mich. 142 264, 295, 299
v. Holton, 20 Pick. (Mass.) 458 301
v. Hopkins, 62 Kans. 175 12, 14
v. Hooper, 50 Maine 371 323
v. Hughes, 106 Ga. 775 338
v. Lenoir, 53 Miss. 321 324
v. McCalla, 25 Iowa 464 127
v. Mandaville, 26 Miss. 397 547
v. Markle, 36 Pa. St. 117 466
v. Poole, 54 Miss. 323 128, 545
Allen's Appeal, 99 Pa. St. 196 86
Allen-West Commission Co. v. Millstead, 92 Miss. 837 565
Allin v. Connecticut River Lumber Co., 150 Mass. 560 655
Alling v. Nelson, 55 Nebr. 161 578
Allis v. Field, 89 Wis. 327 691
Allison v. Allison, 101 Va. 537 714
v. Kurtz, 2 Watts (Pa.) 185 360
v. Perry, 130 Ill. 9 328
Alma v. Guaranty Sav. Bank, 60 Fed. 203 504
Almond v. Bonnell, 76 Ill. 536 321
Alsop v. Cowan, 66 Miss. 451 618
Alston v. Alston, 114 Iowa 29 719
v. Alston, 4 S. Car. 116 138
Altgelt v. Mernitz, 37 Tex. Civ. App. 397 364
Altringer v. Capeheart, 68 Mo. 441 278
Altschul v. O'Neill, 35 Ore. 202 75
Alvis v. Morrison, 63 Ill. 181 138

[References are to Sections.]

A. L. & E. F. Goss Co. v. Greenleaf, 98 Maine 436 536
American Cannel Coal Co. v. Clemens, 132 Ind. 163 451
American Dramatic Fund Assn. v. Lett, 42 N. J. Eq. 43 481
American Freehold Land Mortgage Co. v. Turner, 95 Ala. 272 408
American Ins. Co. v. Gibson, 104 Ind. 336 562
American Inv. Co. v. Beadle, 5 S. Dak. 410 633
American Land Co. v. Zeiss, 219 U. S. 47 962
American Mortgage Co. v. Hill, 92 Ga. 297 567
v. Hopper, 56 Fed. 67 192
American Sav. Bank & Trust Co. v. Helgesen, 64 Wash. 54 421
American Trust Inv. Co. v. Nashville Abstract Co. (Tenn.), 39 S. W. 877 5, 16
Ames v. Ames, 46 Ind. App. 597 393
v. Holmes, 190 Ill. 561 714
v. Miller, 65 Nebr. 204 119
v. Norman, 4 Sneed (Tenn.) 683 321
Ammidown v. Ball, 8 Allen (Mass.) 293 290
Amos v. Amos, 117 Ind. 37 727
Amsden v. Atwood, 67 Vt. 289 53
Amy v. Amy, 12 Utah 278 708, 717
Amy, In re, 12 Utah 278 730
Anderson v. Baughman, 7 Mich. 69 120, 297
v. Burnham, 52 Kans. 454 688, 689, 698
v. Cary, 36 Ohio St. 506 47
v. Casey-Swasey Co. (Tex. Civ. App.), 120 S. W. 918 348
v. Culbert, 55 Iowa 233 431
v. Culver, 63 Hun (N. Y.) 633 429
v. Messinger, 146 Fed. 929 468
v. Northrop, 30 Fla. 612 341
v. Pemberton, 89 Mo. 61 677
v. Post (Tenn.), 38 S. W. 283 633, 639
v. Spriestersbach, 69 Wash. 393 22
v. Strassburger, 92 Cal. 38 35
v. Thompson, 3 Ariz. 62 447
v. Tydings, 8 Md. 427 566
v. Yoakum, 94 Cal. 227 301
Andrews v. Andrews, 8 Conn. 79 65
v. Burdick, 62 Iowa 714 534
v. Cone, 124 U. S. 720 417
v. Powers, 35 Wis. 644 439
v. Spurlin, 35 Ind. 262 48
Angus v. Noble, 73 Conn. 56 470
Ankeny v. Clark, 148 U. S. 345 74
Anson v. Stein, 6 Iowa 150 714
Anthony v. Anthony, 55 Conn. 256 466
v. Anthony, 161 Mass. 343 429
Appeal of Alden, In re, 93 Pa. St. 182 63
Baily, In re, 32 Pa. St. 40 583
Barnett, In re, 46 Pa. St. 392 58
Bickel, In re, 86 Pa. St. 204 318
Campbell, 64 Conn. 277 741
Clark, In re, 70 Conn. 195 58, 456, 584
Clarke, In re, 79 Pa. St. 376 64
Churchman, In re, 9 Sad. (Pa.) 423 466
Deake, In re, 80 Maine 50 456
De Haven, In re, 38 Pa. St. 373 349
Dickinson, In re, 42 Conn. 491 719
Doebler, In re, 64 Pa. St. 9 47
Dutch, In re, 57 Pa. St. 461 737
Ferguson, In re, 117 Pa. St. 426 241
Francis, In re, 96 Pa. St. 200 61
Griel, In re, 7 Sad. (Pa.) 137 535
Groves, In re, 68 Pa. St. 143 676
Appeal of Gunn, In re, 55 Conn. 149 419
Hacker, In re, 121 Pa. 192 281
Hayes, In re, 123 Pa. St. 110 654
Heil, In re, 40 Pa. St. 453 582
Hutchinson, In re, 92 Pa. St. 186 580
Luch, In re, 44 Pa. St. 519 121
McCurdy, In re, 65 Pa. St. 290 674
Neil, In re, 92 Pa. St. 193 719
Oberholtzer, In re, 124 Pa. St. 583
Opdyke, In re, 49 Pa. St. 373 719
Persons, In re, 74 Pa. St. 121 87, 737
Powers, In re, 63 Pa. St. 443 737
Rankin, In re, 1 Monag (Pa.) 308 667
Reiff, In re, 124 Pa. St. 145 463
Ridgway, In re, 15 Pa. St. 177 581
Russell, In re, 15 Pa. St. 319 119
Tappan, In re, 52 Conn. 412 474
Thompson, In re, 101 Pa. St. 225 313
Varner, In re, 80 Pa. St. 140 59
Waltemate, In re, 86 Pa. St. 219 719
Woodcock, In re, 103 Maine 214 466
Woods, In re, 82 Pa. St. 116 117, 122
Apel v. Kelsey, 47 Ark. 413 360, 596
Apperson v. Bolton, 29 Ark. 418 456
Apple v. Apple, 38 Tenn. 348 86
Applegarth v. Wagner, 86 Md. 468 374
Arbour v. Nettles, 12 La. Ann. 217 197
Armington v. Armington, 28 Ind. 74 730
Arms v. Burt, 1 Vt. 303 45
Armstrong v. McCoy, 8 Ohio 128 346
v. Stovall, 26 Miss. 275 280
v. McLaughlin, 49 Ind. 370 618
v. Mudd, 10 B. Mon. (Ky.) 144 297
v. Vroman, 11 Minn. 220 621
v. Wilson (Tex. Civ. App.), 109 S. W. 955 429
Armstrong's Estate, In re, 2 Pa. Co. Ct. 166 487
Arndt v. Griggs, 134 U. S. 316 652, 962
Arneson v. Spawn, 2 S. Dak. 269 147
Arnold v. Alden, 173 Ill. 229 466
v. Lincoln, 8 R. I. 384 46
v. Patrick, 6 Paige ch. (N. Y.) 310 516
v. Stevenson, 2 Nev. 234 119
Arrington v. Arrington, 114 N. Car. 151 128, 545
Arthur v. Screven, 39 S. Car. 77 120
v. Weston, 22 Mo. 378 328
Ashby v. McKinlock, 271 Ill. 254 46, 464, 469
Ashcroft v. Eastern R. Co., 126 Mass. 196 61, 275, 506
Ashe v. Yungst, 65 Tex. 631 66
Asheville Division v. Aston, 92 N. Car. 578 263, 329
Ashhurst v. McKinzie, 92 Ala. 484 651
Aspen v. Rucker, 10 Colo. 184 215
Astor v. Wells, 4 Wheat. (U. S.) 466 124
Atcheson v. Broadhead, 56 Ala. 414 420
Atchinson Sav. Bank v. Wheeler, 20 Kans. 625 66
Atchison v. Atchison, 89 Ky. 488 712
Atherton v. Essex Junction, 83 Vt. 218 631
v. Fowler, 96 U. S. 513 196
Atkin v. Merrell, 39 Ill. 62 65
Atkins v. Atkins, 18 Nebr. 474 325
Atkinson v. Miller, 34 W. Va. 115 417
Atlanta Nat. Bldg. & Loan Assn. v. Gilmer, 128 Fed. 293 434
Atlanta &c. R. Co. v. Atlanta &c. R. Co., 125 Ga. 529 240
v. McHan, 110 Ga. 543 51
v. McKinney, 124 Ga. 929 93
Atmore v. Walker, 46 Fed. 429 473
Atteherry v. Blair, 244 Ill. 363 5
Attorney-General v. Delaware &c. R. Co., 27 N. J. Eq. 631 214

[References are to Sections.]

Attwater v. Attwater, 18 Beav. 330 47
Atwood v. Arnold, 23 R. I. 609 620
v. Beck, 21 Ala. 590 203, 722
Aucker v. McCoy, 56 Cal. 524 66
Aukam v. Zantzinger, 94 Md. 421 595
Aumiller v. Dash, 51 Wash. 520 54
Austin v. Austin, 50 Maine 74 675
v. Bailey, 37 Vt. 219 723
v. Barnum, 52 Minn. 136 77
v. Bristol, 40 Conn. 120 476
v. Brown, 37 W. Va. 634 695
v. Chambers, 33 Okla. 40 359
v. Clifford, 24 Wash. 172 66
v. Davis, 128 Ind. 472 401
v. Dolbee, 101 Mich. 292 270
Avery v. Everett, 110 N. Y. 317 706
v. Dufrees, 9 Ohio 145 57, 722
v. Stewart, 136 N. Car. 426 59
Axman v. Smith, 156 Mo. 286 441
Ayer v. Philadelphia & Boston B. Co., 159 Mass. 84 97, 316
Ayers v. Hays, 60 Ind. 452 439
v. Reidel, 84 Wis. 276 687
v. Roper, 111 Ala. 651 600, 623
v. Watson, 113 U. S. 594 272
Ayling v. Kramer, 133 Mass. 12 313
Ayres v. United States, 42 Ct. Cl. (U. S.) 385 200

B

Baart v. Martin, 99 Minn. 197 955, 956, 957
Babbitt v. Day, 41 N. J. Eq. 392 65
Babcock v. Wilson, 17 Maine 372 398
Bachop v. Critchlow, 142 Pa. St. 518 228
Bacon v. McBride, 32 Vt. 585 719
v. Thornton, 16 Utah 138 736
v. Van Schoonhoven, 19 Hun (N. Y.) 158 443
v. Woodward, 12 Gray (Mass.) 376 46
Bacon's Estate, In re, 202 Pa. 535 714
Bader v. Dyer, 106 Iowa 715 696
Bagley v. Kennedy, 85 Ga. 703 668
v. Ward, 37 Cal. 121 615
Bagnell v. Broderick, 13 Pet. (U. S.) 436 220
Bailey v. Bailey, 25 Mich. 185 707
v. Block (Tex. Civ. App.), 125 S. W. 955 611
v. Butler, 138 Ala. 153 426
v. Galpin, 40 Minn. 319 120
v. Gilliland, 2 Kans. App. 558 437
v. Myrick, 50 Maine 171 118
v. Rinker, 146 Ind. 129 359
v. Ross, 32 N. J. Eq. 544 711
v. Sanger, 108 Ind. 264 461
Baily's Appeal, In re, 32 Pa. St. 40 583
Bains v. Bullock, 129 Mo. 117 321
Baker v. Baker, 8 Gray (Mass.) 101 713
v. Baker, 239 Ill. 82 283
v. Bliss, 39 N. Y. 70 127
v. Bourne, 127 Ind. 466 87, 710
v. Central Nat. Bank, 86 Kans. 293 443
v. Griffin, 50 Miss. 158 433
v. Heiskell, 1 Coldw. (Tenn.) 641 728
v. Lee, 49 La. Ann. 874 121
v. Mattocks, Quincy (Mass.) 69 48
v. Mott, 78 Hun (N. Y.) 141 54
v. Scott, 62 Ill. 86 465
v. Stewart, 40 Kans. 442 321
v. Woodward, 12 Ore. 3 306
Baker's Appeal, In re, 107 Pa. St. 381 487
Balch v. Arnold, 9 Wyo. 17 99
v. Johnson, 106 Tenn. 249 718
v. Stone, 149 Mass. 39 87
Baldridge v. Cook, 27 Tex. 565 400
Baldwin v. Bean, 59 Maine 481 46
v. Hewett, 88 Ky. 673 636
v. Jenkins, 23 Miss. 206 421
v. Keith, 13 Okla. 624 201
v. Ratliff, 125 Ill. 376 73
v. Taylor, 166 Pa. St. 507 62
Balkema v. Searle, 116 Iowa 374 27
Balkum v. Wood, 58 Ala. 642 431
Ball v. Belden, 59 Tex. Civ. App. 29 399
v. Chadwick, 46 Ill. 28 309, 370
v. First Nat. Bank, 80 Ky. 501 597
v. Phelan, 94 Miss. 293 459
v. Tompkins, 41 Fed. 486 480
Ballard v. Camplin, 161 Ind. 16 709, 734
v. Carmichael, 83 Tex. 355 262
v. Child, 46 Maine 152 312
v. Hunter, 204 U. S. 241 962
v. Ross, 38 Wash. 209 527
v. Ward, 89 Pa. St. 358 718
Ball, In re, 153 Wis. 27 457
Ballou v. Bergvendsen, 9 N. Dak. 285 27
Baltimore v. Chester, 53 Vt. 315 706
v. Fear, 82 Md. 246 244
v. Williams, 6 Md. 235 127
Baltimore &c. R. Co. v. Algire, 63 Md. 319 62
v. Berkeley &c. R. Co., 168 Fed. 770 417
v. Brubaker, 217 Ill. 462 119
v. Patterson, 68 Md. 606 44
v. West, 57 Ohio St. 161 53
Banbury v. Sherin, 4 S. Dak. 88 53
Bancroft v. Cambridge, 126 Mass. 438 72
Banes v. Finney, 209 Pa. 191 730
Banker v. Caldwell, 3 Minn. 94 1, 3, 9, 10, 36
Bank of Ada v. Gullikson, 64 Minn. 91 287
Bank of America v. Banks, 101 U. S. 240 99
Bank of Dillon v. Murchison, 213 Fed. 147 378
Bank of Kentucky v. Haggin, 1 A. K. Marsh. (Ky.) 306 122
Bank of Lemoore v. Fulgham, 151 Cal. 234 641
Bank of Mobile v. Dunn, 67 Ala. 381 375
Bank of Suisun v. Stark, 106 Cal. 202 54
Bank of U. S. v. Benning, 4 Cr. C. C. 81 99
v. Housman, 6 Paige (N. Y.) 526 318
Banks v. Ammon, 27 Pa. St. 172 120
v. Lee, 73 Ga. 25 262
v. Speers, 97 Ala. 560 451, 723
Bank's Will, In re, 87 Md. 425 469
Bantley v. Finney, 43 Nebr. 794 509
Banton v. Shorey, 77 Maine 48 433
Banzer v. Banzer, 156 N. Y. 429 326
Barasch v. Kramer, 62 Misc. (N. Y.) 475 550
Barbe v. Hyatt, 50 Kans. 86 66
Barber v. Barber, 17 Hun (N. Y.) 72 359
v. Brundage, 50 App. Div. (N. Y.) 123 87
v. Brundage, 169 N. Y. 368 728
v. Crowell, 55 Nebr. 571 416
v. Morris, 37 Minn. 194 662
v. Pittsburg &c. R. Co., 166 U. S. 83 466
v. Robinson, 78 Minn. 193 688
v. Rorabeck, 36 Mich. 399 66
v. Taylor, 9 Dana (Ky.) 84 737
v. Williams, 74 Ala. 331 67
Barber Asphalt Pav. Co. v. Hezel, 155 Mo. 391 647
Barbieri v. Messner, 106 Minn. 102 100

[*References are to Sections.*]

Barbour v. Nichols, 3 R. I. 187 125
v. Tompkins, 58 W. Va. 572 575
Barclay v. Cameron, 25 Tex. 232 714
v. Platt, 170 Ill. 384 468
Barden v. Grace, 167 Ala. 453 263
Bardsley v. Hines, 33 Iowa 157 661
Barke v. Early, 72 Iowa 273 633
Barkenthein v. People, 77 Misc. (N. Y.) 395 956
Barker v. Flood, 103 Mass. 474 428
v. Harvey, 181 U. S. 481 189, 214
v. Muehler, 55 Wash. 411 641
v. Pearce, 30 Pa. St. 173 721
Barksdale v. Capital City Realty Co., 88 Miss. 623 59
Barlow v. Wainwright, 22 Vt. 88 53
Barnard v. Bailey, 2 Har. (Del.) 56 47
v. Barnard, 119 Ill. 92 718
v. Brown, 112 Mich. 452 77
v. Duncan, 38 Mo. 170 355
v. Gantz, 140 N. Y. 249 281
Barnard & Leas Mfg. Co. v. Smith, 77 Ark. 590 516
Barnes v. Allen, 25 Ind. 222 718, 737
v. Boardman, 149 Mass. 106 437
v. Henshaw, 226 Ill. 605 591
v. Long Island Real Estate &c. Co., 88 App. Div. (N. Y.) 83 438
v. Loyd, 37 Ind. 523 708
v. Marshall, 102 Mich. 248 480
v. Morris, 39 N. Car. 22 594
Barnes' Estate, In re, 47 Okla. 117 724
Barnett v. Barnett, 104 Cal. 298 48
v. Barnett, 9 N. Mex. 205 676
v. Gaines, 8 Ala. 373 34
v. Wheeler, 7 M. & W. 363 34
Barnett's Appeal, In re, 46 Pa. St. 392 58
Barnewall v. Murrell, 108 Ala. 366 487
Barney v. Dolph, 97 U. S. 652 202
v. Hays, 11 Mont. 571 455, 487
v. Keokuk, 94 U. S. 324 104
v. Lincoln Park, 203 Ill. 397 62, 317
v. Little, 15 Iowa 527 120
v. McCarty, 15 Iowa 510 132
Barnhizel v. Ferrell, 47 Ind. 335 718
Barnitz v. Casey, 7 Cranch (U. S.) 456 725
Barnum v. Barnum, 42 Md. 241 718, 719
v. Barnum, 119 Mo. 63 708
v. Le Master, 110 Tenn. 638 320
Barr v. Gardner, 259 Ill. 256 721
v. Schroeder, 32 Cal. 609 106
Barre v. Perry, 82 Vt. 301 501
Barrett v. Cox, 112 Mich. 220 51
v. Furnish, 21 Ore. 17 618
v. Hinkley, 124 Ill. 32 429
v. Lewis, 106 Ind. 120 530
v. Prentiss, 57 Vt. 297 132
Barrett's Will, In re, 111 Iowa 570 46
Barringer v. Davis (Iowa), 112 N. W. 208 228
v. Ryder, 119 Iowa 121 671
Barron v. Barron, 122 Ala. 194 437, 439
Barrow v. Baughman, 9 Mich. 213 120
Barry v. Adams, 3 Allen (Mass.) 493 314
Barson v. Mulligan, 191 N. Y. 306 91
Barth v. Backus, 140 N. Y. 230 376
Barthell v. Syverson, 54 Iowa 160 426
Bartholomew v. West, 2 Dill (U. S.) 290 66
Bartlett v. Bangor, 67 Maine 460 317
v. Blanton, 4 J. J. Marsh. (Ky.) 426 287
Barton v. King, 41 Miss. 288 458
Bascombe v. Marshall, 129 App. Div. (N. Y.) 516 578
Bass v. Estill, 50 Miss. 300 120, 283
Bassett v. Bassett, 55 Maine 125 318
Batchelder v. Dean, 16 N. H. 265 50
Batchelor v. Brereton, 112 U. S. 396 262
Bateman, In re, 11 R. I. 585 324
Bateman, Petitioner, 11 R. I. 585 284
Bates v. Brown, 5 Wall. (U. S.) 710 87
v. Coe, 10 Conn. 280 371
v. Cotton, 32 Miss. 266 717
v. Foster, 59 Maine 157 301
v. Gillett, 132 Ill. 287 713, 717
v. Herron, 35 Ala. 117 192, 195
v. Shrader, 13 Johns. (N. Y.) 260 709
v. Sparrell, 10 Mass. 323 40
Bates Mach. Co., In re, 91 Fed. 625 379
Batjer v. Roberts (Tex. Civ. App.), 148 S. W. 841 674
Battery Park Bank v. Loughran, 122 N. Car. 668 400
Batty v. Fout, 54 Ind. 482 19, 24
Bauer v. Glas, 244 Ill. 627 29
v. Word, 135 Ala. 430 570
Baum v. Birchall, 150 Pa. St. 164 395
Bauman v. Ross, 167 U. S. 548 119
Baxter v. Bradbury, 20 Maine 260 91
Bay v. Posner, 78 Md. 42 263, 422
v. Posner (Md.), 29 Atl. 11 99
Beach v. Cooke, 28 N. Y. 508 443
v. Osborne, 74 Conn. 405 433
v. Shaw, 57 Ill. 17 446
Beal v. Blair, 33 Iowa 318 357
v. Gordon, 55 Maine 482 692
v. Harrington, 116 Ill. 113 530
Beaman v. Whitney, 20 Maine 413 328
Bean v. Atkins (Vt.), 89 Atl. 643 475
v. Bean, 163 Mich. 379 61
v. Kenmuir, 86 Mo. 666 45
v. People, 7 Colo. 200 137
Beard v. Allen, 141 Ind. 243 646
v. Mosely, 30 Ark. 517 708
Beard's Succession, 14 La. Ann. 121 487
Beardslee v. Beardslee, 5 Barb. (N. Y.) 324 65
Beardsley v. Knight, 10 Vt. 185 327
Bear Lake County v. Budge, 9 Idaho 703 576
Bear Lake River Waterworks & Irr. Co. v. Garland, 164 U. S. 1 432
Beasley v. Phillips, 20 Ind. App. 185 304
Beattie v. Crewdson, 124 Cal. 577 434
v. Dickinson, 39 Ark. 205 392
v. National Bank, 174 Ill. 571 581
v. Whipple, 154 Ill. 273 138
Beatty v. O'Harrow, 49 Tex. Civ. App. 404 645
Beaver v. Frick Co., 53 Ark. 18 124
v. Ross, 140 Iowa 154 484
Bechtel v. Wier, 152 Cal. 443 591
Becker v. Church, 115 N. Y. 562 314
Beckett v. Cuenin, 15 Colo. 281 661
v. Selover, 7 Cal. 215 360, 723
Beckwith v. Beckwith, 61 Mich. 315 65
Beebee v. Griffing, 14 N. Y. 235 730
Beechwood Park Land Co. v. Summit, 78 N. J. L. 182 677
Beeman v. Beeman, 88 Hun (N. Y.) 14 59
Beers v. Narramore, 61 Conn. 13 720
Beidleman v. Koch, 42 Ind. App. 423 418
Belcher v. Chambers, 53 Cal. 635 652
Belding v. Texas Produce Co., 61 Ark. 377 53
Belford v. Crane, 16 N. J. Eq. 265 623
Belknap v. Sealey, 14 N. Y. 143 257
Bell v. Bell, 84 Ala. 64 66
v. Chandler, 23 Ga. 356 611
v. Dozier, 12 N. Car. 333 708
v. Duncan, 11 Ohio 192 224, 753
v. McDuffie, 71 Ga. 264 267, 394
v. Ohio R. Co., 25 Pa. St. 161 63

[References are to Sections.]

Bell
v. Pelt, 51 Ark. 433 417
v. Redd, 133 Ga. 5 272
v. Watkins, 104 Ga. 345 473
v. Woodward, 46 N. H. 315 270
Bellas v. Lloyds, 2 Watts (Pa.) 401 125, 433
Bell County v. Felts (Tex. Civ. App.), 120 S. W. 1065 611
Bell County Land & Coal Co. v. Hendrickson, 24 Ky. L. 371 240
Bellfountain Imp. Co. v. Niedringhaus, 181 Ill. 426 272
Bell, In re, 34 N. Y. S. 191 730
Bellows v. Cheek, 20 Ark. 424 400
v. Litchfield, 81 Iowa 36 636
v. McGinnis, 17 Ind. 64 360
Belo v. Mayes, 79 Mo. 67 324
Belton v. Summer, 31 Fla. 139 492
Bemis v. Plato, 119 Iowa 127 638
Bender v. Brooks, 61 Tex. Civ. App. 464 100
Benedict v. Beurmann, 90 Mich. 396 87
Benham v. Potter, 52 Conn. 248 503
Beniost v. Rothschild, 145 Mo. 399 696
Benjamin v. Cavaroc, 2 Woods (U. S.) 168 447
Bennett v. Atlantic Coast Line R. Co., 126 Ga. 411 108
v. Davis, 90 Maine 457 279
v. Harms, 51 Wis. 251 325
v. Kovarick, 23 Misc. (N. Y.) 73 687
v. Littlefield, 177 Mass. 294 59
v. Packer, 70 Conn. 357 477
v. Robinson, 27 Mich. 26 52
v. United States Land &c. Co., 16 Ariz. 138 674
Benson v. Morrow, 61 Mo. 352 103, 104
v. Shotwell, 87 Cal. 49 6, 26
v. Swan, 60 Maine 160 87
Benson's Estate, In re, 169 Pa. St. 602 481
Bent v. Maxwell &c. R. Co., 3 N. Mex. (Gild.) 227 654
v. St. Vrain, 30 Mo. 268 719
v. Thompson, 5 N. Mex. 408 491
Bentley v. Cavallier, 121 La. 60 640
v. Deforest, 2 Ohio 221 309
v. Napier (Ky. App.), 122 S. W. 180 272
Benton v. Sentell, 50 La. Ann. 869 99
v. Shafer, 47 Ohio St. 117 548
v. Williams, 202 Mass. 189 52
Bent's Appeal, 35 Conn. 523 492
Beranek v. Beranek, 113 Wis. 272 66
Bercaw v. Cockerill, 20 Ohio St. 163 122
Bergen v. State, 58 Miss. 623 563
Beringer v. Lutz, 188 Pa. St. 364 74
Bernier v. Bernier, 147 U. S. 243 197
Bernstein v. Humes, 71 Ala. 260 420, 692
Berry v. Billings, 44 Maine 416 45, 312
v. Boggess, 62 Tex. 239 392
v. Potter, 52 N. J. Eq. 664 62
v. Reed, 73 Ind. 235 563
v. Seawall, 65 Fed. 742 327
Bertles v. Nunan, 92 N. Y. 152 321
Bethany Hospital Co. v. Philippi, 82 Kans. 64 665
Bethell v. Bethell, 54 Ind. 428 724
Betsey v. Torrance, 34 Miss. 132 314
Bettison v. Budd, 17 Ark. 546 346
Betts v. Letcher, 1 S. Dak. 182 687
Betz v. Mullin, 62 Ala. 365 123
v. Snyder, 48 Ohio St. 492 122
Beverly v. Waller, 115 Ky. 596 620
Bickel's Appeal, In re, 86 Pa. St. 204 318
Bicknell v. Comstock, 113 U. S. 149 226
Bidleman v. Brooks, 28 Cal. 72 644
Biddle v. Ramsey, 52 Mo. 153 667
Bieber v. Porter, 242 Ill. 616 669, 678
Biedler v. Biedler, 87 Va. 300 462
Bigelow v. Blake, 18 Wis. 520 195
v. Brewer, 29 Wash. 670 546
v. Morong, 103 Mass. 287 712
v. Topliff, 25 Vt. 273 122
Bigley v. Jones, 114 Pa. St. 510 128
Biles v. O. & G. H. R. Co., 5 Wash. 509 275
Bill v. Payne, 62 Conn. 140 471, 483
Billings v. Head, 184 Ind. 361 718
v. Kothe, 49 Iowa 34 652
v. Parsons, 17 Utah 22 372
Billingsley v. Bates, 30 Ala. 376 147
Bills v. Bills, 80 Iowa 269 472
Bingham v. Salene, 15 Ore. 208 63
Bingham's Appeal, 64 Pa. St. 345 456
Binns v. Dazey, 147 Ind. 536 719
Bird v. Burgsteiner, 100 Ga. 486 615
v. Gilliam, 125 N. Car. 76 547
Birge v. Bock, 44 Mo. App. 69 75
Birnie v. Main, 29 Ark. 591 430
Biscoe v. Coulter, 18 Ark. 423 633
Bishop v. Cook, 13 Barb. (N. Y.) 326 117
v. Hampton, 11 Ala. 254 721
v. O'Conner, 69 Ill. 431 364, 592
v. Rider, 31 Ohio C. C. 332 729
v. Schneider, 46 Mo. 472 120, 122, 132
v. Woodward, 103 Ga. 281 675
Bismark Building & Loan Assn. v. Bolster, 92 Pa. St. 123 566
Bissell v. Foss, 114 U. S. 252 638
Bisson v. West Shore R. Co., 143 N. Y. 125 710
Bivings v. Gosnell, 133 N. Car. 574 124
Bixby v. Smith, 49 How. Pr. (N. Y.) 50 661
Bjmerland v. Eley, 15 Wash. 101 583
Black v. Cartmell, 10 B. Mon. (Ky.) 188 719
v. Cartmell, 49 Ky. 188 714
v. Elkhorn Mining Co., 49 Fed. 549 63
v. Hills, 36 Ill. 376 119
v. Sharkey, 104 Cal. 279 286
v. Skinner Mfg. Co., 53 Fla. 1090 124
v. Tennessee Coal &c. Co., 93 Ala. 109 73
Blackborough v. Davis, 1 P. Wms. 41 86
Blackburn v. Nelson, 100 Cal. 336 272
Blacklaws v. Milne, 82 Ill. 505 717
Blackman v. Preston, 123 Ill. 381 311
v. Wadworth, 65 Iowa 80 734
v. Wright, 96 Iowa 541 584
Blacksber Co. v. Northrup, 176 Ala. 190 456
Blackstone Bank v. Davis, 21 Pick. (Mass.) 42 47
Blackwell v. Blackwell, 124 N. Car. 269 291
Blaine County v. Brewster, 32 Nebr. 264 109
Blair v. Blair, 82 Kans. 464 473
v. Whitaker, 31 Ind. App. 664 125
Blaisdell v. Portsmouth &c. R. Co., 51 N. H. 483 62
Blake v. Blake, 85 Ind. 65 710
v. Fash, 44 Ill. 302 265
v. Jones, 7 Mass. 28 663
Blake's Estate, In re, 134 Pa. St. 240 473
Blalock v. Miland, 87 Ga. 573 282
Blanchard v. Floyd, 93 Ala. 53 263, 328
Blanton v. Nunley, 55 Tex. Civ. App. 427 640
Blatchley v. Osborn, 33 Conn. 226 127

[*References are to Sections.*]

Bledsoe v. Fitts, 47 Tex. Civ. App. 578 722
Bleecker v. Hennion, 23 N. J. Eq. 123 67
Blinn v. Schwartz, 177 N. Y. 252 307
Bliss v. Tidrick, 25 S. Dak. 533 120
Bloch v. Ryan, 4 App. Cas. (D. C.) 283 75, 77
Blodget v. Brinsmaid, 9 Vt. 27 89
Blodgett v. Sioux City & St. P. R. Co., 63 Iowa 606 27
Blondeau v. Sheridan, 81 Mo. 545 506
Blood v. Blood, 23 Pick. (Mass.) 8 120
v. Light, 38 Cal. 649 615
Bloom v. Van Rensselaer, 15 Ill. 503 442
Blose v. Bear, 87 Va. 177 572
Blount v. Walker, 31 S. Car. 13 58
Bludworth v. Lake, 35 Cal. 255 203
v. Poole, 21 Tex. Civ. App. 551 351
Blum v. Robertson, 24 Cal. 127 336
Blume v. White, (Tex. Civ. App.), 111 S. W. 1066 283
Blumenthal v. Brainard, 38 Vt. 402 128
Blythe v. Ayres, 96 Cal. 532 719
Boal v. King, 6 Ohio 11 349
Board of Education v. Berry, 62 W. Va. 433 592
Board of Health v. Van Hoesen, 87 Mich. 533 109
Board of Regents v. Linscott, 30 Kans. 240 642
Boas v. Farrington, 85 Cal. 535 25
Boatman v. Lasley, 23 Ohio St. 614 61
Boaz v. Swinney, 79 Kans. 332 718
Bobb v. Barnum, 59 Mo. 394 262, 346, 360
v. Woodward, 42 Mo. 482 661
Boden v. Mier, 71 Nebr. 191 737
Bodine v. Arthur, 91 Ky. 53 45, 274
v. Brown, 12 App. Div. (N. Y.) 335 712, 714
v. Wayne Title &c. Co., 33 Pa. Super. Ct. 68 23
Boe v. Filleul, 26 La. Ann. 126 90
Boehly v. Mansing, 52 Misc. (N. Y.) 382 393, 671
Boeing v. Owsley, 122 Minn. 190 724
Bogan v. Edinburgh American Land Mtg. Co., 63 Fed. 192 183, 196
Bogard v. Barhan, 52 Ore. 121 270
Bogardus v. Trinity Church, 4 Paige (N. Y.) 178 72
Boggan v. Somers, 152 N. Car. 390 268
Boggs v. Fowler, 16 Cal. 559 364
Bohall v. Dilla, 114 U. S. 47 196
Bohlman v. Green Bay &c. R. Co., 40 Wis. 157 677
Boise City v. Wilkinson, 16 Idaho 150 192
Bolard v. Mason, 66 Pa. St. 138 662
Bolin v. Bolin, 245 Ill. 613 735, 737
Bolinger v. Beacham, 81 Kans. 746 87
Bolles v. Smith, 39 Conn. 217 471
Bolling v. Jones, 67 Ala. 508 364, 601
Bolton v. Branch, 22 Ark. 435 26
v. London School Board, 7 Ch. Div. 766 8
v. Roebuck, 77 Miss. 710 434
Boltz v. Colsch, 134 Iowa 480 687
Bonati v. Welsch, 24 N. Y. 157 724
Bonetti v. Treat, 91 Cal. 223 408
Bonnell v. Holt, 89 Ill. 71 663
Bonner v. Ware, 10 Ohio 465 129, 222
Bonncy v. Morrill, 52 Maine 252 290
Booker v. Tarwater, 138 Ind. 385 263, 714
Boone v. Armstrong, 87 Ind. 168 99, 427
Booraem v. North Hudson County R. Co., 40 N. J. Eq. 557 317
Booth v. Bradford, 114 Iowa 562 656
v. Clark, 17 How. (U. S.) 322 655
v. Hoskins, 75 Cal. 271 419
v. Opel, 244 Ill. 317 630
v. Phelps, 8 Wash. 549 36
Bopp v. Fox, 63 Ill. 540 65
Borden v. Smith, 20 N. Car. 27 616
Borders v. Vance, 134 Ga. 85 622
Boreel v. Lawton, 90 N. Y. 293 278
Boreham v. Byrne, 83 Cal. 23 66
Borel v. Rollins, 30 Cal. 408 337
Borgner v. Brown, 133 Ind. 391 463
Borst v. Simpson, 90 Ala. 373 54, 276
Bosley v. Wyatt, 14 How. (U. S.) 390 455
Boss v. Jordan, 118 Iowa 204 546
Boston Safe Deposit &c. Co. v. Stich, 61 Kans. 474 46
Boswell v. Goodwin, 31 Conn. 74 127
v. Sharp, 15 Ohio 447 576
Botsford v. O'Connor, 57 Ill. 72 721
Bourke v. Boone, 94 Md. 472 460
Bourn v. Robinson (Tex. Civ. App.), 107 S. W. 873 562
Bouton v. Doty, 69 Conn. 531 424
Bowden v. Bland, 53 Ark. 53 289
v. Hadley, 138 Iowa 711 620
Bowen v. Beck, 94 N. Y. 86 296
v. Chase, 94 U. S. 812 58
v. John, 201 Ill. 292 42
v. Julius, 141 Ind. 310 429
v. Swander, 121 Ind. 164 644
Bower v. Cooper, 2 Hare (Eng.) 408 395
Bowers v. Johnson, 49 N. Y. 432 436
v. Keesecker, 14 Iowa 301 196
v. Pomeroy, 21 Ohio St. 184 467
Bowery Nat. Bank v. Duncan, 12 Hun (N. Y.) 405 722
Bowling v. Bowling (Ky. App.), 118 S. W. 923 350, 612
v. Breatbitt Coal &c. Co., 134 Ky. 249 669
Bowman v. Officer & Pusey, 53 Iowa 640 638
Bowne v. Wolcott, 1 N. Dak. 415, 497 191, 192, 279
Bowser v. Westcott, 145 N. Car. 56 193
Box v. Goodbar, 54 Ark. 6 373
Box, In re, 11 Wash. St. 90 595
Boyce v. Danz, 29 Mich. 146 183
v. Grundy, 3 Pet. (U. S.) 210 673
Boyd v. Boyd, 176 Ill. 40 696
v. Ellis, 11 Iowa 97 423
v. Ellis, 107 Mo. 394 646
v. Redd, 118 N. Car. 680 98
v. Schlesinger, 59 N. Y. 301 639
Boylan v. Warren, 39 Kans. 301 137
Boyle v. John Boyle & Co., 136 App. Div. (N. Y.) 367 481
Boynton v. Rees, 8 Pick. (Mass.) 329 434
Bozeman v. Bishop, 94 Ga. 459 49
Bozza v. Rowe, 30 Ill. 198 595
Brace v. Superior Land Co., 65 Wash. 681 430
Bracken v. McAlvey, 83 Iowa 421 658
Brackenridge v. Dawson, 7 Ind. 383 345
Brackett v. Ridlon, 54 Maine 426 42
Bracklee Co. v. O'Connor, 67 Misc (N. Y.) 599 382
Bradfield v. Newby, 130 Ind. 59 564
Bradford v. Anderson, 60 Nebr. 368 535
v. Durham, 54 Ore. 1 644
Bradlee v. Whitney, 108 Pa. St. 362 127
Bradley v. Chester Valley R. Co., 36 Pa. St. 141 358
v. Dells Lumber Co., 105 Wis. 245 229
v. Dike, 57 N. J. L. 471 526, 632
v. Merrill, 88 Maine 319 301, 417

[*References are to Sections.*]

Bradley
v. Richmond, 110 Va. 521 630
v. Slater, 50 Nebr. 682 53
v. Whitesides, 55 Minn. 455 336
Bradshaw v. Bradbury, 64 Mo. 334 290
v. Edelen, 194 Mo. 640 220
Bradt v. Hodgdon, 94 Maine 559 60
Brady v. Johnson, 75 Md. 445 432
v. Kreuger, 8 S. Dak. 464 66
Brakken v. Minneapolis &c. R. Co., 29 Minn. 41 105
Bramell v. Cole, 136 Mo. 201 472, 653
Bramlett v. Roberts, 68 Miss. 325 99
Branch v. Doane, 17 Conn. 402 50
Brandies v. Atkins, 204 Mass. 471 705
Branham v. San Jose, 24 Cal. 585 106, 307
Brannock v. Magoon, 141 Mo. App. 316 59
Brannon v. Pringle, 94 Miss. 215 643
Branson v. Studabaker, 133 Ind. 147 267
v. Yancy, 16 N. Car. 77 67
Brasfield v. Brasfield, 96 Tenn. 580 322
Brattle Square Church v. Grant, 3 Gray (Mass.) 142, 156 56, 475, 482
Braun v. Mathieson, 139 Iowa 409 192, 206, 225
Bray v. Adams, 114 Mo. 486 346
v. Neill, 21 N. J. Eq. 343 602
Brazee v. Schofield, 124 U. S. 495 202
Breaux v. Hanson Lumber Co., 125 La. Ann. 421 100
Breed v. Osborne, 113 Mass. 318 45, 274
Breeden v. Moore, 82 S. Car. 534 700
Brega v. Dickey, 16 Grant's Ch. (N. Car.) 494 18
Breg's Estate, In re, 71 Minn. 11 710, 711
Breit v. Yeaton, 101 Ill. 242 263
Brem v. Lockhart, 93 N. Car. 191 118
Bremerton Development Co. v. Title Trust Co., 67 Wash. 268 15, 22
Brewer v. Atkeison, 121 Ala. 410 439
v. Blougher, 14 Pet. (U. S.) 178 87, 719
v. State, 59 Ala. 101 740
v. Watson, 71 Ala. 299 137
Brewster v. Carnes, 103 N. Y. 556 438
v. Ludekins, 19 Cal. 162 659
v. McCall, 15 Conn. 274 481
Bridge v. Wellington, 1 Mass. 219 267
Bridger v. Exchange Bank, 126 Ga. 821 545, 547
Bridges v. Arnold, 37 Iowa 221 662
v. Linder, 60 Iowa 190 419
Brier v. Traders' Nat. Bank, 24 Wash. 695 562
Briggs v. Greene, 10 R. I. 495 719
v. Murray, 29 Wash. 245 100
v. Sneghan, 45 Ind. 14 659
v. Walker, 171 U. S. 466 466
Brigham City v. Rich, 34 Utah 130 184
Brigham Young Trust Co. v. Wagner, 12 Utah 1 100
Bright v. Buckman, 39 Fed. 243 120, 433, 551, 692
Brighton v. White, 128 Ind. 320 651
Brillhart v. Mish, 99 Md. 447 338
Brinckerhoff v. Lansing, 4 Johns. Ch. (N. Y.) 65 125
Bringhurst v. Orth, 7 Del. Ch. 178 455
Brinkman v. Jones, 44 Wis. 498 127, 692
Bristol v. Atwater, 50 Conn. 402 469
v. Austin, 40 Conn. 438 708
Broadwell v. Phillips, 30 Ohio St. 255 99
Brobst v. Brock, 10 Wall. (U. S.) 519 429
Brock v. Frank, 51 Ala. 85 491, 492
v. Sawyer, 39 N. H. 547 479
v. State, 85 Ind. 397 719
Brockenborough v. Melton, 55 Tex. 493 117
Brockway v. McClun, 243 Ill. 196 429
Brodhead v. Reinbold, 200 Pa. 618 399
Brodie v. Watkins, 31 Ark. 319 278
Broemsen v. Agnic, 70 W. Va. 106 671
Broliar v. Marquis, 80 Iowa 49 465
Brombacher v. Berking, 56 N. J. Eq. 251 470
Brooke v. Gregg, 89 Md. 234 668
Brookfield v. Goodrich, 32 Ill. 363 122
Brookhaven v. Baggett, 61 Miss. 383 407
Brooklin St., In re, 118 Pa. St. 640 244
Brooks v. Burlington & Southwestern R. Co., 101 U. S. 443 535
v. Garner, 20 Okla. 236 638
v. Kearns, 86 Ill. 547 323
v. Rooney, 11 Ga. 423 346
v. Woods, 40 Ala. 538 675
Brosnan v. Kramer, 135 Cal. 36 408
Brower v. Hunt, 18 Ohio St. 311 87, 708, 722
v. Witmeyer, 121 Ind. 83 430
Brown v. Addison Gilbert Hospital, 155 Mass. 323 48, 464
v. Baraboo, 90 Wis. 151 89
v. Belmarde, 3 Kans. 41 719
v. Boston & M. R. Co., 106 Maine 248 671
v. Bragg, 22 Ind. 122 50
v. Brown, 41 Ala. 215 583
v. Brown, 101 Ind. 340 718
v. Brown, 103 Ind. 23 417
v. Brown, 133 Ind. 476 670
v. Brown, 86 Tenn. 277 652
v. Brown, 1 D. Chip. (Vt.) 360 730
v. Bryant, 17 Tex. Civ. App. 454 465
v. Combs, 29 N. J. L. 36 329
v. Covilland, 6 Cal. 566 398
v. Cranberry Iron &c. Co., 59 Fed. 434 275
v. Critchell, 110 Ind. 31 724
v. Dickey, 106 Maine 97 281
v. Farran, 3 Ohio 140 283
v. Finley, 157 Ala. 424 718
v. Henry, 106 Pa. St. 262 443
v. Hitchcock, 173 U. S. 473 207
v. Hooks, 133 Ga. 345 697
v. Kayser, 60 Wis. 1 51
v. Knapp, 54 Mich. 132 137
v. Knapp, 79 N. Y. 136 525
v. Lunt, 37 Maine 423 120
v. Manter, 21 N. H. 528 267
v. Markham, 56 Fla. 202 52
v. Morrill, 91 Mich. 29 147
v. Morrisey, 124 N. Car. 292 693
v. Norman, 65 Miss. 369 673
v. O'Brien, 168 Mass. 484 425
v. O'Connor, 1 Cal. 419 214
v. Oldham, 123 Mo. 621 699
v. Pforr, 38 Cal. 550 337
v. Reeder, 108 Md. 653 297, 338
v. Renshaw, 57 Md. 67 60
v. Richards, 17 N. J. Eq. 32 65
v. Rodgers, 125 Mo. 392 48
v. Sims, 22 Ind. App. 317 9, 16, 22
v. Smith, 83 Ill. 291 52
v. Stark, 47 Mo. App. 370 678
v. Steele, 23 Kans. 672 724
v. Taylor, 62 Ind. 295 710, 737
v. Throckmorton, 11 Ill. 529 197
v. Trent, 36 Okla. 239 434
v. Veazie, 25 Maine 359 636
v. Webster, 87 Nebr. 788 723
v. Whaley, 58 Ohio St. 654 708
v. Widen (Iowa), 103 N. W. 158 7, 77
v. Wood, 17 Mass. 68 696

[*References are to Sections.*]

Browne v. Bowdoinham, 71 Maine 144 317
v. Davis, 109 N. Car. 23 443
Brownell, In re, 60 Hun (N. Y.) 586 443
Browning v. Harriss, 99 Ill. 456 431
Brown, In re, 22 Okla. 216 720
Brownsville v. Basse, 36 Tex. 461 221
Bruce v. Bissell, 119 Ind. 525 87
v. McIntosh (Okla.), 159 Pac. 261 727
v. Patton, 54 Ark. 455 207
Bruch's Estate, In re, 185 Pa. St. 194 477
Brumfield v. Drook, 101 Ind. 190 359
Brunson v. Henry, 140 Ind. 455 59
Brush v. Ware, 16 Pet. (U. S.) 93 95
Bryan v. Bliss-Cook Oak Co., 178 Fed. 217 276
v. Bradley, 16 Conn. 474 58
v. Bryan, 62 Ark. 79 65
v. Harvey, 18 Md. 113 129
v. Ramirez, 8 Cal. 461 330
v. Spires, 3 Brewst. (Pa.) 580 55
v. Uland, 101 Ind. 477 306
Bryant v. Fairfield, 51 Maine 149 611
v. Main, 25 Ky. L. 1242 434
v. Richardson, 126 Ind. 145 443
Bryant Timber Co. v. Wilson, 151 N. Car. 154 550
Brydolf v. Wolf, 32 Iowa 509 660
Buchanan v. Balkum, 60 N. H. 406 129
v. Curtis, 25 Wis. 99 105
v. International Bank, 78 Ill. 500 118, 125
v. Tennant, 55 Ore. 116 640
Buckingham v. Buckingham, 81 Mich. 89 66
v. Hanna, 2 Ohio 551 97, 99
v. Jaques, 37 Conn. 402 707
Bucklen v. Hasterlik, 155 Ill. 423 6
Buckley v. Buckley, 11 Barb. (N. Y.) 43 64
v. Frasier, 153 Mass. 525 712
v. Gray, 110 Cal. 339 22
Bucklin v. Crampton, 20 Vt. 261 553
Buckner v. Buckner, 120 Ky. 596 717
v. Street, 15 Fed. 365 303
Budd v. Gallier, 50 Ore. 42 192
Buehler v. McCormick, 169 Ill. 269 438
Buell v. Cross, 4 Ohio 327 345
v. Irwin, 24 Mich. 145 284
Buffalo v. Harling, 50 Minn. 551 215
Buffalo Sav. Bank v. Hunt, 64 Misc. (N. Y.) 643 565
Bull v. Coe, 77 Cal. 54 419
Bullard v. Barksdale, 33 N. Car. 461 698
Bullitt v. Eastern Ky. Land Co., 99 Ky. 324 656
Bullock v. Rouse, 81 Cal. 590 208
v. Wallingford, 55 N. H. 619 122
v. Whipp, 15 R. I. 195 126
Bumstead v. Cook, 169 Mass. 410 506
Bunch v. Grave, 111 Ind. 351 428
v. Nicks, 50 Ark. 367 311
Burbank v. Wiley, 66 N. Car. 58 578
Burchinell v. Koon, 25 Colo. 59 371
Burden v. Taylor, 124 Mo. 12 643
Burdick v. Wentworth, 42 Iowa 440 192
Burdis v. Burdis, 96 Va. 81 54, 474
Burgess v. Hargrove, 64 Tex. 110 717
Burk v. Johnson, 146 Fed. 209 93
Burke v. Brown, 148 Mo. 309 639
v. Burke, 142 Iowa 206 560
v. Burke, 34 Mich. 451 727
v. Chamberlain, 22 Md. 298 467
v. McCowen, 115 Cal. 481 239
v. Snell, 42 Ark. 57 443
Burkett v. Clark, 46 Nebr. 466 615
Burkhard v. Mitchell, 16 Colo. 376 53
Burkitt v. Twyman (Tex. Civ. App.), 35 S. W. 421 99
Burleigh v. Clough, 52 N. H. 267 469
Burlington v. Fosby, 6 Vt. 83 719
Burnaby v. Equitable Reversionary Interest Soc., 28 Ch. Div. 416 3
v. Equitable Reversionary Interest Soc., 54 L. J. Ch. 466 10
Burnes v. Burnes, 137 Fed. 781 463
v. Daviess County Bank & Trust Co., 135 Ky. 355 375
Burnett v. Caldwell, 9 Wall. (U. S.) 290 391
v. Wright, 135 N. Y. 543 424
Burnham v. Farmers' Loan &c. Co., 44 Nebr. 438 117
Burnley v. Stevenson, 24 Ohio St. 474 655
Burns v. Burns (Tex. Civ. App.), 126 S. W. 333 676
v. Keas, 21 Iowa 257 66
v. Scoggin, 16 Fed. 734 426
v. Tiffer, 49 Okla. 262 717
v. Travis, 117 Ind. 44 486, 492
Burnside v. Terry, 45 Ga. 621 421
v. United Sawmill Co., 92 Ark. 118 667
Burr v. Stenton, 43 N. Y. 462 407
Burris v. Kennedy, 108 Cal. 331 600
Burt v. Merchants' Ins. Co., 106 Mass. 356 85, 109
Burton v. Baxter, 7 Blackf. (Ind.) 297 437
v. Tuite, 78 Mich. 363 13
Burton-Whayne Co. v. Farmers' & Drovers' Bank, 130 Ky. 389 283
Burwell v. Jackson, 9 N. Y. 535 299
Bury v. Young, 98 Cal. 446 311
Bush v. Bush, 5 Del. Ch. 144 42, 65
v. Golden, 17 Conn. 594 119, 125
Bussing v. Crain, 8 B. Mon. (Ky.) 593 117
Bussman v. Ganster, 72 Pa. St. 285 406
Butler v. Fitzgerald, 43 Nebr. 192 620
v. Merchants Ins. Co., 14 Ala. 777 737
Butler, In re, 66 Misc. (N. Y.) 406 466
Butlers v. Stevens, 26 Maine 484 127
Butterfield v. Beall, 3 Ind. 203 336
v. Hamant, 105 Mass. 338 487
v. Sawyer, 187 Ill. 598 714
Button v. American Tract Soc., 23 Vt. 336 481
Butts v. Andrews, 136 Mass. 221 7
v. Cooper, 152 Ala. 375 328
Buzard v. Houston, 119 U. S. 347 651
Buzby v. Roberts, 53 N. J. Eq. 566 471
Buzon v. Licauco, 13 Philippine 354 957
Bye v. Atlantic City, 73 N. J. L. 402 501
Byers v. Byers, 183 Pa. 509 327
Byington v. Stone, 51 Iowa 317 642
Byrd v. Belding, 18 Ark. 118 736
Byrne v. Morehouse, 22 Ill. 611 196
Byrnes v. Palmer, 18 App. Div. (N. Y.) 1 16, 19

C

Cabell v. Grubbs, 48 Mo. 353 234, 283
Cadell v. Allen, 99 N. Car. 542 335, 336
Cadwalader v. Bailey, 17 R. I. 495 61, 63
Cady v. Barnes, 208 Fed. 361 597
v. Cady, 67 Miss. 425 483
v. Eagbmey, 54 Iowa 615 198
v. Purser, 131 Cal. 552 287
Cagle v. Parker, 97 N. Car. 271 61
Cagliostro v. Galgano, 69 Misc. (N. Y.) 321 421
Cahill v. Cahill, 75 Conn. 522 668

[*References are to Sections.*]

Cairo & Vincennes R. Co. v. Fackney, 78 Ill. 116 537
Calame v. Calame, 24 N. J. Eq. 440 65
Calder v. Chapman, 52 Pa. St. 359 8, 99, 121, 126
Caley v. Portland, 12 Colo. App. 397 408
Caldwell v. Bush, 6 Wyo. 342 195
v. Matthewson, 57 Kans. 258 59
v. Miller, 44 Kans. 12 225
Caldwell Land & Lumber Co. v. Smith, 146 N. Car. 199 636
California Canneries Co. v. Scatena, 117 Cal. 447 280
California Domestic Water Co. v. Los Angeles County, 10 Cal. App. 185 634
Calkins v. Miller, 55 Nebr. 601 576
Call v. Los Angeles-Pacific Co., 162 Fed. 926 193, 200
v. Shewmaker, 24 Ky. L. 686 478
Callaghan, In re, 119 Cal. 571 720
Callahan v. Davis, 90 Mo. 78 197
Callahan Co. v. Michael, 45 Ind. App. 215 407
Callaway v. Harrold, 61 Ga. 111 660
Callerand v. Piot, 241 Ill. 120 286
Callicott v. Callicott (Miss.), 43 So. 616 737
Calumet Canal & Dock Co. v. Russell, 68 Ill. 426 126
Calvo v. Davies, 8 Hun (N. Y.) 222 316
Camp v. Cleary, 76 Va. 140 55
v. Shaw, 52 Ill. App. 241 455
v. Smith, 2 Minn. (Gil. 131) 155 196, 198
Campbell v. Baker, 51 N. Car. 255 598
v. Brackett, 45 Ind. App. 293 501
v. Keys, 130 Mich. 127 433
v. Knights, 26 Maine 224 602
v. McCahan, 41 Ill. 45 657
v. McClure, 45 Nebr. 608 526, 632
v. Porter, 162 U. S. 478 491, 492
v. Roach, 45 Ala. 667 128
v. Southwestern Tel. &c. Co., 108 Ark. 569 434
v. Swasey, 12 Ind. 70 663
v. Vedder, 3 Keys (N. Y.) 174 316
v. Wiggins, 1 Rice's Eq. (S. Car.) 10 462
Campbell's Appeal, 64 Conn. 277 87, 711
Canfield v. Canfield, 62 N. J. Eq. 578 734
v. Hard, 58 Vt. 217 66
Canning v. Fibush, 77 Cal. 196 51
Cannon v. Williams, 14 Colo. 21 538
Canton Co. v. Baltimore, 106 Md. 69 698
Capek v. Kropik, 129 Ill. 509 66
Carbine v. Pringle, 90 Ill. 302 126
Carbrey v. Willis, 7 Allen (Mass.) 368 102
Card v. Dean, 84 Nebr. 4 668
Cardwell v. Crumley (Tenn.), 35 S. W. 767 633, 639
Carey-Lombard Lumber Co. v. Bierbauer, 76 Minn. 434 536
Carino v. Insular Government, 212 U. S. 449 214
Carlin v. Cavender, 56 Mo. 286 646
Carlisle v. Carlisle, 78 Ala. 542 283
Carlson v. Curren, 48 Wash. 249 669
Carlton v. Byers, 70 N. Car. 691 736
Carman v. Johnson, 29 Mo. 84 192, 195
v. Newell, 1 Denio (N. Y.) 25 89
Carmichael v. Carmichael, 72 Mich. 76 401
Carnall v. Duval, 22 Ark. 136 119, 120
v. Wilson, 21 Ark. 62 325
Carner v. Chicago &c. R. Co., 43 Minn. 375 206
Carnes v. Bingham, 134 Ky. 96 727
Carney v. Hadley, 32 Fla. 344 667
Carolina Sav. Bank v. McMahon, 37 S. Car. 309 699
Carpenter v. Buller, 8 Mees. & W. 209 99
v. Mitchell, 54 Ill. 126 530
v. Perkins, 83 Conn. 11 466
v. Plagge, 192 Ill. 82 447
v. Sherfy, 71 Ill. 427 347
Carpenter's Estate, In re, 170 Pa. 203 733
Carr v. Dooley, 119 Mass. 294 632
v. Givens, 9 Bush (Ky.) 679 64
v. Roach, 2 Duer. (N. Y.) 20 26
Carrier v. Eastis, 112 Ala. 474 397
Carrigan v. Drake, 36 S. Car. 354 465
v. Rowell, 96 Tenn. 185 108
Carroll v. Tomlinson, 192 Ill. 398 419
Carson v. Fuhs, 131 Pa. St. 256 465
v. Sheldon, 51 Mo. 436 659
v. Smith, 5 Minn. 78 95
v. Smith, 12 Minn. 543 215
Carter v. Carter, 39 Ala. 579 43
v. Carter, 234 Ill. 507 87, 730
v. Chesapeake &c. R. Co., 26 W. Va. 644 104
v. Couch, 157 Ala. 470 64
v. Goodin, 3 Ohio St. 75 325
v. Hobbs, 92 Fed. 594 381
v. Randolph, 47 Tex. 376 108
v. Ruddy, 166 U. S. 493 221
v. Wingard, 47 Ill. App. 296 62
Carthage Tissue Paper Mills v. Carthage, 200 N. Y. 1 434
Cartwright v. Ruffin, 43 Colo. 377 393
Cary v. Whitney, 48 Maine 516 185
Case v. Edgeworth, 87 Ala. 203 201
Casey v. Casey, 107 Iowa 192 696
v. King, 98 Mass. 503 50
Cashman v. Cashman's Heirs, 123 Mo. 647 700
Casler v. Gray, 159 Mo. 588 64
Casper v. Klippen, 61 Minn. 353 581
Cass County v. Cowgill, 97 Mich. 448 50
Cass Farm Co. v. Detroit, 139 Mich. 318 698
Cassedy v. Jackson, 45 Miss. 397 314
Cassidy v. Caton, 47 Iowa 22 426
v. Woodward, 77 Iowa 354 576
Caswell v. Black River Mfg. Co., 14 Johns. (N. Y.) 453 34
Cathey v. Buchanan Lumber Co., 151 N. Car. 592 270
Catholic Mutual Ben. Assn. v. Firnane, 50 Mich. 82 721
Catlin Coal Co. v. Lloyd, 180 Ill. 398 266
Catron v. Laughlin, 11 N. Mex. 604 214
Caujolle v. Ferrié, 26 Barb. (N. Y.) 177 719
Cauley v. Sutton, 150 N. Car. 327 638
Cautley v. Morgan, 51 W. Va. 304 100
Cave v. Crafts, 53 Cal. 135 506
Cavender v. Smith, 5 Iowa 157 349
Caverly v. McOwen, 123 Mass. 574 773
Caw v. Robertson, 5 N. Y. 125 458
Cazort & McGehee Co. v. Dunbar, 91 Ark. 400 424
Cecil v. Beaver, 28 Iowa 241 286
Centenary M. E. Church v. Parker, 43 N. J. Eq. 307 263, 329
Central Pac. R. Co. v. Beal, 47 Cal. 151 290
Cerney v. Pawlot, 66 Wis. 262 443
C. G. Larned Mercantile, Real Estate & Live Stock Co. v. Omaha &c. R. Co., 56 Kans. 174 677
Chace v. Lamphere, 148 N. Y. 206 460
v. Morse, 189 Mass. 559 446
Chadbourne v. Sumner, 16 N. H. 129 662
Chadwick v. Chadwick, 37 N. J. Eq. 71 483

[References are to Sections.]

Chaffee v. Fourth Nat. Bank, 71 Maine 514 376
Challefoux v. Ducharme, 4 Wis. 554 106
Challiss v. Atchison &c. R. Co., 16 Kans. 117 110
Chamberlain v. Bell, 7 Cal. 292 120, 288
Chambers v. Chambers, 249 Ill. 126 711
v. Chambers, 227 Mo. 262 266
v. Chambers, 92 Tenn. 707 321
v. Haney, 45 La. Ann. 447 124
Chambers, In re, 44 Fed. 786 13
Champion v. Hinkle, 45 N. J. Eq. 162 674
Chancellor v. Windham, 1 Rich. (S. Car.) 161 311
Chandler v. Clark, 151 Mich. 159 639
v. Hart, 161 Cal. 405 405
v. Morey, 195 Ill. 596 595
v. Von Roeder, 24 How. (U. S.) 224 315
Chandos v. Mack, 77 Wis. 573 272
Chapin v. School Dist. No. 2, 35 N. H. 445 475
Chaplin v. Simmons, 7 T. B. Mon. (Ky.) 337 67
Chapman v. Chapman, 92 Va. 537 65
v. Dougherty, 87 Mo. 617 70
v. Hamblet, 100 Maine 454 272
v. Lee, 55 Ala. 616 26, 30
v. Polack, 70 Cal. 487 147
v. Price, 83 Va. 392 64
v. Schroeder, 10 Ga. 321 65
v. White Sewing Machine Co., 78 Miss. 438 66
Chappell v. Chappell (Ky.), 119 S. W. 218 47
v. New York &c. R. Co., 62 Conn. 195 275
Charland v. Trustees of Home for Aged Women, 204 Mass. 563 643
Charleroi Timber & Cannel Coal Co. v. Spaulding (Ky. App.), 117 S. W. 291 699
Charles v. Charles, 8 Grat. (Va.) 486 64
Charles River Bridge v. Warren Bridge, 11 Pet. (U. S.) 420 297
v. Warren Bridge, 7 Pick. (Mass.) 346 227
Charleston C. & C. R. Co. v. Leech, 33 S. Car. 175 266
Charlotte v. Pembroke Iron Works, 82 Maine 391 693
Charter v. Graham, 56 Ill. 19 123
Chase v. Heaney, 70 Ill. 268 10, 15, 16, 17, 18, 20, 174
v. Peck, 21 N. Y. 581 531
v. Williams, 71 Maine 190 615
v. Woodruff, 133 Wis. 555 91
Chase's Case, 1 Bland (Md.) 227 65
Chatham v. Bradford, 50 Ga. 327 132
Chattahoochie & G. R. Co. v. Pilcher, 163 Ala. 401 270
Chauvin v. Louisiana Oyster Commission, 121 La. 10 228
Cheely v. Clayton, 110 U. S. 701 676
Chenault v. Scott, 23 Ky. L. 1974 43
Cheney v. Billhy, 74 Fed. 52 671
v. Harding, 21 Nebr. 65 662
Cherokee Const. Co. v. Harris, 92 Ark. 260 66
Cherry v. Mitchell, 108 Ky. 1 719
Chew v. Hyman, 7 Fed. 7 356
v. Kellar, 171 Mo. 215 291
v. Tome, 93 Md. 244 493
Chicago v. Middlebrooke, 143 Ill. 265 73
v. Pittsburg &c. R. Co., 146 Ill. App. 403 503
v. Witt, 75 Ill. 211 127
Chicago &c. Rolling Mill Co. v. Scully, 141 Ill. 408 672
Chicago & N. W. R. Co. v. Garrett, 239 Ill. 297 547
v. Morrison, 195 Ill. 271 325
Chicago Dock & Canal Co. v. Kinzie, 93 Ill. 415 621
Chicago, P. & St. L. R. Co. v. Vaughn, 206 Ill. 234 125
Chicago Terminal T. R. Co. v. Winslow, 216 Ill. 166 59
Chicago &c. R. Co. v. Clapp, 201 Ill. 418 110
v. Keegan, 152 Ill. 413 99
v. Pontiac, 169 Ill. 155 109
Chick v. Rollins, 44 Maine 104 429
v. Willetts, 2 Kans. 384 416
Chickering v. Failes, 26 Ill. 508 73
Chidsey v. Brookes, 130 Ga. 218 491, 493
Chilcott v. Hart, 23 Colo. 40 469, 491
Childers v. Bumgarner, 53 N. Car. 297 64
v. Wm. H. Coleman Co., 122 Tenn. 109 284
Childress v. Cutler, 16 Mo. 24 708
Childs v. Alexander, 22 S. Car. 169 352
v. Lanterman, 103 Cal. 387 571
Chiles v. Conley, 2 Dana (Ky.) 21 299
Chinoweth v. Haskell, 3 Pet. (U. S.) 92 185
Chirac v. Reinecker, 2 Pet. (U. S.) 613 87
Chisholm v. Caines, 67 Fed. 285 185
v. Georgia, 2 Dall. (U. S.) 419 72
Chittenden v. Hobbs, 9 Iowa 417 660
Chitty v. Gillett, 46 Okla. 724 736
Chotard v. Pope, 12 Wheat. (U. S.) 587 191, 193
Choteau v. Thompson, 2 Ohio St. 114 535, 536
Chowning v. Stanfield, 49 Ark. 87 723
Christain v. Cabell, 22 Grat. (Va.) 99 34
Christal v. Kelly, 88 N. Y. 285 663
Christopher v. Curtis-Attalla Lumber Co., 175 Ala. 484 434
Christy v. Burch, 25 Fla. 942 118
v. Dana, 34 Cal. 548 99, 427
Church v. Adams, 37 Ore. 355 206
v. Venable, 159 Ill. 215 722
Churchill v. Monroe, 1 R. I. 209 283
v. Reamer, 8 Bush (Ky.) 256 708
Churchman's Appeal, In re, 9 Sad. (Pa.) 423 466
Chute v. Washburn, 44 Minn. 312, 46 N. W. 555 276
Cihak v. Klehr, 117 Ill. 643 61
Cincinnati, I., St. L. & C. R. Co. v. Smith, 127 Ind. 461 129
Citizens' Bank of Stanton v. Young, 78 Nebr. 312 134
Citizens' Nat. Bank v. Abbott, 72 Wash. 73 447, 654
v. Dayton, 116 Ill. 257 120
Citizens' Sav. Bank v. Bauer, 49 Hun (N. Y.) 238 596
Citizens' State Bank v. Harris, 149 Ind. 208 619
City Loan & Banking Co. v. Poole, 149 Ala. 164 393
Clabaugh v. Byerly, 7 Gill (Md.) 354 125
Claflin v. Dunne, 129 Ill. 241 570
Clairborne v. Holmes, 51 Miss. 146 123
v. Holland, 88 Va. 1046 355
Clamorgan v. Lane, 9 Mo. 446 119, 122
Clancey v. Houdlette, 39 Maine 451 104
Clapp v. Boston, 133 Mass. 367 62

[*References are to Sections.*]

Clark v. Baker, 14 Cal. 612 42
v. Campau, 92 Mich. 573 690
v. Clark, 84 Hun (N. Y.) 362 65
v. Clark, 56 N. H. 105 321
v. Condit, 18 N. J. Eq. 358 442
v. Cox, 115 N. Car. 93 710
v. Farrow, 10 B. Mon. (Ky.) 446 546
v. Fuller, 39 Conn. 238 128
v. Gilbert, 39 Conn. 94 694
v. Glidden, 60 Vt. 702 61
v. Hall, 19 Mich. 356 192
v. Henne, 127 Fed. 288 380
v. Hillis, 134 Ind. 421 360, 617
v. Holland, 72 Iowa 34 129
v. Kingsley, 37 Hun (N. Y.) 246 737
v. Kirkland, 64 Misc. (N. Y.) 585 634
v. Kittenplan, 63 Misc. (N. Y.) 122 466
v. Landon, 90 Mich. 83 419
v. Lumbert, 55 W. Va. 512 99
v. Mack, 161 Mich. 545 466, 729
v. Marlow, 149 Ind. 41 473
v. Miller, 65 Kans. 726 458
v. Muzzey, 43 N. H. 59 675
v. Neumann, 56 Nebr. 374 399
v. Northern Coal &c. Co., 33 Ky. L. 1047 263
v. Sawyer, 48 Cal. 133 347
v. Shailer, 46 Conn. 119 707, 708
v. Thias, 173 Mo. 628 66
v. Titus, 2 Ariz. 147 215
v. Way, 11 Rich. (S. Car.) 621 290
v. Wilson, 53 Miss. 119 60
Clark & Leonard Inv. Co. v. Way, 52 Nebr. 204 592
Clarke v. Clarke, 178 U. S. 186 456, 584
v. White, 12 Pet. (U. S.) 178 123
Clarke's Appeal, In re, 79 Pa. St. 376 64
Clark's Appeal, In re, 70 Conn. 195 58, 456, 584
Clarkson v. Clarkson, 125 Mo. 381 48
v. Hatton, 143 Mo. 47 712, 718
v. Louderback, 36 Fla. 660 537
Clary v. Watkins, 64 Nebr. 386 711
Clason v. Shepherd, 6 Wis. 369 119
Classen v. Chesapeake Guano Co., 81 Md. 258 62
Clay v. Ballard, 87 Va. 787 115
v. Chenault, 108 Ky. 77 46
v. Cousins, 1 T. B. Mon. (Ky.) 75 730
v. Field, 115 U. S. 260 602
v. Hammond, 199 Ill. 370 307
v. Kagelmacher, 98 Ga. 149 595
Claypoole v. Houston, 12 Kans. 324 661
Clayson v. Clayson, 24 Ore. 542 584
Clayton v. Drake, 17 Ohio St. 367 707, 711
Clearwater v. Rose, 1 Blackf. (Ind.) 137 45
Clegg v. Lemessurier, 15 Grat. (Va.) 108 281
Clement v. Bank of Rutland, 61 Vt. 298 272
Clements v. Hunt, 46 N. Car. 400 740
v. Pearce, 63 Ala. 284 272
Clendening v. Wyatt, 54 Kans. 523 334
Cleveland v. Bergen Bldg. &c. Co. (N. J. Eq.), 55 Atl. 117 531
v. Choate, 77 Cal. 73 241
Cleveland, C., C. & St. L. R. Co. v. Mitchell, 74 Ill. App. 602 408
v. Peirce, 34 Ind. App. 188 581
Clifford v. Hyde County, 24 S. Dak. 237 641
Clift v. Clift, 87 Tenn. 17 65
v. White, 12 N. Y. 519 40
Clifton Heights Land Co. v. Randell, 82 Iowa 89 263, 329
Cliver v. Sanders, 8 Ohio St. 501 707
Clizer v. Krauss, 57 Wash. 26 636
Close v. Close, 28 N. J. Eq. 472 563
v. Farmers' Loan &c. Co., 195 N. Y. 92 59
v. Stuyvesant, 132 Ill. 607 77, 198
v. Wheaton, 65 Kans. 830 656
v. Zell, 141 Pa. 390 33
Clotilde Lutz, In re, 157 Mo. 439 473
Cloud v. Bruce, 61 Ind. 171 87, 726
v. El Dorado County, 12 Cal. 128 623
Clough v. Clough, 10 Colo. App. 433 491
Cloyd v. Trotter, 118 Ill. 391 576, 661
Clubb v. Wise, 64 Ill. 157 66
Coates v. Cheever, 1 Cow. (N. Y.) 460 65
Cobb v. Hines, 44 N. Car. 343 267
v. Lucas, 15 Pick. (Mass.) 7 263
Cobbey v. Wright, 29 Nebr. 274 656
Cobbs v. Coleman, 14 Tex. 594 66
Cockey v. Milne, 16 Md. 200 120
Cochran v. Adler, 121 Ala. 442 119
Cockrill v. Armstrong, 31 Ark. 580 65
Cocks v. Simmons, 57 Miss. 183 670
Codman v. Bradley, 201 Mass. 361 722
Coe v. Harahan, 8 Gray (Mass.) 198 326
v. Winters, 15 Iowa 481 126
Coffee v. Gates, 28 Ark. 43 660, 662
Coffey v. Hendricks, 66 Tex. 676 283
Coffman v. Bartsch, 25 Ind. 201 717
v. Coffman, 85 Va. 459 491
v. Coffman, 41 W. Va. 8 737
Cofran v. Cockran, 5 N. H. 458 331
Cogan v. Cook, 22 Minn. 137 118, 120
Cogel v. Raph, 24 Minn. 194 298
Coggins, v. Flythe, 113 N. Car. 102 471
v. Stephens, 73 Ga. 414 373
Coggswell v. Griffith, 23 Nebr. 334 128
Cogswell v. Tibbetts, 3 N. H. 41 65
Cohee v. Baer, 134 Ind. 375 571
Colbert's Estate, In re, 44 Mont. 259 86
Colburn v. Mason, 25 Maine 434 696
Cole v. Clark, 85 Maine 336 533
v. Cole, 126 Mich. 569 66
v. Cunningham, 133 U. S. 107 371
v. Killam, 187 Mass. 213 395
v. Lake Co., 54 N. H. 242 45, 268
v. Taylor, 132 Tenn. 92 86
Coleman v. Billings, 89 Ill. 183 324
v. Commonwealth, 25 Grat. (Va.) 865 115
v. Foster, 112 Ala. 506 730
v. McCormick, 37 Mo. 179 201
v. O'Leary, 114 Ky. 388 456
v. Pickett, 82 Hun (N. Y.) 287 687
v. St. Paul &c. R. Co., 38 Minn. 260 212
v. Thomson, 6 Pa. County Ct. 126 61
Coles v. Berryhill, 37 Minn. 56 119
Coler v. Alexander, 60 Tex. Civ. App. 573 28
Colescott v. King, 154 Ind. 621 137
Collamore v. Collamore, 158 Mass. 74 48
Collier v. Grimesey, 36 Ohio St. 17 359, 470
v. Slaughter, 20 Ala. 263 477
Collins v. Aaron, 162 Pa. St. 539 123
v. Capps, 235 Ill. 560 460
v. Miller, 64 Tex. 118 611
v. Moore, 115 Ga. 327 434
v. Rowe, 1 Abb. N. Cas. (N. Y.) 97 316
v. Sanitary Dist. of Chicago, 270 Ill. 108 722
v. Smith, 75 Wis. 392 522
Colomer v. Morgan, 13 La. Ann. 202 121
Colorado Cent. R. Co. v. Allen, 13 Colo. 229 677
Colorado Coal & Iron Co. v. United States, 123 U. S. 307 229

[*References are to Sections.*]

Columbia Bank v. Jacobs, 10 Mich. 349 118
Columbian Ins. Co. v. Ashby, 4 Pet. (U. S.) 139 52
Colt v. Colt, 32 Conn. 422 455
v. O'Connor, 59 Misc. (N. Y.) 83 401
Colton v. Colton, 21 Fed. 594 59
v. Colton, 127 U. S. 300 452, 463
Combs v. Combs, 67 Md. 11 472
v. Dodd, 4 Rob. (La.) 58 224
v. Jolly, 28 Cal. 498 192
Comegys v. Emerick, 134 Ind. 148 363
Comer v. Baldwin, 16 Minn. 172 286
Comet Con. Min. Co. v. Frost, 15 Colo. 310 658
Comley v. Ford, 65 W. Va. 429 281
Commercial Bank v. King, 107 Ala. 484 438
v. Prichard, 126 Cal. 600 433
Commonwealth v. Andre, 3 Pick. (Mass.) 224 100
v. Harmer, 6 Phila. (Pa.) 90 21, 22
v. Nancrede, 32 Pa. St. 389 718
v. New York &c. R. Co., 132 Pa. St. 591 113
v. Owen, 2 Wkly. N. Cas. (Pa.) 200 582
v. Pollitt, 25 Ky. L. 790 43
v. Reading Sav. Bank, 137 Mass. 431 332
Commonwealth Title Ins. & Trust Co. v. Ellis, 192 Pa. St. 321 430
Comparet v. Randall, 4 Ind. 55 602
Compton v. Bagley, 1 Ch. 313 31
v. McMahan, 19 Mo. App. 494 452
Comstock v. Adams, 23 Kans. 513 450
v. Kerwin, 57 Nebr. 1 668
v. Son, 154 Mass. 389 266
Conant v. Kent, 130 Mass. 178 87, 711
v. Stone, 176 Mich. 654 474
Conard v. Atlantic Insurance Co., 1 Pet. (U. S.) 386 562
Concord Mfg. Co. v. Robertson, 66 N. H. 1 272
Condit v. De Hart, 62 N. J. L. 78 481
Conduitt v. Ross, 102 Ind. 166 507
Congdon v. Morgan, 14 S. Car. 587 687
Conger v. Babcock, 87 Ind. 497 347
v. Cook, 56 Iowa 117 736
v. Lowe, 124 Ind. 368 47, 465, 478
Congregational Church v. Walker, 124 Mass. 69 423
Congregational Church Bldg. Soc. v. Everett, 85 Md. 79 54
Congregational Soc. v. Stark, 34 Vt. 243 45
Conklin v. Foster, 57 Ill. 104 66
Conley v. Murdock, 106 Maine 266 100
Conn v. Davis, 33 Tex. 203 715
Connar v. Leach, 84 Md. 571 263
Connecticut Mut. L. Ins. Co. v. Bulte, 45 Mich. 113 638
v. Jones, 8 Fed. 303 441
v. King, 47 Ind. App. 587 90
v. Smith, 117 Mo. 261 127
v. Talbot, 113 Ind. 373 438
Conner v. Shepherd, 15 Mass. 164 65
Connor v. Connor, 59 Fla. 467 421
v. Dillard, 129 N. Car. 50 656
v. McCormick (Iowa), 117 N. W. 976 619
v. McCoy, 83 S. Car. 165 597
Conover v. Smith, 17 N. J. Eq. 51 407
Conrad v. Everich, 50 Ohio St. 476 676
v. West End Hotel &c. Land Co., 126 N. Car. 776 244
Constantine v. East, 8 Ind. App. 291 1, 6
Consumers' Gas Trust Co. v. Harless, 131 Ind. 446 677
Contee v. Lyons, 19 D. C. 207 262
Continental Ins. Co. v. Reeve, 135 App. Div. (N. Y.) 737 595
Converse v. Kellogg, 7 Barb. (N. Y.) 590 75
v. Starr, 23 Ohio St. 491 491
Conway v. German, 166 Fed. 67 380
v. Owensboro Sav. Bank & Trust Co., 165 Fed. 822 665
Cook v. Chicago &c. R. Co., 40 Iowa 451 61
v. Cook, 28 Ala. 660 51
v. First Universalist Church, 23 R. I. 62 714
v. French, 96 Mich. 525 126
v. Hall, 6 Gil. (Ill.) 579 117
v. Hammond, 4 Mason 467 72
v. Hart, 135 Ky. 650 459
v. Jennings, 40 S. Car. 204 560
v. Norton, 43 Ill. 391 73, 688
v. Patrick, 135 Ill. 499 318
v. Rogers, 31 Mich. 391 377
v. Stearns, 11 Mass. 533 62
v. Travis, 20 N. Y. 400 126
v. Tullis, 18 Wall. (U. S.) 332 532
v. Walker, 70 Maine 232 65
v. Webb, 18 Ala. 810 67
Cooke v. Avery, 147 U. S. 375 563
Coolidge v. Burke, 69 Ark. 237 708, 722
Coomler v. Hefner, 86 Ind. 108 52
Coon v. McNelly, 254 Ill. 39 466
Cooney v. Coppock, 119 Iowa 486 546
Cooper v. Adams, 6 Cush. (Mass.) 87 51
v. Denison, 13 Sim. 290 730
v. Emery, 1 Phil. 388 8
v. Flesner, 24 Okla. 47 138
v. Hargis, 20 Ky. L. 41 593, 595
v. Hayes, 96 Ind. 386 584
v. Ives, 62 Kans. 395 724, 736
v. Jackson, 99 Ind. 566 638
v. Merritt, 30 Ark. 686 531
v. Sunderland, 3 Iowa 114 650
v. Wilder, 111 Cal. 191 206, 225
Copertini v. Oppermann, 76 Cal. 181 76
Copley v. Ball, 176 Fed. 682 465
Coray v. Matthewson, 7 Lans. (N. Y.) 80 6
Corby v. Corby, 85 Mo. 371 49
Corbin v. Dale, 57 Mo. 297 317
v. Healy, 20 Pick. (Mass.) 514 48, 291
Corbitt v. Clenny, 52 Ala. 480 129, 316
v. Corbitt, 54 N. Car. 114 714
Cordova v. Hood, 17 Wall. (U. S.) 1 273
Core v. Wigner, 32 W. Va. 277 699
Corey v. Springer, 138 Ind. 506 43
Corley v. McElmeel, 149 N. Y. 228 492, 583
Cormack v. Wolcott, 37 Kans. 391 137
Cormerais v. Genella, 22 Cal. 116 442
Cornelius v. Kissel, 128 U. S. 457 195
Cornell v. Hall, 22 Mich. 377 418
v. Maltby, 165 N. Y. 557 434
Cornett v. Hough, 136 Ind. 387 707, 708
Corning v. Gould, 16 Wend. (N. Y.) 531 108
Cornwall v. Falls City Bank, 92 Ky. 381 476
Cornwell v. Orton, 126 Mo. 355 59
Corwine v. Corwine, 24 N. J. Eq. 579 453
Cosby v. Buchanan, 81 Ala. 574 419
Cosner v. McCrum, 40 W. Va. 339 281
Coster v. Monroe Mfg. Co., 1 Gr. Ch. (N. J.) 467 326
Cotting v. DeSartiges, 17 R. I. 668 456
Cotton v. Citizens' Bank, 97 Ark. 568 737

[References are to Sections.]

Cottrell v. Adams, 2 Biss. (U. S.) 351 437
Coudert v. Sayre, 46 N. J. Eq. 386 313
Coulter v. Crawfordsville Trust Co., 45 Ind. App. 64 466
Coulthard v. Stevens, 84 Iowa 241 103
Council v. Averett, 95 N. Car. 131 359
Council Imp. Co. v. Draper, 16 Idaho 541 722
Courtner v. Etheredge, 149 Ala. 78 417
Courtright v. Cedar Rapids &c. R. Co., 35 Iowa 386 212
Cover v. Manaway, 115 Pa. St. 338 286
Coverdale v. Wilder, 17 Pick. (Mass.) 178 375
Cowan v. Green, 2 Hawks (N. Car) 384 123
v. Radford Iron Co., 83 Va. 547 51
v. Withrow, 111 N. Car. 306 128
Cowell v. Colorado Springs Co., 100 U. S. 55 47
Cowles v. Hardin, 91 N. Car. 231 138
Cowley v. Knapp, 42 N. J. L. 297 487
Cox v. Arnold, 129 Mo. 337 103
v. Clark, 93 Ala. 400 730
v. Cox, 18 D. C. 1 591
v. Cox, 44 Ind. 368 87, 717
v. Cox, 101 Mo. 168 492
v. Crockett, 93 Va. 50 98
v. Easter, 1 Port. (Ala.) 130 195
v. Garst, 105 Ill. 342 65
v. Hart, 145 U. S. 376 297
v. Ledward, 124 Pa. St. 435 428
v. Matthews, 17 Ind. 367 721
v. Rash, 82 Ind. 519 719
v. Von Ahlefeldt, 105 La. 543 715
v. Ward, 107 N. Car. 507 734
v. Wayt, 26 W. Va. 807 120
Cozzens v. Jamison, 12 Mo. App. 452 486
v. Joslin, 1 R. I. 122 731
Crabbe v. Hardy, 77 Misc. (N. Y.) 1 956
Crabtree v. Bank of Winchester, 108 Tenn. 483 100
Cragin v. Powell, 128 U. S. 691 147, 241
Craig v. Fox, 16 Ohio 563 352
v. Leslie, 3 Wheat. (U. S.) 563 516
v. Wells, 11 N. Y. 315 313
Crain v. Mallone, 130 Ky. 125 737
v. Wright, 114 N. Y. 307 46
Cramer v. Mooney, 59 N. J. Eq. 164 395
Cramond, In re, 145 Fed. 966 517
Crane v. Aultman-Taylor Co., 61 Wis. 110 428
v. Crane, 31 Iowa 296 719
v. Reeder, 21 Mich. 24 111, 282, 314
v. Turner, 67 N. Y. 437 99
v. Turner, 7 Hun (N. Y.) 357 427
Crassen v. Swoveland, 22 Ind. 427 127
Craver v. Spencer, 40 Fla. 135 397
Crawford v. Engram, 157 Ala. 314 100
v. McDonald, 88 Tex. 626 583
v. Morris, 5 Grat. (Va.) 90 53
v. Richeson, 101 Ill. 351 528
v. Thomas, 114 Ky. 197 456
Crawford County Bank v. Bolton, 87 Ark. 142 363
Creamer v. Briscoe, 101 Tex. 490 192
Creech v. Johnson, 116 Ky. 441 187
Cremer's Estate, In re, 156 Pa. St. 40 87
Crews v. Taylor, 56 Tex. 461 122
Criley v. Cassel, 144 Iowa 685 100
Crim v. Umbsen, 155 Cal. 697 398
Crisfiel v. Murdock, 55 Hun (N. Y.) 143 528
Crisfield v. Storr, 36 Md. 129 721
Crislip v. Cain, 19 W. Va. 438 290
Crist v. Cosby, 11 Okla. 635 722
Croan v. Phelps' Admx., 94 Ky. 213 717
Crocker v. Balch, 104 Tenn. 6 718
Crockett v. Maguire, 10 Mo. 34 99
Croft v. Thornton, 125 Ala. 391 99
Cromelien v. Brink, 29 Pa. St. 522 640
Crommelin v. Thiess, 31 Ala. 412 53, 408
Cromwell v. MacLean, 123 N. Y. 474 634
Crook v. Chilvers, 99 Nebr. 684 16, 162
v. Rindskopf, 105 N. Y. 476 375
Crooks v. Whitford, 47 Mich. 283 270
Cropsey v. Ogden, 11 N. Y. 228 65
Crosby v. Covington, 24 Miss. 619 737
v. Dowd, 61 Cal. 557 723
v. Parker, 4 Mass. 110 290
v. Roub, 16 Wis. 616 439
Cross v. Armstrong, 44 Ohio St. 613 652
v. Hoch, 149 Mo. 325 465
v. Noble, 67 Pa. St. 74 529
Crossett Lumber Co. v. Files, 104 Ark. 600 456, 724
Crouch v. Fowle, 9 N. H. 219 407
Crouse v. Mitchell, 130 Mich. 347 119
v. Murphy, 140 Pa. St. 335 581
Crouter v. Crouter, 133 N. Y. 55 398
Crow v. Beardsley, 68 Mo. 435 371
v. Kightlinger, 25 Pa. St. 343 64
v. Powers, 19 Ark. 424 491
Crowley v. C. N. Nelson Lumber Co., 66 Minn. 400 521
Cruger v. Ginnuth, 3 Wills. Civ. Cas. Ct. App. (Tex.) 24 278
Cruikshank v. Home for Friendless, 113 N. Y. 337 485
v. Luttrell, 67 Ala. 318 596
Crump v. Faucett, 70 N. Car. 345 717
Culberson v. Culberson, 37 Ga. 296 65
Culbertson v. Coleman, 47 Wis. 193 191
Culbertson Irr. & Water-Power Co. v. Olander, 51 Nebr. 539 95, 201
Cullum v. Emanuel, 1 Ala. 23 428
Culver v. Waters, 248 Ill. 163 955
Cumberledge v. Brooks, 235 Ill. 249 272
Cumming v. McDade, 118 Ga. 612 672
Cummings v. Cummings, 123 Mass. 270 583
v. Cummings, 76 N. J. Eq. 568 49
v. Black, 65 Vt. 76 423
v. Dearborn, 56 Vt. 441 301
v. Dolan, 52 Wash. 496 77
v. Lohr, 246 Ill. 577 43
v. National Bank, 101 U. S. 153 651
v. Wilson, 99 Minn. 502 31
Cummins v. Boyle, 1 J. J. Marsh. (Ky.) 480 673
v. Woodruff, 5 Ark. 116 281
Cunningham v. Blake, 121 Mass. 333 7
v. Boston &c. R. Co., 153 Mass. 506 241
v. Cunningham, 72 Conn. 157 473
v. Holton, 55 Maine 33 51
v. Pattee, 99 Mass. 248 692
Cunninggim v. Peterson, 109 N. Car. 33 116
Cunnins v. Reading School Dist., 198 U. S. 458 90
Currell v. Villars, 72 Fed. 330 119
Curren v. Taylor, 19 Ohio 36 708
Currier v. Gale, 9 Allen (Mass.) 522 429
v. Perley, 24 N. H. 219 53
Curry v. Lehman, 55 Fla. 847 562, 563, 584
Curry's Estate, In re, 39 Cal. 529 717
Curtis v. Curtis, 40 Maine 24 737
v. Flinn, 46 Ark. 70 424
v. Hewens, 11 Metc. (Mass.) 294 719
v. Lyman, 24 Vt. 338 132
v. Moore, 152 N. Y. 159 433

[References are to Sections.]

Curtis Land & Loan Co. v. Interior Land Co., 137 Wis. 341 393, 398
Curyea v. Berry, 84 Ill. 600 138
Cutlar v. Cutlar, 9 N. Car. 324 728
Cutler v. Meeker, 71 Nebr. 732 722
v. Smith, 57 Ill. 252 62
Cutter v. Waddington, 22 Mo. 206 708, 730
Cutting v. Harrington, 104 Maine 96 611
Cutright v. Stanford, 81 Ill. 240 736
Cyrus v. Holbrook, 32 Ky. L. 466 314

D

Daggett v. Bonewitz, 107 Ind. 276 208, 209
Dailey v. Kastell, 56 Wis. 444 129
v. Kennedy, 64 Mich. 208 663
Dale v. Griffith, 93 Miss. 573 192
Dalton v. Taliaferro, 101 Ill. App. 592 278
Dana v. Wentworth, 111 Mass. 291 277
Daniel v. Leitch, 13 Grat. (Va.) 195 657
v. Weaver, 5 Lea (Tenn.) 392 536
Daniels v. Densmore, 32 Nebr. 40 443
v. Lansdale, 43 Cal. 41 95
Daniher v. Daniher, 201 Ill. 489 65
Danley v. Rector, 10 Ark. 211 611
Danner v. Brewer, 69 Ala. 191 375
v. Shissler, 31 Pa. St. 289 708
Darby v. Mayer, 10 Wheat. (U. S.) 465 492, 724
Dart v. Woodhouse, 40 Mich. 399 36
Daugherty v. Deardorf, 107 Ind. 527 714
D'Autremont v. Anderson Iron Co., 104 Minn. 165 581
Davenport v. Lamb, 13 Wall. (U. S.) 418 198, 303
v. Sargent, 63 N. H. 538 473
Davenport, In re, 172 N. Y. 454 711
David v. Rickabaugh, 32 Iowa 540 119
Davidson v. Coon, 125 Ind. 497 459, 473, 525
v. Davidson Real Estate &c. Inv. Co., 226 Mo. 1 678
v. Richmond, 24 Ky. L. 699 722
Davie v. Davie (Ark.), 18 S. W. 935 722
Davies v. Leete, 111 Ky. 659 583
Davis v. Abstract Construction Co., 121 Ill. App. 121 130
v. Bogle, 11 Heisk. (Tenn.) 315 324
v. Davis, 61 Maine 395 325
v. Davis, 81 Vt. 259 578
v. Davis, 43 W. Va. 300 458
v. Fogle, 124 Ind. 41 712
v. Green, 102 Mo. 170 65
v. Hayden, 9 Mass. 514 735
v. Headley, 22 N. J. Eq. 115 671
v. Hollingsworth, 113 Ga. 210 263
v. Hoover, 112 Ind. 423 361
v. Lane, 10 N. H. 156 337
v. Laning, 85 Tex. 39 706
v. Lutkiewiez, 72 Iowa 254 118
v. McCullouch, 192 Ill. 277 66
v. Pursel, 55 Colo. 287 434
v. Steeps, 87 Wis. 472 580
v. Vanderveer, 23 N. J. Eq. 558 711
v. Van Sands, 45 Conn. 600 451, 524
v. Ward, 109 Cal. 186 287
v. Watson, 54 Miss. 679 594
v. Whitaker, 114 N. Car. 279 122, 132
v. William Rosenzweig Realty Operating Co., 192 N. Y. 128 531
v. Windsor Sav. Bank, 46 Vt. 728 337
v. Wood, 161 Mo. 17 289
Davis' Estate, In re, 151 Cal. 318 491
Davis-Henderson Lumber Co. v. Gottschalk, 81 Cal. 641 533
Dawley v. Ayers, 23 Cal. 108 66
v. Brown, 79 N. Y. 390 314, 688
Dawson v. Lawrence, 13 Ohio 543 327
v. Mayall, 45 Minn. 408 225
v. Western Maryland R. Co., 107 Md. 70 275
Day v. Adams, 42 Vt. 510 66
v. Clark, 25 Vt. 397 126
v. Davey, 132 Mich. 173 638
v. Reynolds, 23 Hun (N. Y.) 131 22
Deake's Appeal, In re, 80 Maine 50 456
Dean v. Bittner, 77 Mo. 101 186
v. Long, 122 Ill. 447 58, 129, 273
Deane v. Hutchinson, 40 N. J. Eq. 83 121
Dearnaley v. Chase, 136 Mass. 288 358
Deason v. Taylor, 53 Miss. 697 129, 273
Deavitt v. Washington County, 75 Vt. 156 110
De la Croix v. Chamberlain, 12 Wheat. (U. S.) 599 189
De Lancey Stables Co., In re, 170 Fed. 860 380
De Land v. Dixon &c. Lighting Co., 225 Ill. 212 698
DeLane v. Moore, 14 How. (U. S.) 253 123
Delano v. Bruerton, 148 Mass. 619 89
Delaplaine v. Jones, 8 N. J. L. 340 730
Delashmutt v. Parrent, 40 Kans. 641 714
De Lassus v. Faherty, 164 Mo. 361 103
Delaunay v. Burnett, 9 Ill. 454 197
Delavan v. Wright, 110 Mich. 143 315
Delaware & H. Canal Co. v. Hughes, 183 Pa. St. 66 693
Delaware &c. R. Co's. Tax Assessment, In re, 224 Pa. 240 630
De Leon v. Higuera, 15 Cal. 483 421
Delles v. Second Nat. Bank, 7 Wyo. 66 229
Del Notaro v. Douglas, 55 Wash. 493 669
Den v. Drake, 14 N. J. L. 523 51
v. Durham, 29 N. Car. 151 615
v. Roberts, 4 N. J. L. 315 123
v. Smith, 10 N. J. L. 46 48
v. Urison, 2 N. J. L. 212 730
Dendy v. Waite, 36 S. Car. 569 357
De Nefe v. Agency City, 143 Iowa 237 244
Denison v. Denison, 185 N. Y. 438 59
Dennis v. Atlanta Nat. Bldg. & Loan Assn., 136 Fed. 539 434
v. Holsapple, 148 Ind. 297 481
Dennison v. Page, 29 Pa. St. 420 719
Denny v. Cotton, 3 Tex. Civ. App. 634 103
v. Dodson, 32 Fed. 899 191
Densmore v. Savage, 110 Mich. 27 436
Denton v. Nashville Title Co., 112 Tenn. 320 15, 19
Denver v. Knowles, 17 Colo. 204 647
Denver & R. G. R. Co. v. Doelz, 49 Colo. 48 694
Denzler v. O'Keefe, 34 N. J. Eq. 361 428
DeCamp v. Dobbins, 31 N. J. Eq. 671 458
De Castro v. Barry, 18 Cal. 96 728
Decker v. Boice, 83 N. Y. 220 110
v. Fessler, 146 Ind. 16 593
v. Freeman, 3 Maine 338 331
v. Patton, 120 Ill. 464 672
Decoster v. Wing, 76 Maine 450 708, 727
Dee v. King, 77 Vt. 230 61
Deem v. Millikin, 53 Ohio St. 668 733
Deere v. Chapman, 25 Ill. 610 66
Deering v. Tucker, 55 Maine 284 40
De Farges v. Ryland, 87 Va. 404 99
De France v. Johnson, 26 Fed. 891 65
De Geoffroy v. Riggs, 133 U. S. 258 458

[*References are to Sections.*]

De Hatre v. Edmonds, 200 Mo. 246 697
De Haven's Appeal, In re, 38 Pa. St. 373 349
De Mares v. Gilpin, 15 Colo. 76 106
Deming v. Miles, 35 Nebr. 739 64
Demps v. Hogan, 57 Fla. 60 668
Dempsey v. Poore, 75 W. Va. 107 736
Depere v. Reynen, 65 Wis. 271 408
Depue v. Miller, 65 W. Va. 120 64, 699
Dequindre v. Williams, 31 Ind. 444 650
Dersheimer v. Maloney, 143 Pa. St. 532 534
Des Moines &c. Real Estate Co. v. Beale, 78 Ill. App. 40 25
Despatch Line Co. v. Bellamy Manuf. Co., 12 N. H. 205 337
Detrick v. Migatt, 19 Ill. 146 721
Detroit v. Jepp, 52 Mich. 458 636
Detroit & B. Plank Rd. Co. v. Detroit Suburban R. Co., 103 Mich. 585 62
Detroit City R. Co. v. Mills, 85 Mich. 634 110
DeVaughn v. Hutchinson, 165 U. S. 566 456
Devereux v. McMahon, 102 N. Car. 284 282
v. McMahon, 108 N. Car. 134 280
Devine v. Lord, 175 Mass. 384 110
Devine's Estate, In re, 199 Pa. 250 466
Devinney v. Reynolds, 1 Watts & S. (Pa.) 328 335
Devlin v. Commonwealth, 101 Pa. St. 273 90
Dew v. Kuehn, 64 Wis. 293 49
Dewey v. Sugg, 109 N. Car. 328 134, 567
v. Kimball, 89 Minn. 454 955, 956
DeWitt v. Elmira Transfer Co., 134 N. Y. 495 227
DeWolf v. A. & W. Sprague Mfg. Co., 49 Conn. 282 441
v. Lawson, 61 Wis. 469 484
v. Pratt, 42 Ill. 198 119
Dexter v. Arnold, Fed. Cas. No. 3857 672
v. Evans, 63 Conn. 58 480
v. Hayes, 88 Iowa 493 451
v. Nelson, 6 Ala. 68 314
v. Tree, 117 Ill. 532 102
Dey v. Dunham, 2 Johns. Ch. (N. Y.) 182 673
Dezendorf v. Humphreys, 95 Va. 473 320
De Zeng v. Beekman, 2 Hill (N. Y.) 489 331
Diament v. Lore, 31 N. J. L. 220 470
Diamond v. Turner, 11 Wash. 189 347, 622
Diana Shooting Club v. Lamoreux, 114 Wis. 44 207
Dickens v. Mahana, 21 How. (U. S.) 276 208
Dickerson v. Bowers, 42 N. J. Eq. 295 117
v. Carroll, 76 Ala. 377 530
v. Colgrove, 100 U. S. 578 97
v. Talbot, 53 Ky. 60 99
Dickerson, In re, 111 N. Car. 108 362
Dickinson v. Chesapeake R. Co., 7 W. Va. 390 25
v. Hayes, 31 Conn. 417 583
Dickinson's Appeal, In re, 42 Conn. 491 719
Dickle v. Abstract Co., 89 Tenn. 431 9, 15, 22
v. Nashville Abstract Co., 89 Tenn. 431 17
Dickman v. Birhauser, 16 Nebr. 686 66
Dieterlen v. Miller, 114 App. Div. (N. Y.) 40 277
Dietrich v. Hutchinson, 73 Vt. 134 322
Dietz v. Farish, 44 N. Y. Super. Ct. 190 286
Digman v. McCollum, 47 Mo. 372 99
Dikeman v. Struck, 76 Wis. 332 663
Dikes v. Miller, 24 Tex. 417 108
Dildine v. Dildine, 32 N. J. Eq. 78 471
Dill v. Wisner, 88 N. Y. 153 525
Dillard, In re, 2 Hughes (N. S.) 190 385
Dillaway v. Butler, 135 Mass. 479 128
Dille v. Webb, 61 Ind. 85 737
Dillingham v. Fisher, 5 Wis. 475 196
Dills v. Jasper, 33 Ill. 262 595, 597
Dimon v. Dunn, 15 N. Y. 498 433
Dingey v. Paxton, 60 Miss. 1038 75
Dingley v. Bon, 130 N. Y. 607 126
v. Greene, 54 Cal. 333 534
Di Nola v. Allison, 143 Cal. 106 546
Dirks v. Collin, 37 Wash. 620 12
Dittemore v. Cable Mill Co., 16 Idaho 298 378
Dixie Grain Co. v. Quinn, 181 Ala. 208 433
Dixon v. Cooper, 88 Tenn. 177 483
v. Hunter, 204 Mo. 382 669
Doane v. Doane, 46 Vt. 485 66
v. Willcutt, 5 Gray (Mass.) 328 279, 303
Dochterman v. Marshall, 92 Miss. 747 272
Dodd v. Bartholomew, 44 Ohio St. 171 262
v. Williams, 3 Mo. App. 278 8, 9, 10, 18, 161
Dodge v. Beeler, 12 Kans. 524 87
v. Davis, 85 Iowa 77 692
v. Silvertborn, 12 Wis. 644 119
Dodson v. Cincinnati, 34 Ohio St. 276 110
Doe v. Bates, 6 Blackf. (Ind.) 533 111, 719
v. Beck, 108 Ala. 71 196, 197
v. Carrol, 16 Ala. 148 67
v. Considine, 6 Wall. (U. S.) 458 469
v. Doe, 52 Hun (N. Y.) 405 676
v. Dugan, 8 Ohio 87 288
v. Errington, 6 Bing. N. Cas. 79 99
v. Henderson, 4 Ga. 148 360
v. Jackson, 51 Ala. 514 362
v. Lazenby, 1 Ind. 234 732
v. Reed, 5 Ill. 117 306
v. Stephenson, 9 Ind. 144 195
v. Willetts, 7 Mann. Gr. & S. 709 467
Doebler's Appeal, In re, 64 Pa. St. 9 47
Dolan v. Scott, 25 Wash. 214 51
Donahue v. Hubbard, 154 Mass. 537 321
v. Mills, 41 Ark. 421 126
Donald v. Beals, 57 Cal. 399 122, 128
v. Hewitt, 33 Ala. 534 417
Donaldson v. Lamprey, 29 Minn. 18 66
v. Winningham, 48 Wash. 374 66
Donegan v. Donegan, 103 Ala. 488 321
Donlon v. Evans, 40 Minn. 501 398
Donnan v. Intelligence Printing &c. Co., 70 Mo. 168 423
Donnell v. Wright, 147 Mo. 639 98, 575
Donnelly v. Eastes, 94 Wis. 390 54
Donnelly, In re, 125 Cal. 417 706
Donnelly's Estate, In re, 125 Cal. 417 706
Donogan v. Griffith, 215 Mo. 149 64
Donohue v. McNichol, 61 Pa. St. 73 54
Donough v. Garland, 269 Ill. 565 737
Donovan v. Griffith, 215 Mo. 149 64
v. Major, 253 Ill. 179 90
v. Pitcher, 53 Ala. 411 75
Dooley v. Greening, 201 Mo. 343 65
v. Watson, 1 Gray (Mass.) 414 671
Doolittle v. Cook, 75 Ill. 354 692
Doran v. Beale, 106 Miss. 305 724
v. Kennedy, 122 Minn. 1 722
Doren v. Gillum, 136 Ind. 134 274, 312

[*References are to Sections.*]

Dorkray v. Noble, 8 Greenl. (Maine) 278 437
Dorr v. Johnson, 170 Mass. 540 476
Dorrance v. Raynsford, 67 Conn. 1 599
Dorsey v. Dodson, 203 Ill. 32 483
Doswell v. Buchanan, 3 Leigh (Va.) 365 99
Doton v. Russell, 17 Conn. 146 429
Doty v. Deposit Bldg. & L. Assn., 103 Ky. 710 654
v. Hubbard, 55 Vt. 278 362
v. Sandusky Cement Co., 46 Ind. App. 440 390
v. Teller, 54 N. J. L. 163 48
Douglas v. Cameron, 47 Nebr. 358 710
v. Lewis, 131 U. S. 75 278, 304
v. St. Louis Zinc Co., 56 Mo. 388 538
Douglass v. Dickson, 31 Kans. 310 639
v. Douglass Bagging Co., 94 Mo. 226 443
v. Durin, 51 Maine 121 437
v. Lowell, 64 Kans. 533 639
v. McCrackin, 52 Ga. 596 545
Dousman v. Hooe, 3 Wis. 466 186
Dontbitt v. MacCulsky, 11 Wasb. 601 536
v. Stinson, 63 Mo. 268 329
Dow v. Dow, 36 Maine 211 463
Dowdy v. McArthur, 94 Ga. 577 262
Dowell v. Talbot Pav. Co., 138 Ind. 675 647
Downend v. Kansas City, 156 Mo. 60 239
Downer v. Smith, 38 Vt. 464 638
Downing v. Nicholson, 115 Iowa 493 471
Doyle v. Hays Land & Inv. Co., 80 Kans. 209 669
v. Mellen, 15 R. I. 523 423
v. San Diego Land Co., 46 Fed. 709 329
v. Stevens, 4 Mich. 87 125
v. Wade, 23 Fla. 90 563, 723
Drain v. Violett, 2 Bush (Ky.) 155 712
Drake v. Drake, 134 N. Y. 220 712
v. Ellman, 80 Ky. 434 375
v. Hale, 38 Mo. 346 617
v. McLean, 47 Mich. 102 621
v. Moore, 66 Iowa 58 66
v. Reggel, 10 Utah 376 121
v. Root, 2 Colo. 685 520
v. Steele, 242 Ill. 301 470
Draper v. Bradley, 126 N. Car. 72 725
Dresel v. Jordan, 104 Mass. 407 265
v. King, 198 Mass. 546 483
Drew v. Wakefield, 54 Maine 291 485
Drey v. Doyle, 99 Mo. 459 692
Driscoll v. Green, 59 N. H. 101 291
v. New Haven, 75 Conn. 92 110
Driskell v. Hanks, 18 B. Mon. (Ky.) 855 708
Driver v. Spence, 1 Ala. 540 348
Dronillard v. Whistler, 29 Ind. 552 553
Druecker v. McLaughlin, 235 Ill. 367 276
Drury v. Drury, 271 Ill. 336 722
v. Mickelberry, 144 Mo. App. 212 25
Dryer v. Crawford, 90 Ala. 131 471
Dublin v. Chadbourn, 16 Mass. 433 492
Dubreuil v. Pennsylvania R. Co., 130 Ind. 137 655
Dubuque Nat. Bank v. Weed, 57 Fed. 513 310
Dudley v. Dudley, 76 Wis. 567 65
v. Strain (Tex. Civ. App.), 130 S. W. 778 100
Duff v. Combs, 132 Ky. 710 568
Duffy v. Jarvis, 84 Fed. 731 48
v. Shirden, 139 App. Div. (N. Y.) 755 955, 956
Dufphey v. Frenaye, 5 St. & P. (Ala.) 215 120
Dugan v. Follett, 100 Ill. 581 657
v. Harman, 80 Kans. 302 614
Duke v. Culpepper, 72 Ga. 842 421
v. Harper, 6 Yerg. (Tenn.) 280 51
Dukes v. Faulk, 37 S. Car. 255 714
Dulin v. Moore (Tex. Civ. App.), 69 S. W. 94 46
Dull's Estate, In re, 222 Pa. 208 484
Duluth & I. R. Co. v. Roy, 173 U. S. 587 222
Dun v. Dietrich, 3 N. Dak. 3 278
Duncan v. De Yampert, 182 Ala. 528 466
v. Gainey, 108 Ind. 579 359, 602
v. Stewart, 25 Ala. 408 90
v. Terre Haute, 85 Ind. 104 325
v. Wallace, 114 Ind. 169 473
Duncklee v. Webber, 151 Mass. 408 50
Dundee Mtg. Co. v. Hughes, 20 Fed. 39 15, 22
Dungan v. American Life Ins. &c. Co., 52 Pa. St. 253 123
Dunham v. Averill, 45 Conn. 61 455
v. Hartman, 153 Mo. 625 595
v. W. Steele Packing &c. Co., 100 Mich. 75 439
Dunkle v. Elston, 71 Ind. 585 660
Dunklee v. Crane, 103 Mass. 470 535
Dunlap v. Green, 60 Fed. 242 328
v. Robinson, 28 Ala. 100 458
Dunn v. Eaton, 92 Tenn. 743 699
v. Houghton (N. J. Eq.), 51 Atl. 71 453
v. Ketchum, 38 Cal. 93 185
v. Oettinger, 148 N. Car. 276 446
v. Rothermel, 112 Pa. St. 272 51
v. Snell, 74 Maine 22 638
v. Taylor (Tex. Civ. App.), 107 S. W. 952 270
v. White, 1 Ala. 645 651
Dunning, In re, 48 Misc. (N. Y.) 482 87
Dunster v. Kelly, 110 N. Y. 558 70
Dupee v. Rose, 10 Utah 305 442
v. Salt Lake &c. Trust Co., 20 Utah 103 545
Duperier v. Berard, 107 La. 91 491
Dupont v. Wortheman, 10 Cal. 354 309
Durant v. Crowell, 97 N. Car. 367 127
v. Muller, 88 Ga. 251 48
v. Ritchie, Fed. Cas. No. 4190 58
Durfee v. McNeil, 58 Ohio St. 238 476
v. Pomeroy, 154 N. Y. 583 470
Durkheimer v. Copperopolis Copper Co., 55 Ore. 37 533
Durkin v. Cobleigh, 156 Mass. 108 105, 244
Durling v. Stillwell, 74 N. J. Eq. 697 565
Durr v. Wilson, 116 Ala. 125 60
Durrett v. Stewart, 88 Ky. 665 636
Dutch's Appeal, In re, 57 Pa. St. 461 737
Dutro v. Kennedy, 9 Mont. 101 593
Dutton v. Ives, 5 Mich. 515 428
Duval v. Wilmer, 88 Md. 66 434
Duvale v. Duvale, 54 N. J. Eq. 581 401
Duvall v. Parker, 2 Duv. (Ky.) 182 699
Dweuger v. Geary, 113 Ind. 106 354
Dwight v. Merritt, 4 Fed. 614 659
v. Newell, 3 N. Y. 185 565
Dwinel v. Perley, 32 Maine 197 437
Dye v. Thompson, 126 Mich. 597 99
Dyer v. Brannoch, 66 Mo. 391 719
v. Clark, 5 Metc. (Mass.) 562 65
v. Eldridge, 136 Ind. 654 699
Dyson v. Simmons, 48 Md. 207 417

E

Earle v. Fiske, 103 Mass. 491 118
Early Times Distillery Co. v. Zeiger, 11 N. Mex. 221 119

[*References are to Sections.*]

East v. Pugh, 71 Iowa 162 289
Eastern Oregon Land Co. v. Brosnan, 147 Fed. 807 210
Easterling v. Chiles, 93 Ky. 315 562
Eastes v. Walley, 51 Colo. 166 716
East Jersey Iron Co. v. Wright, 32 N. J. Eq. 248 62
East Lewisburg Lumber & Mfg. Co. v. Marsh, 91 Pa. St. 96 334
Eastman v. Perkins, 111 Mass. 30 406
Easton v. Montgomery, 90 Cal. 307 25, 26, 27, 395, 398
East Tennessee Iron &c. Co. v. Wiggin, 68 Fed. 446 108
East St. Louis v. Davis, 233 Ill. 553 502
Eatman v. Eatman, 83 Ala. 478 730
Eaton v. Cheseborough, 82 Mich. 214 632
v. Robbins, 29 Minn. 329 66
v. Straw, 18 N. H. 320 60
v. Trowbridge, 38 Mich. 454 286
v. Whiting, 3 Pick. (Mass.) 484 441
Eayrs v. Nason, 54 Nebr. 143 576
Eble v. State, 77 Kans. 179 698
Economy Bldg. &c. Assn. v. West Jersey Title Co., 64 N. J. L. 27 16
Ector v. Grant, 112 Ga. 557 711, 730
Eddie v. Eddie, 8 N. Dak. 376 718, 719
Eddy v. Winchester, 60 N. H. 63 376
Edmundson v. State, 17 Ala. 179 581
Edwards v. Barksdale, 2 Hill Eq. (S. Car.) 416 730
v. Barwise, 69 Tex. 84 122, 125, 129
v. Bender, 121 Ala. 77 466
v. Bibb, 54 Ala. 475 65
v. Butler, 89 Miss. 179 208
v. Clark, 83 Mich. 246 529
v. McKernan, 55 Mich. 520 119
Edwardsville R. Co. v. Sawyer, 92 Ill. 377 45
Effinger v. Hall, 81 Vt. 94 434
Ege v. Hering, 108 Md. 391 474
Eggers v. Busch, 154 Ill. 604 77
Eggleston v. Harrison, 61 Ohio St. 397 119, 124
v. Watson, 53 Miss. 339 120
Ehle v. Quackenboss, 6 Hill (N. Y.) 537 75
Ehmer v. Title Guarantee & Trust Co., 156 N. Y. 10 773
Ehrenstrom v. Phillips, 9 Del. Ch. 74 671
Ehrman v. Alabama Mineral Land Co., 109 Ala. 478 428
Eichengreen v. Appel, 44 Ill. App. 19 52
Eikelman v. Perdew, 140 Cal. 687 421
Eisendrath Co. v. Gebhardt, 222 Ill. 113 538
Eldridge v. Binghamton, 120 N. Y. 309 694
Elizabethtown Sav. Inst. v. Gerber, 34 N. J. Eq. 130 584
Ellerd v. Cox, 52 Tex. Civ. App. 60 185
Ellerson v. Wescott, 148 N. Y. 149 733
Ellicott v. Pearl, 10 Pet. (U. S.) 412 690
Ellinger v. Thomas, 64 Kans. 180 66
Elliott v. Delaney, 217 Mo. 14 47
v. Dycke, 78 Ala. 150 623
v. Elliott, 117 Ind. 380 458
v. Osborn, 1 Harr. & McH. (Md.) 146 335
v. Sackett, 108 U. S. 132 390
v. Wood, 45 N. Y. 71 442
Ellis v. Bashor, 17 Idaho 259 443
v. Davis, 109 U. S. 485 492, 651
v. Dumond, 259 Ill. 483 734
v. Harrison, 140 N. Car. 444 87
v. Kyger, 90 Mo. 600 65
v. Leek, 127 Ill. 60 447
v. Sisson, 96 Ill. 105 546
v. Smith, 112 Ga. 480 699
Ellis
v. Young, 31 S. Car. 322 692
Ellison v. Barnstrator, 153 Ind. 146 240
v. Jackson Water Co., 12 Cal. 542 533
Ellsworth v. Hale, 33 Ark. 633 51
v. Low, 62 Iowa 178 640
Elmslie's Estate, In re, 10 Pa. Dist. 397 483
El Paso Gas, Electric Light & Power Co. v. El Paso, 22 Tex. Civ. App. 309 504
Elrod v. Owensboro Wagon Co., 128 Ga. 361 639
Elterman v. Hyman, 192 N. Y. 113 531
Eltzroth v. Ryan, 89 Cal. 135 223
Elwell v. Universalist General Convention, 76 Tex. 514 481
Ely v. Ellinton, 7 Mo. 302 183
v. Ferguson, 91 Cal. 187 109
v. Mathews, 58 Misc. (N. Y.) 365 664
v. Wilcox, 20 Wis. 523 132
Elyton Land Co. v. Denny, 108 Ala. 553 687
v. South & N. A. R. Co., 100 Ala. 396 276
Emblen, In re, 161 U. S. 52 229
Emerson v. Burgin, 76 Cal. 197 62
v. Galloupe, 158 Mass. 146 339
v. Mooney, 50 N. H. 315 506
v. White, 29 N. H. 482 738
Emerson's Homestead, In re, 58 Minn. 450 66
Emeric v. Alvarado, 90 Cal. 444 126, 644
Empire State Surety Co. v. Ballou, 66 Wash. 76 654
Emslie v. Young, 24 Kans. 732 196
Enewold v. Olsen, 39 Nebr. 59 581
Engel v. Ayer, 85 Maine 448 275, 506
Engel's Estate, In re, 180 Pa. St. 215 476
English v. Waples, 13 Iowa 57 126
Enslen v. Allen, 160 Ala. 529 671
Ensley v. Coolbaugh, 160 Mich. 299 643
v. Page, 13 Colo. App. 452 357
Entwhistle v. Henke, 211 Ill. 273 62
Enyard v. Enyard, 190 Pa. St. 114 521
Enyeart v. Kepler, 118 Ind. 34 321
Equitable Bldg. &c. Assn. v. Bank of Commerce, 118 Tenn. 678 5, 16, 17, 19, 22
Equitable Securities Co. v. Green, 113 Ga. 1013 546
Equitable Sureties Co. v. Sheppard, 78 Miss. 217 594
Erck v. Church, 87 Tenn. 575 691
Erickson v. Conniff, 19 S. Dak. 41 284
Erie R. Co. v. Steward, 59 App. Div. (N. Y.) 187 677
Ernst v. Freeman, 129 Mich. 271 87
Erskine v. Moulton, 66 Maine 276 104, 241
Erwin v. Lewis, 32 Wis. 276 126
Estate of Alabone, In re, 75 N. J. Eq. 527 484
Alexander, In re, 149 Cal. 146 477
Armstrong, In re, 2 Pa. Co. Ct. 166 487
Bacon, In re, 262 Pa. 535 714
Barnes, In re, 47 Okla. 117 724
Benson, In re, 169 Pa. St. 602 481
Blake, In re, 134 Pa. St. 240 473
Breg, In re, 71 Minn. 11 710
Bruch, In re, 185 Pa. St. 194 477
Carpenter, In re, 170 Pa. 203 733
Colbert's, In re, 44 Mont. 259 86
Cremer's, In re, 156 Pa. St. 40 87
Curry, In re, 39 Cal. 529 717
Davis, In re, 151 Cal. 318 491
Devine, In re, 199 Pa. 250 466

[References are to Sections

Estate of
Donnelly, In re, 125 Cal. 417 706
Dull, In re, 222 Pa. 208 484
Elmslie, 10 Pa. Dist. 397 483
Engel, In re, 180 Pa. St. 215 476
Fair, In re, 132 Cal. 523 59
Gill, In re, 79 Iowa 296 732
Grandjean, In re, 78 Nebr. 349 722
Granniss, In re, 142 Cal. 1 485
Hatch, In re, 62 Vt. 300 66
Heywood, In re, 148 Cal. 184 59, 480
Glass, In re, 164 Cal. 765 458
Jeremy, In re, 178 Pa. St. 477 46
Kane, In re, 38 Misc. (N. Y.) 276 87
Kimmel, In re, 226 Pa. 47 100
Kissel, In re, 65 Misc. (N. Y.) 443 631
Kuhn, In re, 125 Iowa 449 733
Kurtz, In re, 145 Pa. St. 637 466
Lawrence, In re, 136 Pa. St. 354 482
Learned, In re, 70 Cal. 140 456
Lewis, In re, 32 La. Ann. 385 456
McGraw, In re, 111 N. Y. 66 458
McKenna, In re, 168 Cal. 339 730
Markle, In re, 187 Pa. St. 639 471
Marrow, In re, 204 Pa. 479 487
Nevins, In re, 192 Pa. St. 258 59
North, In re, 48 Conn. 583 727
Noyes, In re, 40 Mont. 178 457
Pappleton, In re, 34 Utah 285 477
Peet, In re, 99 Iowa 314 473
Phillip, In re, 205 Pa. 504 459
Plumel, In re, 151 Cal. 77 455
Rash, In re (Pa.), 2 Pars. Eq. Cas. 160 40
Reith, In re, 144 Cal. 314 480
Robert, In re, 84 Wash. 163 717
Roberts, In re, 163 Pa. St. 408 473
Robinson, In re, 149 Pa. St. 418 48
Rogers, In re, 131 Pa. St. 871 87
Rose, In re, 63 Cal. 346 583
Russell, In re, 150 Cal. 604 483
Ryan, In re, 14 Wkly. Notes Cas. (Pa.) 79 716
Schedel, In re, 73 Cal. 594 466
Shillaher, In re, 74 Cal. 144 487
Smith, In re, 131 Cal. 433 730
Smith, In re, 144 Pa. St. 428 59, 338, 339, 480
Soulard, In re, 141 Mo. 642 59, 480
Spring, In re, 216 Pa. 529 59
Sternberg, In re, 94 Iowa 305 491
Sullivan, In re, 48 Wash. 631 726
Swenson, In re, 55 Minn. 300 471
Thompson, In re, 6 S. Dak. 576 735
Tobin, In re, 139 Wis. 494 436
Tomlinson, In re, 133 Pa. St. 166 487
Walin, In re, 189 Pa. St. 631 483
Walker, In re, 5 Ariz. 70 719
Walker, In re, 110 Cal. 387 457
Walkerly, In re, 108 Cal. 627 43, 482, 484
Wells, In re, 69 Vt. 388 583
Young, In re, 123 Cal. 337 487
Esterly's Appeal, 109 Pa. St. 222 90
Estes v. Nicholson, 39 Fla. 759 731
v. Odom, 91 Ga. 600 257
Estlow v. Hanna, 75 Mich. 219 553
Espy v. Anderson, 14 Pa. St. 308 26, 27, 30
Esty v. Baker, 48 Maine 495 408
E. T. Arnold & Co. v. Barner, 91 Kans. 768 14
Ettridge v. Bassett, 136 Mass. 314 535
Eubanks v. Becton, 158 N. Car. 230 442
Evans v. Anderson, 15 Ohio St. 324 492
v. Ashe, 50 Tex. Civ. App. 54 394
v. Fisher, 40 Miss. 643 736
v. Frisbie, 84 Tex. 341 614
Evans
v. Holman, 244 Ill. 596 426
v. Mengel, 3 Pa. St. 239 120
v. Taylor, 177 Pa. St. 286 6
Evansville Ice & Cold Storage Co. v. Winsor, 148 Ind. 682 119, 456
Everitt v. Everitt, 71 Iowa 221 65
Everson v. State, 66 Nebr. 154 350
Evitts v. Roth, 61 Tex. 81 119
Ewing v. Burnet, 11 Pet. (U. S.) 41 689
v. Nesbitt, 88 Kans. 708 48
v. Shannahan, 113 Mo. 188 45, 338, 340
Exchange Bank Tax Cases, 21 Fed. 99 645
Ex parte Clark, 87 Cal. 638 718
Foster, 2 Story (U. S.), 131 523, 552
Gordan, 92 Cal. 478 650
Harris, 26 Fla. 77 89
Howard-Harrison Iron Co., 119 Ala. 484 580
Karish, 32 S. Car. 437 66
Rice, 102 Ala. 671 98
Watkins, 3 Pet. (U. S.) 193 650
Yarborough, 110 U. S. 651 650
Exploration Mercantile Co. v. Pacific &c. Steel Co., 177 Fed. 825 380
Exum v. Brister, 35 Miss. 391 222

F

Factors' & Traders' Ins. Co. v. Murphy, 111 U. S. 738 428
Fagan v. Hook, 134 Iowa 381 3, 7
v. Stuttgart Normal Institute, 91 Ark. 141 100
Fail v. Goodtitle, 1 Ill. 201 349
Fair v. Brown, 40 Iowa 209 638
Fairbanks v. San Francisco &c. R. Co., 115 Cal. 579 693
Fairman v. Bacon, 8 Conn. 418 98
Fair's Estate, In re, 132 Cal. 523 59
Faith v. Bowles, 86 Md. 13 276
Faivre v. Daley, 93 Cal. 664 291
Falkner v. Jones, 12 Ala. 165 119
Fallon v. Chidester, 46 Iowa 588 492
Falls City Lumber Co. v. Watkins, 53 Ore. 212 100
Falls of Neuse Mfg. Co. v. Brooks, 106 N. Car. 107 73
Faloon v. Flannery, 74 Minn. 38 60
Fannin Co. v. Riddle, 51 Tex. 360 100
Fanning v. Doan, 128 Mo. 323 48
v. Krapfl, 61 Iowa 417 581
Faran v. Robinson, 17 Ohio St. 242 736
Fargo v. Miller, 150 Mass. 225 729
Farish v. Coon, 40 Cal. 33 100
Farley v. Eller, 29 Ind. 322 322
v. McKeegan, 48 Nebr. 237 53
Farmer v. Ward, 75 N. J. Eq. 33 638
Farmers' Bank v. Heighe, 3 Md. 357 566
Farmers' Loan & Trust Co. v. Carroll, 5 Barb. (N. Y.) 613 59
v. Iowa Water Co., 80 Fed. 467 89
v. Maltby, 8 Paige (N. Y.) 361 8, 99
Farmers & Merchants' Ins. Co. v. Jensen, 58 Nebr. 522 58
Farmers & Merchants' Nat. Bank v. Wallace, 45 Ohio St. 152 321
Farmers' Nat. Bank v. Fletcher, 44 Iowa 252 551
Farnam v. Farnam, 83 Conn. 369 473
Farnan v. Borders, 119 Ill. 228 108
Farnum v. Peterson, 111 Mass. 148 314
Farr v. Flood, 11 Cush. (Mass.) 24 89
Farrar v. Dean, 24 Mo. 16 732
Farrell v. Bouck, 60 Nebr. 771 578
v. Enright, 12 Cal. 450 732
v. Lewis, 56 Conn. 280 436, 439

[References are to Sections.]

Farrell
v. Lockhart, 210 U. S. 142 108
Farrell, In re, 176 Fed. 505 375
Faught v. Faught, 98 Ind. 470 492, 651, 678
Faulkner v. Adams, 126 Ind. 459 265
Fauntleroy's Heirs v. Dunn, 3 B. Mon. (Ky.) 594 106, 307
Fawcett v. Mitchell, 133 Ky. 361 371
Faxon v. United States, 171 U. S. 244 214
Fayette L. Co. v. Louisville &c. R. Co., 93 Va. 274 113
Fechheimer v. Hollander, 21 D. C. 76 375
Federal St. & P. V. Pass. R. Co. v. Pittsburg, 226 Pa. 419 630
Feinberg v. Stearns, 56 Fla. 279 565
Feit v. Richard, 64 N. J. Eq. 16 46
Feld v. Roanoke Inv. Co., 123 Mo. 603 443
Fellows v. Little, 46 N. H. 27 737
Felton v. Brown, 102 Ark. 658 735
Fenn v. Holme, 21 How. (U. S.) 481 202
Fenno v. Sayre, 3 Ala. 458 417
Fenton v. Miller, 94 Mich. 204 286
v. Way, 44 Iowa 438 673
Fereday v. Mankedick, 172 Pa. St. 535 244
Ferguson v. Dent, 8 Mo. 667 273
v. Herr, 64 Nebr. 649 718
v. Spencer, 127 Ind. 66 62
v. Thomason, 87 Ky. 519 476
v. Tweedy, 43 N. Y. 543 64
Ferguson's Appeal, In re, 117 Pa. St. 426 241
Ferrell v. Gill, 130 Ga. 534 455
Ferris v. Smith, 24 Vt. 27 117
v. Van Vechten, 73 N. Y. 113 532
Fetes v. Volmer, 55 Hun (N. Y.) 604 661
Field v. Morris, 88 Ark. 148 722
Fields v. Burnett, 49 Tex. Civ. App. 446 722
Fies v. Rosser, 162 Ala. 504 669
Fifield v. Sperry, 20 N. H. 338 444
Fike v. Green, 64 N. Car. 665 723
Filbert, In re, 195 Pa. St. 295 91
Filmore v. Reithman, 6 Colo. 120 722
Finch v. Garrett, 102 Iowa 381 737
Finlay v. King, 3 Pet. (U. S.) 346 54, 276
Finley v. Abner, 4 Ind. Terr. 386 87
v. Hogan, 60 Ark. 499 73, 688
v. Isett, 154 U. S. 561 339
v. Prescott, 104 Wis. 614 280
Finn v. Jones, 80 Kans. 431 643
Finney v. St. Louis, 39 Mo. 177 53
Firebaugh v. Ward, 51 Tex. 409 566
First Nat. Bank v. Bell &c. Mining Co., 8 Mont. 32 441
v. Bennett, 40 Iowa 537 566
v. De Pauw, 86 Fed. 722 476
v. Edgar, 65 Nebr. 34 119
v. Farmers & Merchants' Nat. Bank, 171 Ind. 323 550, 553
v. Jacobs, 50 Mich. 340 66
v. Jaggers, 31 Md. 38 580
v. Kreig, 21 Nev. 404 358
v. Paul, 75 Va. 594 324
v. Pearson, 119 N. Car. 494 355
v. Woburn, 192 Mass. 220 956
First Universalist Soc. v. Boland, 155 Mass. 171 43, 482
Fischer v. Johnson, 106 Iowa 181 62
Fiscus v. Moore, 121 Ind. 547 524, 602, 736
Fish v. Capwell, 18 R. I. 667 62
v. First Nat. Bank, 150 Fed. 524 438
Fisher v. Edington, 80 Tenn. 189 308
v. Fields, 10 Johns. (N. Y.) 495 59
Fisher
v. Hampton Trans. Co., 136 Mich. 218 59
v. Pender, 52 N. Car. 483 93
v. Wister, 154 Pa. St. 65 469
Fisk v. Chandler, 30 Maine 79 316
v. Fisk, 60 N. J. Eq. 195 87
v. Norvel, 9 Tex. 13 90
Fitch v. Boyer, 51 Tex. 336 138
v. Creighton, 24 How. (U. S.) 159 527
v. Pinckard, 5 Ill. 69 621
v. Seymour, 9 Metc. (Mass.) 462 61
v. Willard, 73 Ill. 92 6, 398
Fitzpatrick v. New Orleans, 27 La. Ann. 457 658
Flagg v. Dow, 99 Mass. 18 308
v. Mann, 14 Pick. (Mass.) 467 418
v. Teneick, 29 N. J. L. 25 722
Flannigan v. Howard, 200 Ill. 396 718, 720
Fleming v. Bumgarner, 29 Ind. 424 535
v. Burnham, 100 N. Y. 1 77
v. Charnock, 66 W. Va. 50 634
v. Greener, 173 Ind. 260 537
v. Katahdin Pulp &c. Co., 93 Maine 110 326
v. Ray, 86 Ga. 533 468
Flemister v. Flemister, 83 Ga. 79 451
Fleschner v. Sumpter, 12 Ore. 161 120, 123
Fletcher v. Carpenter, 37 Mich. 412 436
v. Fuller, 120 U. S. 534 699
v. Holmes, 32 Ind. 497 716
v. Monroe, 145 Ind. 56 65
v. Root, 240 Ill. 429 678
Flinn v. Barber, 64 Ala. 193 395, 398
Flint v. Sheldon, 13 Mass. 443 419
Flomerfelt v. Siglin, 155 Ala. 633 722
Flood v. Pilgrim, 32 Wis. 376 723
Flora v. Anderson, 67 Fed. 182 466
Floto v. Floto, 213 Ill. 438 491
Flower v. Elwood, 66 Ill. 438 429
v. Myrick, 49 La. Ann. 321 737
Flowers v. Flowers, 89 Ga. 632 325
Floyd v. Ricks, 14 Ark. 286 265
Floyd County v. Wolfe, 138 Iowa 749 66
Flye v. Berry, 181 Mass. 442 429
Fogarty v. Sawyer, 17 Cal. 589 442
Fogg v. Clark, 1 N. H. 163 46, 467
Fogler v. Titcomb, 92 Maine 184 470
Folden v. State, 13 Nebr. 328 406
Foley v. Harrison, 15 How. (U. S.) 433 187
v. McDonald, 46 Miss. 238 736
Folk v. Brooks, 91 S. Car. 7 434
v. Varn, 9 Rich. Eq. (S. Car.) 303 290
Folts v. Ferguson (Tex. Civ. App.), 24 S. W. 657 335
Fontaine v. Houston, 58 Ind. 316 661
Foorman v. Wallace, 75 Cal. 552 621
Foote v. Clark, 102 Mo. 394 304, 345
Forbes v. Hyde, 31 Cal. 342 661
v. Scannell, 13 Cal. 242 372
Ford v. Ford, 80 Mich. 42 456
v. Ford, 70 Wis. 19 456
v. Gill, 109 Ga. 691 46
v. Kennedy, 1 Ore. 166 202
v. Ticknor, 169 Mass. 276 472
v. Unity Church Soc., 120 Mo. 498 99, 125, 126
v. Walsworth, 15 Wend. (N. Y.) 449 602
Fordyce v. Woman's Christian Nat. Library Assn., 79 Ark. 550 226
Fore v. Fore, 2 N. Dak. 260 66
Forest v. Farley, 62 N. Y. 628 592

[*References are to Sections.*]

Forrest v. Camp, 16 Ala. 642 611
v. Porch, 100 Tenn. 391 714
Forsaith v. Clark, 21 N. H. 409 46
Forsythe v. Ballance, 6 McLean (N. S.) 562 227
Ft. Smith v. McKibbon, 41 Ark. 45 102
Fortune v. Hunt, 149 N. Car. 358 286
Fosdick v. Fosdick, 6 Allen (Mass.) 41 482
v. Hempstead, 55 Hun (N. Y.) 611 467, 484
Foss v. Atkins, 204 Mass. 337 954
Foster v. Birch, 14 Ind. 445 602
v. Browning, 4 R. I. 47 61
v. Foster, 62 N. H. 46 277
v. Joice, 3 Wash. (U. S.) 498 49
v. Jordan, 130 Ky. 445 493
v. Marshall, 22 N. H. 491 49
v. Mitchell, 15 Ala. 571 119
v. Stallworth, 62 Ala. 547 127
v. Stewart, 18 Pa. St. 23 46
v. Wick, 17 Ohio 250 43
Fowler v. Black, 136 Ill. 363 465
v. Chadima, 134 Iowa 210 325
v. Duhme, 143 Ind. 248 466, 476
v. Mickley, 39 Minn. 28 618
v. Poor, 93 N. Car. 466 594
Fowlkes v. Wagoner (Tenn.), 46 S. W. 586 47, 56, 475
Fox v. Frazer, 92 Ind. 265 338, 441
v. Palmer, 25 N. J. Eq. 416 417
v. Thibault, 38 La. Ann. 32 18, 21
v. Western Pac. R. Co., 31 Cal. 538 110
v. Zimmermann, 77 Wis. 414 616
Francie's Appeal, In re, 96 Pa. St. 200 61
Frank v. Hudson, 39 N. J. L. 347 534
v. Stratford-Handcock, 13 Wyo. 37 54
Franklin v. Kelley, 2 Nebr. 79 196
Franklin Savings Bank v. Taylor, 131 Ill. 376 138, 355, 547
Franzen v. Hutchinson, 94 Iowa 95 376
Frazer v. Frazer, 24 Ky. L. 2517 468
Frazier v. Boggs, 37 Fla. 307 456
v. Swain, 36 N. J. Eq. 156 664
Frazin, In re, 174 Fed. 713 381
Frederick v. Buckminster, 83 Nebr. 135 568
v. Emig, 186 Ill. 319 430
v. Wilcox, 119 Ala. 355 422
Freedman v. Oppenheim, 187 N. Y. 101 398
v. Safran, 131 App. Div. (N. Y.) 675 549
Freedman's Sav. & Trust Co. v. Earle, 110 U. S. 710 566
Freeman v. Atwood, 50 Maine 473 444
v. Hawkins, 77 Tex. 498 661
v. Peay, 23 Ark. 439 120
v. Prendergast, 94 Ga. 369 60
Freeman, In re, 146 Iowa 38 709
Frellsen v. Crandell, 217 U. S. 71 224
Fremont Cultivator Co. v. Fulton, 103 Ind. 393 553
French v. Fyan, 93 U. S. 169 207
v. Mehan, 56 Pa. St. 286 321
Frey v. Thompson, 66 Ala. 287 43
Freydendall v. Baldwin, 103 Ill. 325 375
Frick Coal Co. v. Laughead, 203 Pa. 168 85
Friedman v. Janssen, 23 Ky. L. 2155 546
v. Steiner, 107 Ill. 125 42
Friedrichs v. New Orleans, B. & T. Co., 114 La. 95 109
Frisk v. Reigelman, 75 Wis. 499 661
Fritsche v. Fritsche, 77 Wis. 270 668
Frost v. Beekman, 1 Johns. Ch. (N. Y.) 288 120
v. Courtis, 167 Mass. 251 471
Frow v. Downman, 11 Ala. 880 375
Fry v. Morrison, 159 Ill. 244 455
Fryer v. Rockefeller, 63 N. Y. 268 120, 284
Fuhr v. Dean, 26 Mo. 116 61, 62
Fulghum v. Strickland, 123 Ga. 258 471
Fulkerson v. Taylor, 100 Va. 426 522, 567
Fuller v. Arms, 45 Vt. 400 313
v. Fuller, 84 Maine 475 46
v. Missroon, 35 S. Car. 314 59
v. Scribner, 76 N. Y. 190 547
Fullmer v. Proust, 155 Pa. St. 275 536
Fulmer v. Williams, 122 Pa. St. 191 272
Fulton v. Doe, 5 How. (Miss.) 751 192
Funk v. Eggleston, 92 Ill. 515 46
v. Halderman, 53 Pa. St. 229 63
Funke v. St. Louis, 122 Mo. 132 239
Furgeson v. Jones, 17 Ore. 204 718
Furrer v. Ferris, 145 U. S. 132 664

G

Gage v. Consumers' Elect. Light Co., 194 Ill. 30 955
v. Gage, 12 N. H. 371 487
v. Gage, 30 N. H. 420 336
v. Pirtle, 124 Ill. 502 633
v. Porter, 64 N. H. 619 445
Gaines v. Fuentes, 92 U. S. 10 652
v. Green Pond Iron Co., 33 N. J. Eq. 603 65
v. Kennedy, 53 Miss. 103 600
v. Saunders, 50 Ark. 322 127
v. Strong, 40 Vt. 354 711
Galloway v. Darby, 105 Ark. 558 46, 464, 483, 485
Galpin v. Abbott, 6 Mich. 17 120
Galvin v. Britton, 151 Ind. 1 653
Gamble v. Black Warrior Coal Co., 172 Ala. 669 434
v. Martin (Tex. Civ. App.), 151 S. W. 327 674
v. Ross, 88 Mich. 315 397
Gambril v. Doe, 8 Blackf. (Ind.) 140 267
Games v. Stiles, 14 Pet. (U. S.) 322 581
Gannon v. Allbright, 183 Mo. 238 46
v. Moore, 83 Ark. 196 645
Gano v. Aldridge, 27 Ind. 294 297
Gans v. Renshaw, 2 Pa. St. 34 34
Ganter v. Atkinson, 35 Wis. 48 53
Garhutt v. Mayo, 128 Ga. 269 434
Garcia v. Callender, 125 N. Y. 307 196
Garden City Sand Co. v. Miller, 157 Ill. 225 524
Gardenhire v. King, 97 Tenn. 585 564
Gardiner v. Miller, 47 Cal. 570 102
Gardner v. Brown, 21 Wall. (U. S.) 36 447
v. Cohn, 191 Ill. 553 424
v. Collins, 2 Pet. (U. S.) 58 87, 707, 708, 730
v. Dakota, 21 Minn. 33 53
v. Gardner, 13 Ohio St. 426 729
v. Gardner, 42 Utah 40 87
v. Moore, 51 Ga. 268 120
Garland v. Harrison, 8 Leigh (Va.) 368 86, 705, 719
v. Smith, 164 Mo. 1 60
Garner v. Wills, 92 Ky. 386 64
v. Wood, 71 Md. 37 708
Garnsey v. Rogers, 47 N. Y. 233 316
Garrard v. Kendall (Ky. App.), 121 S. W. 997 678
Garrett v. Clark, 5 Ore. 464 49
v. Cohen, 63 Misc. (N. Y.) 450 568
v. Fernauld, 63 Fla. 434 438
v. Puckett, 15 Ind. 485 129, 316
Garrison v. Haydon, 1 J. J. Marsh. (Ky.) 222 124
Garry v. Newton, 201 Ill. 170 737
Garvin v. Garvin, 34 S. Car. 388 563
Garwood v. Garwood, 244 Ill. 580 66

[References are to Sections.]

Gassert v. Bogk, 7 Mont. 585 415
v. Strong, 38 Mont. 18 561
Gaston v. Gaston, 114 Cal. 542 676
v. Weir, 84 Ala. 193 262
Gate City Abstract Co. v. Post, 55 Nebr. 742 22, 26
Gates v. Boston &c. R. Co., 53 Conn. 333 447
v. Labeaume, 19 Mo. 17 375
v. Parmley, 93 Wis. 294 6
Gatling v. Carteret Co., 92 N. Car. 536 636
Gauch v. St. Louis Mut. L. Ins. Co., 88 Ill. 251 716
Gault v. Stormont, 51 Mich. 636 51
Gavin v. Gaines, 5 Ky. L. 247 737
v. Sanders, 5 Ky. L. 321 66
Gaylord v. Gaylord, 150 N. Car. 222 286, 318
v. Goodell, 173 Mass. 140 363
v. Lafayette, 115 Ind. 423 59
v. Sanitary Dist., 204 Ill. 576 109
Gazlay v. Williams, 210 U. S. 41 408
Gee v. Moore, 14 Cal. 472 308
Geer v. Missouri Lumber &c. Co., 134 Mo. 85 124
Geithman v. Eichler, 265 Ill. 579 1
Gelstrop v. Moore, 26 Miss. 206 360, 583
Geneva v. Henson, 195 N. Y. 447 297
George v. Cole, 109 La. 816 637
v. George, 47 N. H. 27 491, 492
Gerard v. Buckley, 137 Mass. 475 59
Gerhardt v. Ellis, 134 Wis. 191 447
v. Tucker, 187 Mo. 46 672
German v. Machin, 6 Paige (N. Y.) 288 696
Germania Life Ins. Co. v. Potter, 124 App. Div. (N. Y.) 814 674
Gessner v. Palmateer, 89 Cal. 89 407, 417
Gest v. Packwood, 39 Fed. 525 417
Getchell v. Benedict, 57 Iowa 121 317
Ghazal, In re, 163 Fed. 602 382
Gholson v. Desha, 32 Ky. L. 996 695
Gibson v. Chouteau, 39 Mo. 536 182, 184, 224, 226 301
v. Garst, 81 Kans. 741 643
v. Holden, 115 Ill. 199 407
v. Leonard, 143 Ill. 182 62
v. Sexson, 82 Nebr. 475 638
v. Thomas, 180 N. Y. 483 119
Giddings v. Giddings, 65 Conn. 149 485
v. Smith, 15 Vt. 344 48
Gilbert v. Baxter, 71 Iowa 327 27
v. Peteler, 38 Barb. (N. Y.) 489 61
v. Richards, 7 Vt. 203 326
Gilchrist v. Gough, 63 Ind. 576 123, 132
Gile v. Hallock, 33 Wis. 523 572
Giles v. Anslow, 128 Ill. 187 43
v. Little, 104 U. S. 291 477
v. Miller, 36 Nebr. 346 66
v. Wilhoit (Tenn.), 48 S. W. 268 713
Gill v. Grand Tower Min. &c. Co., 92 Ill. 249 720
v. Hardin, 48 Ark. 409 692
v. Lydick, 40 Nebr. 508 103
v. Pinney, 12 Ohio St. 38 122
Gillen v. Hadley (N. J. Err. & App.), 73 Atl. 849 678
Gillespie v. Broas, 23 Barb. (N. Y.) 370 70
v. Rogers, 146 Mass. 610 122, 263
Gillett v. Gaffney, 3 Colo. 351 467
Gillig v. Maass, 28 N. Y. 191 428
Gill's Estate, In re, 79 Iowa 296 732
Gilman v. Hovey, 26 Mo. 280 10, 15, 16, 24
Gilmore v. Hamilton, 83 Ind. 196 49
v. Sapp, 100 Ill. 297 229
Gilpin v. Hollingsworth, 3 Md. 190 462
Gilroy v. Richards, 26 Tex. Civ. App. 355 483
Gingrich v. Gingrich, 146 Ind. 227 474
Girardin v. Lampe, 58 Wis. 267 120
Gittings v. Worthington, 67 Md. 139 327
Givan v. Doe, 7 Blackf. (Ind.) 210 437
Given v. Hilton, 95 U. S. 591 460
Givens v. Ott, 222 Mo. 395 93, 483
Glading v. Frick, 88 Pa. St. 460 122
Gladson v. Whitney, 9 Iowa 267 723
Glascott v. Bragg, 111 Wis. 605 718
Glass v. Gilbert, 58 Pa. St. 266 635
Glasscock v. Tate, 107 Tenn. 486 43
Glass' Estate, In re, 164 Cal. 765 458
Glawatz v. People's Guaranty Search Co., 49 App. Div. (N. Y.) 465 12
Gleason v. Spray, 81 Cal. 217 431
Glendinning v. Superior Oil Co., 162 Ind. 642 99
Glenn v. Thistle, 23 Miss. 42 197
Glidden v. Strupler, 52 Pa. St. 400 322
Globe Mill Co. v. Bellingham Bay Imp. Co., 10 Wash. 458 227
Glore v. Scroggins, 124 Ga. 922 472
Glos v. Cass, 230 Ill. 641 643
v. Cessna, 207 Ill. 69 955, 957
v. Grant Bldg. &c. Assn., 229 Ill. 387 955
v. Holberg, 220 Ill. 167 955
v. Kingman, 207 Ill. 26 955
Gloss v. Sankey, 148 Ill. 536 718
Glover v. Condell, 163 Ill. 566 469
v. Reid, 80 Mich. 228 678
v. Shields, 32 Barb. (N. Y.) 374 270
Glyn v. Title Guarantee &c. Co., 132 App. Div. (N. Y.) 859 11
Glynn v. George, 20 N. H. 114 62
Goad v. Montgomery, 119 Cal. 552 678
Godding v. Deker, 3 Colo. App. 198 195
Godfrey v. Humphrey, 18 Pick. (Mass.) 537 46
Godwin v. Davis, 74 Miss. 742 210
Goebel v. Wolf, 113 N. Y. 405 483
Goettlicher v. Wille, 76 Misc. (N. Y.) 361 437
Goetz, In re, 13 Cal. App. 292 708
Goff v. Anderson, 91 Ky. 303 64
v. Goff, 60 W. Va. 9 676
Goldberg v. Kidd, 5 S. Dak. 169 215
v. Sisseton Loan &c. Co., 24 S. Dak. 49 14, 22
Golden v. Hardesty, 93 Iowa 622 286
v. Murphy, 31 Nev. 395 693
Goldsborough v. Hewitt, 23 Okla. 66 676
Goldsmith v. Goldsmith, 46 W. Va. 426 291
Gomez v. Higgins, 130 Ala. 493 487
Good v. Norley, 28 Iowa 188 652
v. Zercher, 12 Ohio 364 322
Goodell v. Sanford, 31 Mont. 163 35
Goodgion v. Gilreath, 32 S. Car. 388 580
Goodrich v. Adams, 138 Mass. 552 708, 727
v. Lambert, 10 Conn. 448 465
Goodright v. Morningstar, 1 Yeates (Pa.) 313 48
Goodtitle v. Gibbs, 5 B. & C. 709 45
Goodwin v. Colby, 64 N. H. 401 734
v. Keerl, 3 Harr. & M. (Md.) 403 728
v. Owen, 55 Ind. 243 120
Gordon v. Constantine Hydraulic Co., 117 Mich. 620 121
v. Ross-Higgins Co., 162 Fed. 637 200
v. Ware Savings Bank, 115 Mass. 588 429
Gorham v. Daniels, 23 Vt. 600 58, 311
v. Farson, 119 Ill. 425 638

[References are to Sections.]

Goring v. McTaggart, 92 Ind. 200 647
Gormley v. Clark, 134 U. S. 338 105
Glossard v. Ferguson, 54 Ind. 519 595
Gossett v. Tolen, 61 Ind. 388 121
Gotham v. Gotham, 55 N. H. 440 99
Gotthelf v. Stranahan, 138 N. Y. 345 527
Goudy v. Shank, 8 Ohio 415 670
Gough v. Manning, 26 Md. 347 477
Gould v. Howe, 131 Ill. 490 275
v. Tucker, 20 S. Dak. 226 722
Gourley v. Countryman, 18 Okla. 220 183
Gove v. Cather, 23 Ill. 634 65
Gowdy v. Sanders, 88 Ky. 346 658
Grace v. Cox, 16 Ind. App. 150 656
Grady v. Warrell, 105 Mich. 310 451
Graeff v. DeTurk, 44 Pa. St. 527 60
Graham v. DeYampert, 106 Ala. 279 460, 464
v. Hawkins, 38 Tex. 628 583
v. Meek, 1 Ore. 325 322
Grand Gulf R. &c. Co. v. Bryan, 8 Smed. & M. (Miss.) 234 197
Grandin v. Anderson, 15 Ohio St. 286 125
Grandjean's Estate, In re, 78 Nebr. 349 722
Grand Rapids Nat. Bank v. Kritzer, 116 Mich. 688 611
Grand Rapids &c. R. Co. v. Alley, 34 Mich. 18 677
v. Butler, 159 U. S. 87 103
Granger v. Granger, 147 Ind. 95 714
Grannis's Estate, In re, 142 Cal. 1 485
Grant v. Bustin, 21 N. Car. 77 728
v. Grant, 63 Conn. 530 401
v. Mosely (Tenn.) 52 S. W. 508 476
Grantier v. Rosecrance, 27 Wis. 488 660
Graton v. Holliday Koltz Land & Lumber Co., 189 Mo. 322 668
Grattan v. Grattan, 18 Ill. 167 737
Gratz v. Land &c. Co., 82 Fed. 381 119
Graves v. Deterling, 120 N. Y. 447 276, 277
v. Ewart, 99 Mo. 13 570
v. Ward, 2 Duv. (Ky.) 301 119
Graves, In re, 242 Ill. 212 457, 705
Gray v. Brignardello, 1 Wall. (U. S.) 627 592
v. Denson, 129 Ala. 406 592
v. Holmes, 57 Kans. 217 718, 727
v. Jones, 14 Fed. 83 203
v. Pash, 24 Ky. L. 963 471
v. Smith, 76 Fed. 525 508
v. Swerer, 47 Ind. App. 384 708, 731
Graydon v. Graydon, 23 N. J. Eq. 229 477
Great Falls Nat. Bank v. McClure, 176 Fed. 208 552
Greeley State Bank v. Line, 50 Nebr. 434 439
Green v. Alden, 92 Maine 177 456
v. Barker, 47 Nebr. 934 215
v. Cross, 45 N. H. 574 444
v. Garrington, 16 Ohio St. 548 132
v. Gaston, 56 Miss. 748 442, 447
v. Gordon, 38 App. D. C. 443 43
v. Grant, 134 Mich. 462 426
v. Green, 103 Cal. 108 124
v. Lane, 45 N. Car. 102 455
v. Liter, 8 Cranch. (U. S.) 229 95
v. Pettingill, 47 N. H. 375 444
v. Rick, 121 Pa. St. 130 133, 551
v. Tenold, 14 N. Dak. 46 536
v. Witherspoon, 37 La. Ann. 751 120
Greene v. Huntington, 73 Conn. 106 466
Greenlee v. Davis, 19 Ind. 60 707, 708
Greenstreet v. Thornton, 60 Ark. 369 570
Greenwood v. Jenswold, 69 Iowa 53 289
v. La Salle, 137 Ill. 225 646
v. Marvin, 111 N. Y. 423 65
Greenwood
v. Trigg, Dobbs & Co., 143 Ala. 617 562, 566
v. Warren, 120 Ala. 71 546
Greer v. Higgins, 20 Kans. 420 127
v. Jackson, 127 Ga. 47 501
v. Wilson, 108 Ind. 322 43
Gregley v. Jackson, 38 Ark. 487 86, 719
Gregory v. Oates, 92 Ky. 532 456
v. Taber, 19 Cal. 397 602
Greist v. Gowdy, 81 Conn. 351 429
Grellet v. Heilshorn, 4 Nev. 526 121
Gresham v. Johnson, 70 Ga. 631 66
Grevemberg, v. Bradford, 44 La. 400 98, 561
Gribben v. Clement, 141 Iowa 144 429
Griel's Appeal, In re, 7 Sad. (Pa.) 137 535
Griffin v. Arlt, 96 N. Y. S. 1033 13
v. Dutton, 165 Fed. 626 370
v. Franklin, 224 Mo. 667 669
v. Nicholas, 224 Mo. 275 472
Griffith v. Frazier, 8 Cranch (U. S.) 9 90
Grigg v. Landis, 21 N. J. Eq. 494 313
Grim v. Weissenburg School Dist., 57 Pa. St. 433 645
Grimm v. Tittman, 113 Mo. 56 458
Grissom v. Moore, 106 Ind. 296 65
Gritten v. Dickerson, 202 Ill. 372 65
Grogan v. Garrison, 27 Ohio St. 50 65
Groome, In re, 94 Cal. 69 183
Gross v. Bennington, 52 Wash. 417 568
v. Grossdale, 177 Ill. 248 581
v. Howard, 52 Maine 192 601
v. Sheeler, 7 Houst. (Del.) 280 473
v. Watts, 206 Mo. 373 284
Grosscup v. German Sav. &c. Soc., 162 Fed. 947 674
Grove v. Todd, 41 Md. 633 324
v. Zumbro, 14 Grat. (Va.) 501 283
Grover v. Wakeman, 11 Wend. (N. Y.) 187 375
Groves' Appeal, In re, 68 Pa. St. 143 676
Grubb v. Grubb, 74 Pa. St. 25 63
Grubbs v. Leyendecker, 153 Ind. 348 67
Grube v. Lilienthal, 51 S. Car. 442 374
Guerin v. Bagneries, 18 La. 590 740
Guidry v. Woods, 19 La. 334 198
Guier v. Bridges, 114 Ky. 148 727
Guilfoil v. Arthur, 158 Ill. 600 341
Guion v. Burton, Meigs (Tenn.) 565 87
Gunn v. Brown, 63 Md. 96 478
v. Brown (Md.), 23 Atl. 462 57
Gunn's Appeal, In re, 55 Conn. 149 419
Gurney v. Minneapolis Union Elevator Co., 63 Minn. 70 110
Guthrie v. Beamer, 3 Okla. 652 95
Gwin v. Calegaris, 139 Cal. 384 214
Gwynne v. Niswanger, 20 Ohio 556 633

H

Habig v. Dodge, 127 Ind. 31 334
Hacker's Appeal, In re, 121 Pac. 192 281
Hackett v. Moxley, 68 Vt. 210 320
Hadden v. Johnson, 7 Ind. 394 350
Haden v. Goodwin, 217 Mo. 662 668
Haeseig v. Brown, 34 Mich. 503 439
Hafner v. Irwin, 20 N. Car. 433 291
Hagaman v. Moore, 84 Ind. 496 110
Hagan v. Ellis, 39 Fla. 463 95, 192, 226
Hager v. Spect, 52 Cal. 579 119, 125, 336, 433
Hagerty v. Hagerty, 12 Tex. 456 715
Haggerty v. Brower, 105 Iowa 395 420
v. Wagner, 148 Ind. 625 325
Hagler v. Simpson, 44 N. Car. 384 279
Hague v. Aherns, 53 Fed. 58 475

[*References are to Sections.*]

Haight v. Hall, 74 Wis. 152 64
Haijek v. Luck, 96 Tex. 517 377
Hale v. Baker, 60 Tex. 217 530
v. Cottle, 21 Ore. 580 272
v. Marquette, 69 Iowa 376 601
Haley v. Boston, 108 Mass. 576 714
Hall v. Alford, 114 Mich. 165 272
v. Ashby, 9 Ohio 96 306
v. Craig, 125 Ind. 523 663
v. Dean, 13 Johns. (N. Y.) 105 518
v. Denison, 17 Vt. 310 372
v. Farmers' Nat. Bank, 53 Md. 120 375
v. Fields, 81 Tex. 553 66
v. Hall, 76 Kans. 806 59
v. Hall, 98 Wis. 193 451
v. Jarvis, 65 Ill. 302 185, 186
v. Law, 102 U. S. 461 73
v. Lawrence, 2 R. I. 218 63
v. Livingston, 3 Del. Ch. 348 127
v. Miller, 150 Mich. 300 645
v. Moore, 32 Ky. L. 56 64
v. Moore, 70 Miss. 75 616
v. Priest, 6 Gray (Mass.) 18 468
v. Russell, 101 U. S. 503 202
v. St. Louis Mfg. Co., 22 Mo. App. 33 535
v. Smith, 61 N. H. 144 483
v. Tunnell, 1 Houst. (Del.) 320 122
v. Turner, 110 N. Car. 292 43
v. Vandegrift, 3 Bin. (Pa.) 374 48
Halle v. Newbold, 69 Md. 265 277
Halleck v. Guy, 9 Cal. 181 595
Hallett v. Hallett, 8 Ind. App. 305 65
v. Parker, 68 N. H. 598 65
Hall Safe & Lock Co. v. Scites, 38 W. Va. 691 536
Hallyburton v. Slagle, 130 N. Car. 482 99
Halsey v. Goddard, 86 Fed. 25 462
Halstead v. Lake Co., 56 Ind. 363 111
Ham v. Miller, 20 Iowa 450 527
Hamberger v. Eastes, 57 Ga. 71 577
Hamby v. Hamby, 165 Ala. 171 675
Hamilton v. Browning, 94 Ind. 242 436
v. Downer, 152 Ill. 651 59
v. Hamilton, 149 Iowa 321 354
v. Hubbard, 134 Cal. 603 320
v. Nutt, 34 Conn. 501 129
v. Pitcher, 53 Mo. 334 261
v. Steele (Ky.), 117 S. W. 378 224
Hamilton Trust Co. v. Clemes, 163 N. Y. 423 417
Hamlet v. Johnson, 26 Ala. 557 483
Hamlin v. Osgood, 1 Redf. Surr. (N. Y.) 409 713
Hammann v. Mink, 99 Ind. 279 362
Hammon v. Douglas, 50 Mo. 434 53
Hammond v. Croxton, 162 Ind. 353 60
v. Gordon, 93 Mo. 223 349
Hampe v. Higgins, 74 Kans. 296 33
Hancock v. Beverly, 6 B. Mon. (Ky.) 531 118
v. King, 133 Ga. 734 100
Hand v. Weidner, 151 Pa. St. 362 325
Handford v. Edwards, 89 Ark. 151 565
Handley v. Palmer, 91 Fed. 948 458
v. Palmer, 103 Fed. 39 456
Handley, In re, 208 Pa. 388 467
Hanley v. Kraftczyk, 119 Wis. 352 450
Hanlon v. Union Pac. R. Co., 40 Nebr. 52 694
Hanna v. Hanna, 10 Tex. Civ. App. 97 714
Hannibal & St. J. R. Co. v. Green, 68 Mo. 169 297
Hannon v. Southern Pac. R. Co., 12 Cal. App. 350 705
Hannum v. Day, 105 Mass. 33 602
Hanover Nat. Bank v. Moyses, 186 U. S. 181 377
Hanrick v. Patrick, 119 U. S. 156 302
Hanscom v. Hanscom, 6 Colo. App. 97 676
Hansford v. Tate, 61 W. Va. 207 593
Hanson v. Franklin, 19 N. Dak. 259 646
v. Johnson, 62 Md. 25 52
Hantz v. May, 137 Iowa 267 509
Haraden v. Larrabee, 113 Mass. 430 729
Harbaugh v. Costello, 184 Ill. 110 377
Hardage v. Stroope, 58 Ark. 303 465
Hardie v. Bissell, 80 Ark. 74 700
Hardin v. Boyd, 113 U. S. 756 391, 392
v. Crate, 78 Ill. 533 265
v. Day, 29 Wash. 664 564
v. Hardin, 32 S. Car. 599 263
Harding v. Allen, 70 Md. 395 123
v. Guaranty &c. Trust Co., 3 Kans. App. 519 553
v. Harding, 16 S. Dak. 406 676
v. LeMoyne, 114 Ill. 65 723
Hardy v. Beaty, 84 Tex. 562 662
v. Galloway, 111 N. Car. 519 47
v. Samuels, 92 Ark. 289 699
Hargis v. Ditmore, 86 Ky. 653 262
Hargreaves v. Menken, 45 Nebr. 668 612
Hargroves v. Redd, 43 Ga. 142 456, 458
Haring v. Murphy, 60 Misc. (N. Y.) 374 565
v. Shelton, 103 Tex. 10 43, 477
v. Van Buskirk, 8 N. J. Eq. 545 708
Harkey v. Day, 61 Tex. Civ. App. 244 614
Harkness v. Hyde, 98 U. S. 476 663
v. Lisle, 132 Ky. 767 47
Harley v. Harley, 140 Wis. 282 668
v. State, 40 Ala. 689 732
Harlow v. Lake Superior Iron Co., 36 Mich. 105 63
v. Thomas, 15 Pick. (Mass.) 66 316
Harlowe v. Hudgins, 84 Tex. 107 309
Harmon v. Grant's Pass &c. Trust Co., 60 Ore. 69 418
v. Harmon, 61 Maine 222 62
v. Thompson, 119 Ky. 526 399
Harper v. Clayton, 84 Md. 346 620
v. Tapley, 35 Miss. 506 124
Harral v. Leverty, 50 Conn. 46 434, 692
Harriman v. Woburn Electric Light Co., 163 Mass. 85 121
Harrington v. Allen, 48 Miss. 492 126
v. Erie County Sav. Bank, 101 N. Y. 257 118
Harris v. Arnold, 1 R. I. 125 434
v. Chicago, 162 Ill. 288 110
v. Elliott, 10 Pet. (U. S.) 25 503
v. Hiscock, 91 N. Y. 340 308
v. Ingalls, 74 N. H. 339 359
v. Jones, 83 N. Car. 317 421
v. Lester, 80 Ill. 307 509
v. McCrary, 17 Idaho 300 697
v. Mason, 120 Tenn. 668 613, 668
v. Oakley, 130 N. Y. 1 271
Harris, In re, 2 Ann. B. R. 359 385
Harrison v. Alexander, 135 Ala. 307 668
v. Boyd, 36 Ala. 203 67
v. Foote, 9 Tex. Civ. App. 576 54
v. Harrison, 105 Ga. 517 43, 474
v. McMurray, 71 Tex. 122 138
v. Palo Alto Co., 104 Iowa 383 331
v. Ray, 108 N. Car. 215 321
v. Shaffer, 60 Kans. 176 548
v. Simons, 55 Ala. 510 280
v. Trustees of Philip's Academy, 12 Mass. 456 310
v. Weatherly, 180 Ill. 418 119
Harrison's Estate, 18 Pa. Super. Ct. 588 734
Harryman v. Starr, 56 Md. 63 353

[References are to Sections.]

Hart v. Eppstein, 71 Tex. 752 419
v. Farmers' &c. Bank, 33 Vt. 252 118, 128
v. Gibbons, 14 Tex. 213 185
v. Gregg, 32 Ohio St. 502 714
v. Henderson, 17 Mich. 218 634
v. Kendall, 82 Ala. 144 723
v. Seymour, 147 Ill. 598 58
v. Smith, 44 Wis. 213 633
v. West, 16 Tex. Civ. App. 395 486
v. White, 26 Vt. 260 467
Hartfield v. Brown, 8 Ark. 283 578
Hartigan v. Hartigan, 65 W. Va. 471 64
Hartley v. Boynton, 17 Fed. 873 661
v. Keokuk &c. R., 85 Iowa 455 677
Hartmann, v. Hartmann, 59 Ill. 103 670
Harton v. Little, 176 Ala. 267 358
Hartshorn v. Cleveland, 52 N. J. L. 473 632
Hartwell v. Parks, 240 Mo. 537 491
Harty v. Harris, 120 N. Car. 408 53
Harvey v. Ball, 32 Ind. 98 719, 724
v. Gunzberg, 148 Pa. St. 294 53
v. Holles, 160 Fed. 531 698
v. Steptoe, 17 Grat. (Va.) 289 722
Harvill v. Holloway, 24 Ark. 19 65
Hascall v. Cox, 49 Mich. 435 714
Haseltine v. Donahue, 42 Wis. 576 331
Haskell v. Bissell, 11 Conn. 174 122
Hassaurek v. Hassaurek, 68 Obio St. 554 676
Hassey v. Wilke, 55 Cal. 525 119, 129
Hastings & D. R. Co. v. Whitney, 132 U. S. 357 200
Hatch v. Haskins, 17 Maine 391 122
Hatch's Estate, In re, 62 Vt. 300 66
Hatchett v. Hatchett, 103 Ala. 556 60
Hately v. Myers, 96 Ill. App. 217 53
Hatfiel v. Sneden, 54 N. Y. 280 64
Hathaway v. Howell, 54 N. Y. 97 567
Hathorn v. Maynard, 65 Ga. 168 118
Haughwout v. Murphy, 22 N. J. Eq 531 547
Hauxhurst v. Lobree, 38 Cal. 563 52
Haven v. Adams, 4 Allen (Mass.) 80 332
Havens v. Seashore Land Co., 47 N. J. Eq. 365 289, 312
Havighorst v. Bowen, 214 Ill. 90 433
Hawes v. United States Trust Co., 142 App. Div. (N. Y.) 789 956
Hawkins v. Chapman, 36 Md. 83 363
v. Hansen, 92 Kans. 73 474
v. Hughes, 87 N. Car. 115 650
v. Jones, 19 Ohio St. 22 719
v. Pugh, 91 Ky. 522 431
v. Taylor, 128 Ind. 431 575
Hawley v. Bullock, 29 Tex. 216 124
v. Northampton, 8 Mass. 3 48
Haworth v. Taylor, 108 Ill. 275 122
Haxtum, In re, 102 N. Y. 157 602
Hay v. Hay (Tex. Civ. App.), 120 S. W. 1044 678
v. Hill, 24 Wis. 235 122
Hayden v. Barrett, 172 Mass. 472 714, 719
v. Peirce, 165 Mass. 359 64
v. St. Louis &c. R. Co., 222 Mo. 126 297
Hayes v. Hayes, 242 Mo. 155 480
v. Martz, 173 Ind. 297 466
v. Southern Home Bldg. &c. Assn., 124 Ala. 663 426
v. Tabor, 41 N. H. 521 59
Hayes Appeal, In re, 123 Pa. St. 110 654
Hay, In re, 89 Pa. St. 256 711
Haymond v. Murphy, 65 W. Va. 616 562
Haynes v. Bourn, 42 Vt. 686 42
v. Meeks, 20 Cal. 288 653
v. Walker, 111 Tenn. 106 87
Hays v. Goldman, 71 Ark. 251 308
v. Hall, 4 Port. (Ala.) 374 397
v. Peavey, 54 Wash. 78 622
v. Wilstach, 82 Ind. 13 621
Hayward v. Kinney, 84 Mich. 591 49
Haywood v. Haywood, 80 N. Car. 42 601
v. Wright, 152 N. Car. 421 59
Hazelton v. Bogardus, 8 Wash. 102 723
v. Putnam, 3 Pinney (Wis.) 107 61
Hazen v. Webb, 68 Kans. 308 616
H. B. Claflin Co. v. King, 56 Fla. 767 566
Heacock v. Lubuke, 107 Ill. 396 138
Heacock v. Van Dusen, 80 Mich. 359 73
Headen v. Headen, 42 N. Car. 159 737
Heald v. Heald, 56 Md. 300 720
Heard v. Brooklyn, 60 N. Y. 242 503
v. Heard, 181 Ala. 230 417
Hearn v. Purnell, 110 Md. 458 286
Heath v. Nutter, 50 Maine 378 335, 336
v. White, 5 Conn. 228 64
v. Williams, 30 Ind. 495 418
Hebron v. Centre Harbor, 11 N. H. 571 120
Heflin v. Phillips, 96 Ala. 561 278
Heidlebaugh v. Wagner, 72 Iowa 601 461
Heiland v. Ertel, 4 Kans. App. 514 393
Heil's Appeal, In re, 40 Pa. St. 453 582
Heinlen v. Martin, 53 Cal. 321 336
Heinsen v. Lamb, 117 Ill. 549 1, 5, 10, 194
Heist v. Baker, 49 Pa. 9 516
Helfenstein v. Garrard, 7 Ohio 275 58
Heller v. Cohen, 154 N. Y. 299 700
v. Cohen, 15 Misc. (N. Y.) 378 76
Helm v. Board, 114 Ky. 289 620
v. Leggett, 66 Ark. 23 477
Helms v. Elliott, 89 Tenn. 446 718
Hemphill v. Flynn, 2 Pa. St. 144 53
Henderson v. Bonar, 11 Ky. L. 219 90
v. Carbondale &c. Co., 140 U. S. 25 663
v. Ford, 46 Tex. 627 337
v. Hays, 41 N. J. L. 387 616
v. Hunter, 59 Pa. St. 335 55
v. Pilgrim, 22 Tex. 464 119, 437
v. Sherman, 47 Mich. 267 708
Henderson, In re, 161 Cal. 353 471
Hendon v. White, 52 Ala. 597 623
Hendricks v. Gillespie, 25 Grat. (Va.) 181 34
v. Stark, 37 N. Y. 106 507
Hendrickson v. Woolley, 39 N. J. Eq. 307 126
Hendrix v. Cawthorn, 71 Ga. 742 662
v. McBeth, 61 Ind. 473 65
Henninger v. McGuire, 146 Iowa 270 419
Henry v. Atkison, 50 Mo. 266 331
v. Bradshaw, 20 Iowa 355 286
v. Brannan, 149 Ala. 323 207
v. Henderson, 81 Miss. 743 451
v. McKerlie, 78 Mo. 416 360, 596
Hensley v. Rose, 76 Ala. 373 662
Henszey v. Gross, 185 Pa. St. 353 730
Hentig v. Redden, 46 Kans. 231 575
Herbert v. Wren, 7 Cranch (U. S.) 370 675
Herkimer v. McGregor, 126 Ind. 247 737
Herman v. Somers, 158 Pa. St. 424 76, 398
Hermocilla v. Hubbell, 89 Cal. 5 208
Herndon v. Kimball, 7 Ga. 432 120
Herod v. Carter, 81 Kans. 236 643
Heron v. Weston, 44 Colo. 379 665
Herr v. Broadwell, 5 Colo. App. 467 615
Herrick v. Ammerman, 32 Minn. 544 348
v. Morrill, 37 Minn. 250 659
Herrmann v. New York, 136 App. Div. (N. Y.) 28 552

[*References are to Sections.*]

Hersey v. Purington, 96 Maine 166 43
Hershey v. Dennis, 53 Cal. 77 577
Hershiser v. Ward, 29 Nev. 228 16, 19, 24
Herzog v. Title Guarantee & Trust Co., 177 N. Y. 86 455
Heslop v. Heslop, 82 Pa. St. 537 35
Hesnard v. Plunkett, 6 S. Dak. 73 66
Hess v. Cheney, 83 Ala. 251 104
Heyer v. Alexander, 108 Ill. 385 376
Heywood's Estate, In re, 148 Cal. 184 59, 480
Hibbard &c. Co. v. Chicago, 173 Ill. 91 62
Hibberd v. Smith, 67 Cal. 547 101, 613
Hibler v. Hibler, 104 Mich. 274 45, 459, 483
Hickie v. Starke, 1 Pet. (U. S.) 94 196
Hicklin v. Marco, 56 Fed. 549 672
Hickman v. Green, 123 Mo. 165 128
Hickox v. Lowe, 10 Cal. 197 424
Hicks v. Phillips, 148 Ky. 670 722
v. Texas Loan & Investment Co., 51 Tex. Civ. App. 298 431
Hickson v. Lingold, 47 Ala. 449 531
Hickson Lumber Co. v. Gay Lumber Co., 150 N. Car. 281 432
Hiestand v. Meyer, 150 Pa. St. 501 461
Hiestes v. Green, 48 Pa. St. 96 316
Higgins v. Breen, 9 Mo. 497 65
v. Dennis, 104 Iowa 605 8, 10
v. Eaton, 188 Fed. 938 456
v. Higgins, 57 Ohio St. 239 722
v. Manson, 126 Cal. 467 417
v. West, 5 Ohio 554 447
Highstone v. Burdette, 54 Mich. 329 687
Higinbotham v. Stoddard, 72 N. Y. 94 272
Hildreth v. Googins, 91 Maine 227 61
v. Thompson, 16 Mass. 191 675
Hill v. Alexander, 2 Kans. App. 251 437
v. Bacon, 110 Mass. 387 526
v. Eldred, 49 Cal. 398 417
v. Gray, 160 Ala. 273 47
v. Heard, 104 Ark. 23 722
v. King, 48 Ohio St. 75 569
v. Lund, 13 Minn. 451 637
v. McNichol, 76 Maine 314 126
v. Meeker, 24 Conn. 211 118
v. Miller, 36 Mo. 182 224
v. Pike, 174 Mass. 582 65
v. Pixley, 63 Barb. (N. Y.) 200 428
v. Reynolds, 93 Maine 25 347
v. Swihart, 148 Ind. 319 347
v. Taylor, 77 Tex. 295 120
v. Williams, 104 Md. 595 633
Hillen v. Iselin, 144 N. Y. 365 713
Hillhouse v. Chester, 3 Day (Conn.) 166 87
Hillman v. Stephens, 16 N. Y. 278 723
Hillman Land & Iron Co. v. Marshall (Ky. App.), 119 S. W. 180 699
Hillock v. Idaho Title &c. Co., 22 Idaho 440 9, 16, 17, 23
Hills v. Miller, 3 Paige (N. Y.) 254 61
Hilpire v. Claude, 109 Iowa 159 718
Hilton v. Woodman's Estate, 124 Mich. 326 436
Hinchliffe v. Shea, 103 N. Y. 153 65
Hingham & Q. Bridge & Tpk. Corp. v. Norfolk, 6 Allen (Mass.) 353 677
Hinton v. Hicks, 156 N. Car. 24 430
Hinzie v. Hinzie, 45 Tex. Civ. App. 297 485
Hiss v. McCabe, 45 Md. 77 284
Hitchcock v. Merrick, 18 Wis. 375 426
Hitner v. Ege, 23 Pa. St. 305 64
Hoadly v. Wood, 71 Conn. 452 471, 476
Hoagland v. Beckley, 158 Mich. 565 286
Hobart v. Hobart, 45 Iowa 501 676
Hobbs v. Batory, 86 Md. 68 53
Hobson v. Hale, 95 N. Y. 588 456
Hochlander v. Hochlander, 73 Ill. 618 659
Hochstein v. Berghauser, 123 Cal. 681 714
Hockaday v. Lynn, 200 Mo. 456 718
Hockett v. Burns, 90 Nebr. 1 426
Hockman v. McClannahan, 87 Va. 33 324
Hodgdon v. Shannon, 44 N. H. 572 424
v. Wight, 36 Maine 326 637
Hodge v. Donald, 55 Tex. 344 227
Hodgen v. Guttery, 58 Ill. 431 658
Hodges v. Spicer, 79 N. Car. 223 101
v. Williams, 95 N. Car. 331 104
Hodgkins v. Farrington, 150 Mass. 19 507
Hodgman v. Kittredge, 67 N. H. 254 458
Hoffman v. Hoffman, 26 Ala. 535 456
v. Stigers, 28 Iowa 302 321
Hoffman Burneston & Co. v. Mackall, 5 Ohio St. 124 117, 338, 441
Hoffsass v. Mann, 74 Md. 400 49
Hogan v. Hogan, 19 Ky. L. 1960 719
v. Jaques, 19 N. J. Eq. 123 318
Hohn v. Bidwell, 27 S. Dak. 249 724
Hoit v. Hoit, 40 N. J. Eq. 551 574
Holbrook v. Debo, 99 Ill. 372 303
Holcomb v. Lake, 24 N. J. L. 686 48, 724
Holden v. Alexander, 82 S. Car. 441 272
v. Butler, 173 Mich. 116 434
Hole v. Robbins, 53 Wis. 514 718
Holland v. Rogers, 33 Ark. 251 398
Hollenback v. Fleming, 6 Hill. (N. Y.) 303 282
Holley v. Horton, 164 Mich. 31 66
Holliday v. Cromwell, 26 Tex. 188 120
v. Hively, 198 Pa. St. 335 320, 479
Hollifield v. Landrum, 31 Tex. Civ. App. 187 1, 25
Hollingshead v. Nauman, 45 Pa. St. 140 688
Hollister v. Butterworth, 71 Conn. 57 476
Holloway v. Jones, 143 Pa. St. 564 73
v. McCormick, 41 Okla. 1 733
Holm v. Wust, 11 Abb. Prac. (N. S.) (N. Y.) 113 30
Holman v. Riddle, 8 Ohio St. 384 487
Holme v. Strautman, 35 Mo. 293 202
Holmes v. Adams, 110 Maine 167 724
v. Cleveland &c. R. Co., 3 Ohio Dec. 416 108
v. Jordan, 163 Mass. 147 611
v. Walter, 118 Wis. 409 59, 480
v. Woods, 168 Pa. St. 530 77
Holmes, In re, 131 N. Y. 80 564
Holt v. Agnew, 67 Ala. 360 86
v. Classen, 19 Okla. 131 200
v. Murphy, 15 Okla. 12 201
v. Pickett, 111 Ala. 362 465
v. Thacher, 52 Vt. 592 570
v. Watson, 71 Ark. 87 89
Home for Incurables v. Noble, 172 U. S. 383 452, 455
Homestead of Emerson, In re, 58 Minn. 450 66
Hone v. Fisher, 2 Barb. Ch. (N. Y.) 559 674
v. Woolsey, 2 Edw. Ch. (N. Y.) 289 298
Hood v. Hood, 110 Mass. 463 652
Hooper v. Henry, 31 Minn. 264 428
v. Scheimer, 23 How. (U. S.) 235 751
v. Smith, 88 Md. 577 471
v. Van Husen, 105 Mich. 592 397
v. Young, 140 Cal. 274 224
Hoover v. King, 43 Ore. 281 668
v. Smith, 96 Md. 393 714
v. Weesner, 147 Ind. 510 28
Hope v. Blair, 105 Mo. 85 568
v. Hoover (Miss.), 21 So. 134 719

[References are to Sections.]

Hope
v. Shevill, 137 App. Div. 86 447
Hopkins v. Bryant, 85 Tenn. 520 65
v. Glunt, 111 Pa. St. 287 59
v. Grimshaw, 165 U. S. 342 482
v. Ratliff, 115 Ind. 213 405
v. Sanders, 172 Mich. 227 638
v. Smith, 162 Mass. 444 474
Hopper v. Demarest, 21 N. J. L. 525 64
Hoppock v. Tucker, 59 N. Y. 202 471
Horbach v. Hill, 112 U. S. 144 418
Horn v. Butler, 39 Minn. 515 6, 77
Hornblower v. Banton, 103 Maine 375 690
Horne v. Rogers, 110 Ga. 362 400
Horner v. Doe, 1 Ind. 130 600, 617
v. Leeds, 25 N. J. L. 112 50
Horsley v. Grath, 2 Grat. (Va.) 471 122
Horton v. Earle, 162 Mass. 448 471
v. Sledge, 29 Ala. 478 56
Hosack v. Rogers, 6 Paige (N. Y.) 415 724
Hoselton v. Hoselton, 166 Mo. 182 55
Hosleton v. Dickinson, 51 Iowa 244 257
Hosmer v. Campbell, 98 Ill. 572 364
v. Wallace, 97 U. S. 575 196
Hotchkin v. Bussell, 46 Wash. 7 722
Hottenstein v. Lerch, 104 Pa. St. 454 687
Houck v. Yates, 82 Ill. 179 104
Hough v. Buchanan, 27 Fed. 328 100
Houghton v. Dickinson, 196 Mass. 389 719
v. Kern Val. Bank, 157 Cal. 289 643
v. Wilhelmy, 157 Mass. 521 689
Hoult v. Donahue, 21 W. Va. 294 74
House v. Lockwood, 137 N. Y. 259 561, 575
Houseman v. Girard Bldg. &c. Assn., 81 Pa. St. 256 21, 22
v. International Nav. Co., 214 Pa. 552 103
Houston v. Blackman, 66 Ala. 559 266
v. Davidson, 45 Ga. 574 719
v. McKinney, 54 Fla. 600 717
Houzik v. Delglise, 65 Wis. 494 434
Hovey v. Blanchard, 13 N. H. 145 128
v. Edmison, 3 Dak. 449 426
v. Hobson, 51 Maine 62 314
v. Walbank, 100 Cal. 192 461
Howard v. Chase, 104 Mass. 249 129
v. Grant, 107 Ark. 594 722
v. Harrington, 27 R. I. 586 734
v. Iron &c. Co., 62 Minn. 298 417
v. Kennedy, 4 Ala. 592 668
v. Rumble, 4 Ga. App. 327 565
v. Turner, 125 N. Car. 107 266
Howard Ins. Co. v. Halsey, 8 N. Y. 271 129
Howard Inv. Co. v. Benton Land Co., 5 Kans. App. 716 638
Howe v. Coates, 97 Minn. 385 77
v. Harrington, 18 N. J. Eq. 495 336
v. Howe, 152 Ill. 252 461
v. Hutchinson, 105 Ill. 501 25, 31, 35
v. Thayer, 49 Iowa 154 132
Howell v. Jones, 91 Tenn. 402 66
v. Shepard, 48 Mich. 472 658
Hower v. Weiss Malting &c. Co., 55 Fed. 356 651
Howes v. Barmon, 11 Idaho 64 61, 62
Howland v. Slade, 155 Mass. 415 471
Hoxie v. Payne, 41 Conn. 539 659
Hoy v. Varner, 100 Va. 600 325
Hoyt v. Jones, 31 Wis. 389 118
v. Ketcham, 54 Conn. 60 306
v. Tuxbury, 70 Ill. 331 35
v. Weyerhauser, 161 Fed. 324 184
Hronska v. Janke, 66 Wis. 252 262
Hubbard v. Hubbard, 12 Barb. (N. Y.) 148 454
v. Jones, 61 Kans. 722 566
v. Kiddo, 87 Ill. 578 687
v. Norton, 10 Conn. 422 425
v. Whitehead, 221 Mo. 672 272
v. Worcester Art Museum, 179 Fed. 406 458
Huber v. Brown, 57 Wash. 654 643
v. Hess, 191 Ill. 305 592
Huckabee v. Swoope, 20 Ala. 491 43
Hudnall v. Ham, 172 Ill. 76 722
v. Ham, 183 Ill. 486 719
Hudson v. Gray, 58 Miss. 882 720
v. Hudson, 222 Ill. 527 735
v. Hudson's Admr. (Ky. App.), 121 S. W. 973 297, 321
v. Webber, 104 Maine 429 283, 289
v. Wright, 204 Mo. 412 669
Huene v. Cribb, 9 Cal. App. 141 421
Huff v. Hastings Express Co., 195 Ill. 257 272
v. McCauley, 53 Pa. St. 206 61
v. Sweetser, 8 Cal. App. 689 565
v. Webb, 64 Tex. 284 284
Huffman v. Leslie, 23 Ky. L. 1981 315
Hugg v. Hintrager, 80 Iowa 359 538
Huggins v. Huggins, 71 Ga. 66 737
Hughes v. Decker, 38 Maine 153 719
v. Edwards, 9 Wheat. (U. S.) 489 429
v. Farmers' Nat. Bank, 83 Vt. 386 552
v. Fitzgerald, 78 Conn. 4 59, 480
v. Hammond, 136 Ky. 694 274
v. Noyes, 171 Ill. 575 315
v. Sellers, 34 Ind. 337 571
v. State, 41 Tex. 10 111
v. Wilkinson, 37 Miss. 482 119
Hughes Bros. v. Hoover, 3 Cal. App. 145 538
Hulick v. Scovil, 9 Ill. 159 222
Huling v. Fenner, 9 R. I. 410 60
Hull v. Diehl, 21 Mont. 71 438
v. Hull, 35 W. Va. 155 312
v. Sullivan, 63 Ga. 196 129, 316
Hulme v. Montgomery, 31 Miss. 105 87
Huls v. Buntin, 47 Ill. 396 73
Humboldt Bldg. Assn. v. Ducker, 26 Ky. L. 931 773
Humphrey v. Wade, 84 Ky. 391 364
Humphreys v. Newman, 51 Maine 40 125
Humphries v. Davis, 100 Ind. 274 89
Hunt v. Boston, 183 Mass. 303 639
v. Dunn, 74 Ga. 120 127
v. Evans, 134 Ill. 496 487
v. Hayes, 19 Ohio C. C. 151 473
v. Hunt, 14 Pick. (Mass.) 374 428
v. Hunt, 4 N. H. 434 487
v. Johnson, 19 N. Y. 279 119
v. Ronsmanier, 8 Wheat. (U. S.) 174 337
v. Tuttle, 133 Iowa 647 27
Hunter v. Whitworth, 9 Ala. 965 64
Huntington v. Asher, 96 N. Y. 604 61, 63
v. Meyer, 92 Wis. 557 567
Hurd v. Cushing, 7 Pick. (Mass.) 169 49
v. Shelton, 64 Conn. 496 54
Hurdle v. Stockley, 6 Houst. (Del.) 447 90
Hurley v. O'Sullivan, 137 Mass. 86 720
Hurst v. Hurst, 7 W. Va. 289 40
v. Leckie, 97 Va. 550 372
Hurt v. Nave, 49 Ala. 459 611
Hussey v. Roquemore, 27 Ala. 281 399
Hussman v. Durham, 165 U. S. 114 226
Huston v. Scott, 20 Okla. 142 314
Hutchings v. Clark, 64 Cal. 228 443
v. Low, 15 Wall. (U. S.) 77 196

[*References are to Sections.*]

Hutchins v. Byrnes, 9 Gray (Mass.) 367 280
v. Carleton, 19 N. H. 487 290
v. Heywood, 50 N. H. 500 58
v. Van Vechten, 140 N. Y. 115 339
Hutchinson v. Ainsworth, 63 Cal. 286 324
v. Hutchinson, 16 Colo. 349 126
Hutchinson Investment Co. v. Caldwell, 152 U. S. 65 85
Hutchinson's Appeal, In re, 92 Pa. St. 186 580
Huyser v. Chase, 13 Mich. 98 51
Hyatt v. Cochran, 69 Ind. 436 138
Hyde v. Warren, 46 Miss. 13 442
Hyland v. Baxter, 98 N. Y. 610 653

I

Iglehart v. Crane, 42 Ill. 261 129
Illinois Cent. R. Co. v. Hatter, 207 Ill. 88 691
v. Houghton, 126 Ill. 233 687
Illinois Land & Loan Co. v. Bonner, 75 Ill. 315 740
Indiana v. United States, 148 U. S. 148 210
Indianapolis v. Kingsbury, 101 Ind. 200 244, 670
Indiana School Dist. v. Werner, 43 Iowa 643 562
Inge v. Johnston, 110 Ala. 650 491
v. Murphy, 14 Ala. 289 67
Ingels v. Ingels, 50 Kans. 755 66
Inglis v. Webb, 117 Ala. 387 696
Ingraham v. Ingraham, 169 Ill. 432 39, 471
v. Wilkinson, 14 Pick. (Mass.) 268 103
Ingrâm v. Kirkpatrick, 41 N. Car. 463 375
Inhabitants of Trenton v. Standard Fire Ins. Co., 76 N. J. L. 79 631
Innes v. Crawford, 2 Bibb (Ky.) 412 185
In re Alabone's Estate, 75 N. J. Eq. 527 484
In re Alden's Appeal, 93 Pa. St. 182 63
In re Alexander's Estate, 149 Cal. 146 477
In re Amy, 12 Utah 278 730
In re Armstrong's Estate, 2 Pa. Co. Ct. 166 487
In re Bacon's Estate, 202 Pa. 535 714
In re Baily's Appeal, 32 Pa. St. 40 583
In re Ball, 153 Wis. 27 457
In re Bank's Will, 87 Md. 425 469
In re Barnes' Estate, 47 Okla. 117 724
In re Barnett's Appeal, 46 Pa. St. 392 58
In re Barrett's Will, 111 Iowa 570 46
In re Bateman, 11 R. I. 585 324
In re Bates Mach. Co., 91 Fed. 625 379
In re Bell, 34 N. Y. S. 191 730
In re Benson's Estate, 169 Pa. St. 602 481
In re Bickel's Appeal, 86 Pa. St. 204 318
In re Blake's Estate, 134 Pa. St. 240 473
In re Box, 11 Wash. St. 90 595
In re Breg's Estate, 71 Minn. 11 710, 711
In re Brooklyn St., 118 Pa. St. 640 244
In re Brown, 22 Okla. 216 720
In re Brownell, 60 Hun (N. Y.) 586 443
In re Bruch's Estate, 185 Pa. St. 194 477
In re Butler, 66 Misc. (N. Y.) 406 466
In re Callaghan, 119 Cal. 571 720
In re Carpenter's Estate, 170 Pa. 203 733
In re Chambers, 44 Fed. 786 13
In re Churchman's Appeal, 9 Sad. (Pa.) 423 466
In re Clark's Appeal, 79 Pa. St. 376 64
In re Clark's Appeal, 70 Conn. 195 58, 456, 584
In re Colbert's Estate, 44 Mont. 259 86
In re Cox, 93 Ala. 400 730
In re Cramond, 145 Fed. 966 517
In re Cremer's Estate, 156 Pa. St. 40 87
In re Curry's Estate, 39 Cal. 529 717
In re Davenport, 172 N. Y. 454 711
In re Davis' Estate, 151 Cal. 318 491
In re Deake's Appeal, 80 Maine 50 456
In re DeHaven's Appeal, 38 Pa. St. 373 349
In re De Lancey Stables Co., 170 Fed. 860 380
In re Delaware &c. R. Co.'s Tax Assessment, 224 Pa. 240 630
In re Devine's Estate, 199 Pa. St. 250 466
In re Dickerson, 111 N. Car. 108 362
In re Dickinson's Appeal, 42 Conn. 491 719
In re Dillard, 2 Hughes (U. S.) 190 385
In re Doebler's Appeal, 64 Pa. St. 9 47
In re Donnelly's Estate, 125 Cal. 417 706
In re Dull's Estate, 222 Pa. 208 484
In re Dunning, 48 Misc. (N. Y.) 482 87
In re Dutch's Appeal, 57 Pa. St. 461 737
In re Elmslie's Estate, 10 Pa. Dist. 397 483
In re Emblen, 161 U. S. 52 229
In re Emerson's Homestead, 58 Minn. 450 66
In re Engel's Estate, 180 Pa. St. 215 476
In re Fair's Estate, 132 Cal. 523 59
In re Farrell, 176 Fed. 505 375
In re Ferguson's Appeal, 117 Pa. St. 426 241
In re Filbert, 195 Pa. St. 295 91
In re Francies' Appeal, 96 Pa. St. 200 61
In re Frazin, 174 Fed. 713 381
In re Freeman, 146 Iowa 38 709
In re Ghazal, 163 Fed. 602 382
In re Gill's Estate, 79 Iowa 296 732
In re Glass' Estate, 164 Cal. 765 458
In re Goetz, 13 Cal. App. 292 708
In re Grandjean's Estate, 78 Nebr. 349 722
In re Granniss' Estate, 142 Cal. 1 485
In re Graves, 242 Ill. 212 457, 705
In re Griel's Appeal, 7 Sad. (Pa.) 137 535
In re Groome, 94 Cal. 69 183
In re Grove's Appeal, 68 Pa. St. 143 676
In re Gunn's Appeal, 55 Conn. 149 419
In re Hacker's Appeal, 121 Pac. 192 281
In re Handley, 208 Pa. 388 467
In re Harris, 2 Am. B. R. 359 385
In re Hatch's Estate, 62 Vt. 300 66
In re Haxtum, 102 N. Y. 157 602
In re Hayes' Appeal, 89 Pa. St. 256 711
In re Hayes' Appeal, 123 Pa. St. 110 654
In re Heil's Appeal, 40 Pa. St. 453 582
In re Henderson, 161 Cal. 353 471
In re Heywood's Estate, 148 Cal. 184 59, 480
In re Holmes, 131 N. Y. 80 564
In re Hutchinson's Appeal, 92 Pa. St. 186 580
In re Irwin, 177 Fed. 284 378
In re Jeremy's Estate, 178 Pa. St. 477 46
In re Johnson, 164 Cal. 312 718
In re Johnson, 30 Ch. Div. 42 8
In re Kane's Estate, 38 Misc. (N. Y.) 276 87
In re Kepecs, 123 N. Y. S. 872 379
In re Kimmel's Estate, 226 Pa. 47 100
In re Kissel's Estate, 65 Misc. (N. Y.) 443 631
In re Kopmier's Will, 113 Wis. 233 453
In re Kuhn's Estate, 125 Iowa 449 733
In re Kurtz's Estate, 145 Pa. St. 637 466
In re Lawrence's Estate, 136 Pa. St. 354 482

[References are to Sections.]

In re Learned's Estate, 70 Cal. 140 456
In re Lee, 163 Ky. 418 724
In re Lemen, 208 Fed. 80 378
In re Lewis, 32 La. Ann. 385 456
In re Lewis, 29 Ont. 609 737
In re Lewis F. Perry & Whitney Co., 172 Fed. 745 372, 375, 379
In re Logan, 131 N. Y. 456 471
In re Luch's Appeal, 44 Pa. St. 519 121
In re Clotilde Lutz, 157 Mo. 439 473
In re Lynch, 132 Cal. 214 730
In re McCabe, 15 R. I. 330 708
In re McCrea, 180 Pa. St. 81 714
In re McCurdy's Appeal, 65 Pa. St. 290 674
In re McGraw's Estate, 111 N. Y. 66 458
In re Machu, 21 Ch. Div. 838 55
In re McKenna's Estate, 168 Cal. 339 730
In re Magee, 63 Cal. 414 719
In re Maher, 169 Fed. 997 515
In re Majot, 199 N. Y. 29 705, 724
In re Markle's Estate, 187 Pa. St. 639 471
In re Mason-Seaman Transportation Co., 235 Fed. 974 380
In re Middleton, 72 Iowa 424 491
In re Miller, 64 Misc. (N. Y.) 467 550
In re Moore, 14 R. I. 38 718
In re Moran, 151 Mo. 555 718
In re Morrow's Estate, 204 Pa. 479 487
In re Mutual Benefit Co., 174 Pa. St. 1 90
In re Negus, 7 Wend. (N. Y.) 499 15
In re Neil's Appeal, 92 Pa. St. 193 719
In re Nevin's Estate, 192 Pa. St. 258 59
In re Newman, 75 Cal. 213 712, 718
In re Nichol, 128 Pa. St. 428 714
In re Nicholson, 115 Iowa 493 471
In re North's Estate, 48 Conn. 583 727
In re Noye's Estate, 40 Mont. 178 457
In re Oberholtzer's Appeal, 124 Pa. St. 583 124
In re Olson, 63 Iowa 145 491
In re Opdyke's Appeal, 49 Pa. St. 373 719
In re Overdieck, 50 Iowa 244 716, 734
In re Peacock, 178 Fed. 851 381
In re Pearl Street, 111 Pa. St. 565 317
In re Pearson, 110 Cal. 524 708
In re Peet's Estate, 99 Iowa 314 473
In re Pennsylvania Consol. Coal Co., 163 Fed. 579 378
In re Person's Appeal, 74 Pa. St. 121 87, 737
In re Phillips' Estate, 205 Pa. 504 459
In re Pirie, 133 App. Div. (N. Y.) 431 602
In re Plumel's Estate, 151 Cal. 77 455
In re Poppleton's Estate, 34 Utah 285 477
In re Powers' Appeal, 63 Pa. St. 443 737
In re Prasser's Will, 140 Wis. 92 459
In re Proctor, 103 Iowa 232 708
In re Qualifications of Electors, 19 R. I. 387 57
In re Raab, 79 Misc. (N. Y.) 185 471
In re Rankin's Appeal, 1 Monag. (Pa.) 308 667
In re Rash's Estate (Pa.), 2 Pars. Eq. Cas. 160 40
In re Reiff's Appeal, 124 Pa. St. 145 463
In re Reith's Estate, 144 Cal. 314 480
In re Renton, 10 Wash. 533 734
In re Reynolds, 57 Maine 350 711
In re Ridgway's Appeal, 15 Pa. St. 177 581
In re Riesenberg, 116 Mo. App. 308 466
In re Roberts' Estate, 163 Pa. St. 408 473
In re Roberts' Estate, 84 Wash. 163 717
In re Robinson, 6 Mich. 137 662
In re Robinson's Estate, 149 Pa. St. 418 48
In re Rogers, 131 Pa. St. 382 87, 711
In re Rose's Estate, 63 Cal. 346 583
In re Rosher, 26 Ch. Div. 801 47
In re Ross, 140 Cal. 282 734
In re Rowan, 6 Pa. Co. Ct. 461 712
In re Rubel, 166 Fed. 131 382
In re Russell, 168 N. Y. 169 471
In re Russell's Appeal, 15 Pa. St. 319 119
In re Russell's Estate, 150 Cal. 604 483
In re Rutaced Co., 137 App. Div. (N. Y.) 716 372
In re Ryan's Estate, 14 Wkly. Notes Cas. (Pa.) 79 716
In re Saunders, 129 App. Div. (N. Y.) 406 100
In re Schedel's Estate, 73 Cal. 594 466
In re Schlosser, 116 N. Y. 796 87
In re Scholl, 100 Wis. 650 719
In re Seager, 92 Mich. 186 65
In re Shedaker, 74 N. J. Eq. 802 87
In re Shillaber's Estate, 74 Cal. 144 487
In re Simons' Will, 55 Conn. 239 473
In re Simpson, 144 N. Y. S. 1099 708
In re Smith, 131 Cal. 433 708, 730
In re Smith, 4 Nev. 254 349
In re Smith's Estate, 144 Pa. St. 428 59, 339, 480
In re Soulard's Estate, 141 Mo. 642 59, 480
In re Spring's Estate, 216 Pa. 529 59
In re Standard Fuller's Earth Co., 186 Fed. 578 378
In re Starbuck, 63 Misc. (N. Y.) 156 64
In re Steckel, 64 Pa. St. 493 719
In re Steel, L. R. (1903) 1 Ch. 135, 467
In re Sternberg's Estate, 94 Iowa 305 491
In re Stickney's Will, 85 Md. 79 482
In re Stoner, 105 Fed. 752 385
In re Sullivan's Estate, 48 Wash. 631 726
In re Sunderland, 60 Iowa 732 718
In re Swenson's Estate, 55 Minn. 300 471
In re Swofford Bros. Dry Goods Co., 180 Fed. 549 377
In re Tappan's Appeal, 52 Conn. 412 474
In re Taylor, 20 N. Y. S. 960 90
In re Thomas, 199 Fed. 214 385
In re Thompson, 57 Hun (N. Y.) 419 110
In re Thompson's Appeal, 101 Pa. St. 225 313
In re Thompson's Estate, 26 S. Dak. 576 735
In re Thorne, 155 N. Y. 140 718
In re Title Guarantee & Trust Co., 195 N. Y. 339 459
In re Tobin's Estate, 139 Wis. 494 436
In re Tomlinson's Estate, 133 Pa. St. 245 487
In re Tupper, 163 Fed. 766 380
In re Turner, 82 Misc. (N. Y.) 25 456
In re Tuttle, 77 Conn. 310 708
In re Ulfelder Clothing Co., 98 Fed. 409 381
In re Underbill, 62 Misc. (N. Y.) 456 711
In re Union College, 129 N. Y. 308 645
In re Varner's Appeal, 80 Pa. St. 140 59
In re Verplanck, 91 N. Y. 439 653
In re Vigilancia, 68 Fed. 781 433
In re Walkerly's Estate, 108 Cal. 627 43, 482, 484
In re Walker's Estate, 5 Ariz. 70 719
In re Walker's Estate, 110 Cal. 387 457
In re Waln's Estate, 189 Pa. St. 631 483
In re Walter's Will, 64 Wis. 487 487
In re Wardell, 57 Cal. 484 720
In re Weir, 9 Dana (Ky.) 434 714
In re Wells, 113 N. Y. 396 734

[References are to Sections.]

In re Well's Estate, 69 Vt. 388 583
In re West, 128 Fed. 205 385
In re White, 135 Fed. 199 380
In re Williams, 62 Mo. App. 339 737
In re Witter, 15 N. Y. S. 133 720
In re Woltemate's Appeal, 86 Pa. St. 219 719
In re Woodcock's Appeal, 103 Maine 214 466
In re Wood's Appeal, 82 Pa. St. 116 117, 122
In re Woodward, 81 Conn. 152 718
In re Young's Estate, 123 Cal. 337 487
In re Zeile, 74 Cal. 125 452
Interior & W. Va. R. Co. v. Epling, 70 W. Va. 6 722
International Harvester Co. v. Myers, 86 Kans. 497 434
Iowa v. McFarland, 110 U. S. 471 210
Iowa Land Co. v. Douglas Co., 8 S. Dak. 491 630
Irvine v. McCreary, 108 Ky. 495 506
v. Marshall, 20 How. (U. S.) 558 180
v. Tarbat, 105 Cal. 237 220
Irving v. Diamond, 23 Okla. 325 724
v. Ford, 183 Mass. 448 719
Irwin v. Jeffers, 3 Ohio St. 389 592
v. Welch, 10 Nebr. 479 120
Irwin, In re, 177 Fed. 284 378
Iseman v. McMillan, 36 S. Car. 27 591
Ison v. Halcomb, 136 Ky. 523 705
Ives v. McNicoll, 59 Ohio St. 402 719
v. Sanguinetti, 10 Ariz. 83 370
Izard v. Bodine, 9 N. J. Eq. 309 664

J

Jack v. Weiennett, 155 Ill. 105 630
Jackson v. Aldrich, 13 Johns. (N. Y.) 106 51
v. Alexander, 3 Johns. (N. Y.) 484 299
v. Alsop, 67 Conn. 249 85
v. Bank of United States, 5 Cranch C. C. 1 566
v. Bard, 4 Johns. (N. Y.) 230 101
v. Bull, 10 Johns. (N. Y.) 148 46
v. Conlin, 50 Ill. App. 538 30, 31
v. Dines, 13 Colo. 90 212
v. Embler, 14 Johns. (N. Y.) 198 49
v. Fish, 10 Johns. (N. Y.) 456 299
v. Fitzsimmons, 10 Wend. (N. Y.) 9 732
v. Green, 112 Ind. 341 278
v. Hendricks, 3 Johns. Cas. 214 709
v. Hocke, 171 Ind. 371 717
v. Jackson, 78 Ky. 390 719
v. Jackson, 6 Dana (Ky.) 257 487
v. Jackson, 56 S. Car. 346 470
v. Johnson, 5 Cow. (N. Y.) 75 64
v. Littell, 213 Mo. 589 46
v. Lynch, 129 Ill. 72 419
v. McCarron, 77 Kans. 776 643
v. Merrill, 6 Johns. (N. Y.) 185 46
v. Moore, 8 Dana (Ky.) 170 719
v. Newton, 18 Johns. (N. Y.) 355 73
v. Parker, 9 Cow. (N. Y.) 72 40
v. Rogers, 1 Johns. Cas. (N. Y.) 33 51
v. Root, 18 Johns. (N. Y.) 60 106, 299, 306
v. Rowell, 87 Ala. 685 487
v. Scott, 67 Ala. 99 595
v. Stackhouse, 1 Cow. (N. Y.) 122 306
v. State, 104 Ind. 516 650
v. Tribble, 156 Ala. 480 28, 442
v. Van Zandt, 12 Johns. (N. Y.) 169 48
Jackson
v. Weaver, 138 Ind. 539 674
v. Wells, 9 Johns. (N. Y.) 222 46
v. Winslow, 9 Cow. (N. Y.) 13 99
v. Wood, 12 Johns. (N. Y.) 73 93
Jacobs v. All Persons, 12 Cal. App. 163 274
v. Knapp, 50 N. H. 71 518
v. Miller, 50 Mich. 119 321
v. Roach, 161 Ala. 201 275
Jacob Tome Institute v. Davis, 87 Md. 591 70
Jacobus v. Mut. Benefit Life Ins. Co., 27 N. J. Eq. 604 535
Jacoway v. Gault, 20 Ark. 190 120, 330
Jaeger v. Hardy, 48 Ohio St. 335 127, 692
Jaffray v. McGehee, 107 U. S. 361 373
James v. Germania Iron Co., 107 Fed. 597 228
v. James, 51 Wash. 60 676
v. Morey, 6 Johns. Ch. (N. Y.) 417 121
Jameson v. James, 155 Cal. 275 229
Jamieson v. Knights Templar &c. Assn., 9 Ohio Dec. (Reprint) 388 714
Jamison v. Fopiana, 43 Mo. 565 503, 504
v. Hay, 46 Mo. 546 734
Janes v. Wilkinson, 2 Kans. App. 361 229
v. Williams, 31 Ark. 175 492
Janney v. Sprigg, 7 Gill (Md.) 179 64
Jarboe v. Hey, 122 Mo. 341 714
Jarrell v. Crow, 30 Tex. Civ. App. 629 263
v. French, 43 W. Va. 456 325
Jarrett v. Stevens, 36 W. Va. 445 222
Jarvais v. Moe, 38 Wis. 440 66
Jarvis v. Aikens, 25 Vt. 635 99
v. Armstrong, 94 Miss. 145 431
v. Lynch, 157 N. Y. 445 668
Jasper v. Wilson, 14 N. Mex. 482 27
Jecko v. Taussig, 45 Mo. 167 42
Jefferson v. Burhans, 85 Fed. 924 443
v. Coleman, 110 Ind. 515 674
v. Curry, 71 Mo. 85 611
v. Whipple, 71 Mo. 519 527
Jencks v. Smith, 1 N. Y. 90 124
Jenkins v. Dewey, 49 Kans. 49 699
v. Harrison, 66 Ala. 345 508
v. Trager, 40 Fed. 726 224
Jenkins Land & Live Stock Co. v. Attwood, 80 Nebr. 806 597
Jennings v. Dixey, 36 N. J. Eq. 490 129
v. Dockham, 99 Mich. 253 288
v. Jenkins, 9 Ala. 285 592, 597
v. Jennings, 21 Ohio St. 56 456
Jennisons v. Leonard, 21 Wall. (U. S.) 302 74
Jensen v. Woodbury, 16 Iowa 515 616
Jeremy's Estate, In re, 178 Pa. St. 477 46
Jerome v. Ortman, 66 Mich. 668 280
Jersey City v. Bayonne (N. J. L.), 76 Atl. 1010 677
Jessop v. Kittanning Borough, 225 Pa. 583 578
Jewell v. Jewell, 28 Cal. 232 87, 713
v. Knight, 123 U. S. 426 371
v. Porter, 11 Fost. (N. H.) 34 99
Jobson, In re, 164 Cal. 312 718
Jochumsen v. Suffolk Sav. Bank, 3 Allen (Mass.) 87 90
Jockheck v. Board of Comrs., 53 Kans. 780 109
Johanson v. Washington, 190 U. S. 179 208
Johnes v. Jackson, 67 Conn. 81 491
Johnson v. Adams, 92 Ga. 551 371
v. Antrikin, 205 Mo. 244 737
v. Bantock, 38 Ill. 111 347
v. Beard, 93 Ala. 96 436
v. Bodine, 108 Iowa 594 719
v. Brasington, 156 N. Y. 181 464

[*References are to Sections.*]

Johnson
v. Brauch, 9 S. Dak. 116 99
v. Brewer, 134 Ga. 828 370, 371
v. Bush, 3 Barb. Ch. (N. Y.) 207 330
v. Carter, 16 Mass. 443 52
v. Collins, 116 Mass. 392 523
v. Cooper, 56 Miss. 608 106
v. Delome L. &c. Co., 77 Miss. 15 46
v. Elwood, 53 N. Y. 431 644
v. Gilfillan, 8 Minn. 395 203
v. Harrison, 41 Wis. 381 66
v. Hart, 6 Watts & S. (Pa.) 319 321
v. Hess, 126 Ind. 298 580
v. Hines, 61 Md. 122 353
v. Hollensworth, 48 Mich. 140 278
v. Jacob, 11 Bush (Ky.) 646 65
v. Johnson, 14 Idaho 561 227
v. Johnson, 170 Mo. 34 334
v. Johnson, 13 R. I. 467 53
v. Jouchert, 124 Ind. 105 263
v. Knights of Honor, 53 Ark. 255 714
v. Lewis, 47 Ark. 66 61
v. Longmire, 39 Ala. 143 678
v. Lybrook, 16 Ind. 473 708
v. McKay, 119 Ga. 196 423
v. Merithew, 80 Maine 111 90
v. Pacific Coast Steamship Co., 2 Alaska 224 226
v. Perley, 2 N. H. 56 65
v. Phillips, 85 Ark. 86 730
v. Poulson, 32 N. J. Eq. 390 451
v. Robinson, 68 Tex. 399 372
v. Thweatt, 18 Ala. 741 262, 315
v. United R. Co., 227 Mo. 423 673
v. United States, 163 Fed. 30 378
v. Van Velsor, 43 Mich. 208 120
v. Washington Loan &c. Co., 224 U. S. 224 459
v. Webber, 65 Conn. 501 466
v. White, 76 Kans. 159 460
v. Williams, 37 Kans. 179 278
Johnson, In re, 30 Ch. Div. 42 8
Johnston v. Camby, 29 Md. 211 126
v. Chesson, 59 N. Car. 146 711
v. McIntosh, 8 Wheat. (U. S.) 543 107
v. Mendenhall, 9 W. Va. 112 398
v. Sutton, 45 Fed. 296 645
Joliet Stove Works v. Kiep, 230 Ill. 550 633
Jones v. Allen, 88 Ky. 381 615
v. Billstein, 28 Wis. 221 723
v. Bragg, 33 Mo. 337 65
v. Byrne, 149 Fed. 457 59
v. Cable, 114 Pa. St. 586 326
v. Chandler, 40 Ind. 588 321
v. Clifton, 101 U. S. 225 320, 323
v. Davis, 121 Ala. 348 430
v. Devore, 8 Ohio St. 430 633
v. Fisher, 88 Nebr. 627 438
v. French, 92 Ind. 138 593
v. Gardner, 10 Johns. (N. Y.) 269 75
v. Habersham, 107 U. S. 174 456, 458
v. Hartford Ins. Co., 88 N. Car. 499 660
v. Jones, 37 Ala. 646 734
v. Jones, 28 Ark. 19 65
v. Jones, 46 Iowa 466 737
v. Jones, 223 Mo. 424 59
v. Jones, 108 N. Y. 415 663
v. Leeds, 41 Ind. App. 164 718
v. Manly, 58 Mo. 559 67
v. Minogue, 29 Ark. 637 578
v. Parker, 163 Mass. 564 408
v. Petaluma, 38 Cal. 397 215
v. Porter, 59 Miss. 628 673
v. Powers, 65 Tex. 207 124
v. Rees, 6 Pennew. (Del.) 504 465
v. Smith, 55 Tex. 383 348
Jones
v. Stites, 19 N. J. Eq. 324 49
v. Taylor, 7 Tex. 240 74, 360
v. Warnock, 67 Ga. 484 364, 601
v. Webb, 22 Ky. L. 1100 622
v. Williams, 155 N. Car. 179 595
Joplin Brewing Co. v. Payne, 197 Mo. 422 73
Jordan v. McClure, 85 Pa. St. 495 45
v. Mead, 12 Ala. 247 126
v. Roach, 32 Miss. 481 48
v. Sayre, 29 Fla. 100 638
Joslin v. Joslin (Iowa), 75 N. W. 487 87
Jossey v. White, 28 Ga. 265 49
Journell v. Leighton, 49 Iowa 601 716
Joy v. McKay, 70 Cal. 445 51
Joyce v. Hamilton, 111 Ind. 163 737
Judd v. Fairs, 53 Mich. 518 53
Juhan v. Juhan, 104 Ga. 253 618
Justen v. Schaaf, 175 Ill. 45 240
Justice v. Souder, 19 N. Dak. 613 431

K

Kahn v. Kuhn, 44 Ark. 404 659
Kaiser v. Earhart, 64 Miss. 492 99
Kane v. Rippey, 22 Ore. 296 3, 6, 10, 35, 75, 77
Kane's Estate, In re, 38 Misc. (N. Y.) 276 87
Kanne v. Otty, 25 Ore. 531 227
Kansas City v. Marsh Oil Co., 140 Mo. 458 109
Kansas City Land Co. v. Hill, 87 Tenn. 589 129
Kansas City L. & S. K. R. Co. v. Attorney-General, 118 U. S. 682 212
Kaphan v. Toney (Tenn. Ch. App.) 58 S. W. 909 59
Karchner v. Hoy, 151 Pa. St. 383 45, 274
Karr v. Burns, 1 Kans. App. 232 547
Kaser v. Haas, 27 Minn. 406 572
Kaufman v. Anderson, 31 Ky. L. 888 466
v. Cook, 114 Ill. 11 51
Kawananakoa v. Polyblank, 205 U. S. 349 674
Kay v. Pennsylvania R. Co., 65 Pa. St. 273 62
v. Scates, 37 Pa. St. 31 58
Kazebeer v. Nunemaker, 82 Nebr. 732 363
Keagy v. Trout, 85 Va. 390 424
Kearnes v. Hill, 21 Fla. 185 118
Kearney v. Kearney, 17 N. J. Eq. 59 49
v. Taylor, 15 How. (U. S.) 494 645
Keaton v. Snider, 14 Ind. App. 66 656
Keech v. Enriquez, 28 Fla. 597 120
Keegan v. Geraghty, 101 Ill. 26 718
v. Kinnare, 123 Ill. 280 53
Keen v. Board, 8 S. Dak. 558 213
Keepfer v. Force, 86 Ind. 81 643
Keever v. Hunter, 62 Ohio St. 616 736
Keith v. Ault, 144 Ind. 626 718
v. Eaton, 58 Kans. 732 456
v. Keith, 97 Mo. 223 119
Keith & Perry Coal Co. v. Bingham, 96 Mo. 96 126
Keller v. Auble, 58 Pa. St. 410 722
v. Harper, 64 Md. 74 87
Kelleran v. Brown, 4 Mass. 443 419
Kellett v. Shepard, 139 Ill. 433 464
Kelley v. Dearman, 65 W. Va. 49 323
v. Kelley, 80 Wis. 486 651
v. Meins, 135 Mass. 231 472
Kelly v. Calhoun, 95 U. S. 710 283, 330
v. Cotton Belt Lumber Co., 74 Ark. 400 207
v. Donahoe, 2 Metc. (Ky.) 482 110
v. Kelly, 126 Ill. 550 575

[*References are to Sections.*]

Kelly
v. McGuire, 15 Ark. 555 87, 730
v. Neely, 12 Ark. 657 726
v. Nichols, 18 R. I. 62 720
v. Richardson, 100 Ala. 584 455
Kelsey v. Crouther, 7 Utah 519 35
v. Dunlap, 7 Cal. 160 120
v. Remer, 43 Conn. 129 523
Kenaston v. Riker, 146 Mich. 163 501
Kendall v. Clapp, 163 Mass. 69 46, 464
Kendrick v. Latham, 25 Fla. 819 73, 691
Kennard v. Louisiana, 92 U. S. 480 65
v. Mabry, 78 Tex. 151 121
Kennedy v. Alexander, 21 App. D. C. 424 477
v. Duncan, 157 Mo. App. 212 66
v. Harden, 92 Ga. 230 124
v. Haskell, 67 Kans. 612 325
v. Kennedy, 29 N. J. L. 185 65
v. Northup, 15 Ill. 148 118
Kennedy Stave & Cooperage Co. v. Sloss-Sheffield Steel &c. Co., 137 Ala. 401 61
Kennett v. Kidd, 87 Kans. 652 458
Kenney v. Parks, 125 Cal. 146 453
Kenny v. McKenzie, 25 S. Dak. 485 100
Kent v. Barker, 68 Mass. 535 717
v. McCann, 52 Ill. App. 305 65
v. Owenshoro Deposit Bank, 91 Ky. 70 714
v. Williams, 146 Cal. 3 119, 121, 394, 433
Kentucky Distilleries Co. v. Blanton, 149 Fed. 31 32
Kentucky Lumber Co. v. Green, 87 Ky. 257 272
Kenyon v. Charlevoix Imp. Co., 135 Mich. 103 13, 750
Kepecs, In re, 123 N. Y. S. 872 379
Kerfoot v. Cronin, 105 Ill. 609 433
Kernan v. Griffith, 27 Cal. 87 207
Kerner v. McDonald, 60 Nebr. 663 321
Kerr v. Freeman, 33 Miss. 292 301, 306
v. Hoskinson, 5 Kans. App. 193 528
v. Kingsbury, 39 Mich. 150 434
v. Moon, 9 Wheat. (U. S.) 565 724
v. Moore, 54 Miss. 286 537
v. Russell, 69 Ill. 666 324
v. West Shore R. Co., 127 N. Y. 269 109
Kessler v. State, 24 Ind. 313 122
Ketchin v. McCarley, 26 S. Car. 1 572
Keuthan v. St. Louis Trust Co., 101 Mo. App. 1 773
Kew v. Trainor, 150 Ill. 150 408
Kidd v. Central Trust &c. Co., 23 Ky. L. 1402 187, 224
Kidder's Exrs. v. Kidder (N. J. Eq.), 56 Atl. 154 720
Kidwell v. Kidwell, 84 Ind. 224 723
Kieser v. Baldwin, 62 Ala. 526 429
Kiger v. Terry, 119 N. Car. 456 737
Kihlken v. Kihlken, 59 Ohio St. 106 708
Kilbourn v. Sunderland, 130 U. S. 505 651
Kilburn v. Adams, 7 Metc. (Mass.) 33 102
Kilgore v. Kilgore, 127 Ind. 276 87, 710
Kilpatrick v. Baltimore, 81 Md. 179 54
Kilroy v. Mitchell, 2 Wash. 407 578
Kimball v. Blaisdell, 5 N. H. 533 303
v. Connolly, 3 Keyes (N. Y.) 57 12, 16, 18, 19, 21
v. Semple, 25 Cal. 440 284, 297, 301
Kimm v. Griffin, 67 Minn. 25 507
Kimmell v. Meier, 106 Ill. App. 251 350
Kimmel's Estate, In re, 226 Pa. 47 100
Kimmerly v. McMichael, 83 Nebr. 789 568
Kincaid v. Howe, 10 Mass. 203 422
Kinder v. Scharff, 125 La. 594 575
King v. Booth, 94 Ark. 306 634
v. Boyd, 4 Orc. 326 723
v. Clark, 7 Mo. 269 581
v. Cole, 6 R. I. 584 46
v. Gunnison, 4 Pa. St. 171 345
v. Kilbride, 58 Conn. 109 316
v. Middleborough Town &c. Co., 106 Ky. 73 87, 730
v. Mullins, 171 U. S. 404 113
v. Pillow, 90 Tenn. 287 655
v. Portis, 77 N. Car. 25 124
v. Rea, 56 Ind. 1 322
v. Rhew, 108 N. Car. 696 262
v. Samuel, 7 Cal. App. 55 642
v. Savage, 121 Mass. 303 712
v. Sears, 91 Ga. 577 314
Kingsbury v. Cornelson, 122 Ill. App. 495 393
Kingsley v. Kingsley, 39 Cal. 665 66
Kingston v. Guck, 155 Mich. 264 687
Kinna v. Smith, 3 N. J. Eq. 14 437
Kinney v. Keplinger, 172 Ill. 449 476
v. Lee, 10 Tex. 155 658
v. Vinson, 32 Tex. 125 960
Kinports v. Boynton, 120 Pa. St. 306 566
Kintner v. Jones, 122 Ind. 148 339
Kipp v. Cook, 46 Minn. 535 654
Kirby v. Harrison, 2 Ohio St. 326 673
v. Kirby, 236 Ill. 255 688
v. Runals, 140 Ill. 289 577
v. Tallmadge, 160 U. S. 379 434
Kirkland v. Cox, 94 Ill. 400 58
v. Trott, 75 Ala. 321 546
Kirkpatrick v. Kirkpatrick, 197 Ill. 144 65
Kirskey v. Cole, 47 Ark. 504 66
Kirsch v. Tozier, 143 N. Y. 390 129, 338
Kiser v. Heuston, 38 Ill. 252 122
Kissel's Estate, In re, 65 Misc. (N. Y.) 443 631
Kissinger v. Zieger, 138 Wis. 368 611, 613, 616
Kister v. Reeser, 98 Pa. St. 1 275, 506
Kisterson v. Tate, 94 Iowa 665 565
Kitchell v. Young, 46 N. J. Eq. 506 473
Kitsmiller v. Kitchen, 24 Iowa 163 659
Kittell v. Steger, 121 Tenn. 400 690
Kittredge v. Bellows, 7 N. H. 399 522
Klabunde v. Casper, 139 Wis. 491 286
Klauber v. Higgins, 117 Cal. 451 224, 226
Kleespies v. McKenzie, 12 Ind. App. 404 53
Kleimann v. Gieselman, 114 Mo. 437 66
Kling v. Schnellbecker, 107 Iowa 636 459
Klondyke Lumber Co. v. Williams, 71 Ark. 334 533
Klumpke v. Baker, 68 Cal. 559 99
Klussman v. Wessling, 238 Ill. 568 401
Knabe v. Burden, 88 Ala. 436 192, 228
Knapp v. Alexander-Edgar Lumber Co., 145 Wis. 528 192
v. Bailey, 79 Maine 195 127
v. Lee, 3 Pick. (Mass.) 452 398
v. Smith, 27 N. Y. 277 336
v. Windsor, 6 Cush. (Mass.) 156 711
Knight v. Coleman, 117 Ala. 266 424
v. Hollings, 73 N. H. 495 491
v. Indiana Coal &c. Co., 47 Ind. 105 51
v. Rothschild, 132 App. Div. (N. Y.) 274 561
v. Thayer, 125 Mass. 25 99, 322
v. Thomas, 35 Utah 470 503
Knighton v. Smith, 1 Ore. 276 283
Knost v. Knost, 229 Mo. 170 477
Knoth v. Manhattan R. Co., 187 N. Y. 243 109

[References are to Sections.]

Knott v. Shepherdstown Mfg. Co., 30 W. Va. 790 516
Knowles v. Knowles, 132 Ga. 806 481
Knowlson v. Fleming, 165 Pa. St. 10 311
Knowlton v. Walker, 13 Wis. 264 121
Knox v. Knox, 59 Wis. 172 59
v. Paull, 95 Ala. 505 491
Knox Co. v. Brown, 103 Mo. 223 120
Knudsen v. Hannberg, 8 Utah 203 66
Koch v. Briggs, 14 Cal. 256 357
v. Streuter, 232 Ill. 594 210, 289
Kochersperger v. Drake, 167 Ill. 122 724
Koelle v. Knecht, 99 Ill. 396 506
Koerper v. St. Paul &c. R. Co., 40 Minn. 132 124
Kohl v. Kohl, 143 Wis. 214 676
v. United States, 91 U. S. 367 85, 109
Kohn v. Lapham, 13 S. Dak. 78 545
Kommer v. Harrington, 83 Minn. 114 656
Kondolf v. Britton, 160 App. Div. (N. Y.) 381 466
Kopmier's Will, In re, 113 Wis. 233 453
Kopp v. Herrman, 82 Md. 339 73
Korn v. Cutler, 26 Conn. 4 467
Kortright v. Cady, 21 N. Y. 343 429
Kountz v. Davis, 34 Ark. 590 87
Kraft v. Holzman, 206 Ill. 548 119
v. Welch, 112 Iowa 695 407
Krechter v. Grofe, 166 Mo. 385 467
Krueger v. Knab, 22 Wis. 429 643
Krug v. Davis, 87 Ind. 590 719
Kruse v. Wilson, 79 Ill. 233 297
Kuby v. Ryder, 114 Minn. 217 955
Kuecken v. Voltz, 110 Ill. 264 61
Kuhn v. Smith, 125 Cal. 615 51
Kuhn's Estate, In re, 125 Iowa 449 733
Kunes v. McCloskey, 115 Pa. St. 461 633
Kurtz v. Hollingshead, 4 Cranch C. C. (U. S.) 180 265
Kurtz's Estate, In re, 145 Pa. St. 637 466
Kuteman v. Carroll (Tex.), 80 S. W. 842 434
Kutz v. McCune, 22 Wis. 628 506
Kyle v. Kavanagh, 103 Mass. 356 301
v. Kyle, 50 Ind. 387 660
v. Thompson, 11 Ohio St. 616 433

L

La Barre v. Bent, 154 Mich. 520 698
Lacassagne v. Chapuis, 144 U. S. 119 133
Lacey v. Floyd, 99 Tex. 112 483
Lachman v. People, 127 N. Y. S. 912 955, 956
Ladd v. Dickey, 84 Maine 190 636
Ladies Seamen's Friends' Soc. v. Halstead, 58 Conn. 144 104
Lafferty v. Milligan, 165 Pa. St. 534 527, 632
Lagrave v. Hellinger, 144 App. Div. (N. Y.) 39 578
Lahr v. Ulmer, 27 Ind. App. 107 623
Laidley v. Kline, 8 W. Va. 218 723
Lain v. Cook, 15 Wis. 446 643
Lake v. Doud, 10 Ohio 415 287
v. Gray, 35 Iowa 44 640
v. Hood, 35 Tex. Civ. App. 32 491
v. Jarrett, 12 Ind. 395 670
Lake Erie & W. R. Co. v. Michener, 117 Ind. 465 62
v. Priest, 131 Ind. 413 313
v. Whitham, 155 Ill. 514 105, 265
Lake Shore &c. R. Co. v. Platt, 53 Ohio St. 254 272
Lakin v. Ames, 10 Cush. (Mass.) 198 62
Lally v. New York Cent. &c. R. Co., 123 App. Div. (N. Y.) 35 669
Lamar v. Scott, 3 Strob. (S. Car.) 562 675
Lamar Water Co. v. Lamar, 128 Mo. 188 647
Lamb v. Danforth, 59 Maine 322 506
v. Pierce, 113 Mass. 72 127, 692
Lambe v. Drayton, 182 Ill. 110 468
Lambert v. Newman, 56 Ala. 623 127
v. Paine, 3 Cranch (U. S.) 97 46
Lamont v. Cheshire, 65 N. Y. 30 546
Lampert v. Haydel, 96 Mo. 439 478
Lampman v. Milks, 21 N. Y. 505 61
Lamprey v. State, 52 Minn. 181 103, 104
Lamson v. Hutchings, 118 Fed. 321 560
Lancaster v. Lancaster, 187 Ill. 540 471
Land v. Jeffries, 5 Rand. (Va.) 211, 599 315
Landes v. Brant, 10 How. (U. S.) 348 360
v. Perkins, 12 Mo. 238 618
Landreaux v. Foley, 13 La. Ann. 114 347
Lane v. McKinstry, 31 Ohio St. 640 716
v. Utz, 130 Ind. 235 465
Lane's Appeal, 57 Conn. 182 456
Lang v. Everling, 3 Misc. (N. Y.) 530 356
v. Stansel, 106 Ala. 389 442
Langdean v. Hanes, 88 Wall (U. S.) 21 95, 221
Langdon v. Ingram, 28 Ind. 360 47
v. New York, 93 N. Y. 129 227
v. Sherwood, 124 U. S. 74 221
Lange v. Waters, 156 Cal. 142 393
Langley v. Chapin, 134 Mass. 82 633, 642
Langslow v. Cox, 1 Chit. 98 30
Lanham v. Wilson, 15 Ky. L. 109 48
Lanier v. Booth, 50 Miss. 410 61
Lanigan v. Sweany, 53 Ark. 185 437
Lanman v. Crooker, 97 Ind. 163 272
La Plante v. Lee, 83 Ind. 155 601
Lara v. Peterson, 56 Wash. 70 643
Large v. Fisher, 49 Mo. 307 636
Lariverre v. Rains, 112 Mich. 276 442
Larkin v. Avery, 23 Conn. 304 53
Larkins v. Bullard, 88 N. Car. 35 660
Larned v. Hudson, 60 N. Y. 102 51
Larrahee v. Hascall, 88 Maine 511 339
v. Tucker, 116 Mass. 562 87
Larwill v. Ewing, 73 Ohio St. 177 734
Lash v. Lash, 57 Iowa 88 731
Lathers v. Keogh, 109 N. Y. 583 632
Lathrop v. Young, 25 Ohio St. 451 718
Latta v. Clifford, 47 Fed. 614 687
v. Wiley (Tex. Civ. App.), 92 S. W. 433 545, 549
Lattin v. Gillette, 95 Cal. 317 10, 15, 16, 23
Lauer v. Lee, 42 Pa. St. 165 399
Laughlin v. Reed, 89 Maine 226 374
Laughlin Bros. & Co. v. Fream, 14 W. Va. 322 324
Laughran v. Smith, 75 N. Y. 205 53
Laumier v. Francis, 23 Mo. 181 61
Lavery v. Egan, 143 Mass. 389 707
Lavin v. Dodge, 30 R. I. 8 668
Law v. Douglass, 107 Iowa 606 461
v. Smith, 2 R. I. 244 737
La Wall v. Groman, 180 Pa. St. 532 18, 23
Law Guarantee & Trust Co. v. Jones, 103 Tenn. 245 60
Lawless v. Stamp, 108 Iowa 601 346
Lawley v. Keyes, 172 Iowa 320 731
Lawrence v. Lawrence, 181 Ill. 248 341, 354
v. Lawrence, 145 Ky. 61 638
v. Lawrence, 82 S. Car. 150 665
v. Springer, 49 N. J. Eq. 289 506

[References are to Sections.]

Lawrence's Estate, In re, 136 Pa. St. 354 482
Lawson v. De Bolt, 78 Ind. 563 590
Lawton v. Gordon, 37 Cal. 202 122, 127
Lay v. Fuller (Ala.), 59 So. 609 719
Layton v. Herr, 45 Ind. App. 203 334
Leach v. Beattie, 33 Vt. 195 125
v. Burr, 188 U. S. 510 491
v. Minick, 106 Iowa 437 535
Learned's Estate, In re, 70 Cal. 140 456
Leathers v. Greenacre, 53 Maine 561 454
Leavell v. Poore, 91 Ky. 321 548
Leavitt v. Thornton, 123 App. Div. (N. Y.) 683 106
Le Beau v. Armitage, 47 Mo. 138 106
Le Blond v. Peshtigo, 140 Wis. 604 61
LeBreton v. Cook, 107 Cal. 410 470
Lecomte v. Pennock, 61 Kans. 330 420
Lecroix v. Malone, 157 Ala. 434 354
Ledbetter v. Borland, 128 Ala. 418 224, 228
Leddy v. Enos, 6 Wash. 247 304
Ledoux v. Lavedan, 52 La. Ann. 311 112
Lee v. Belknap, 163 Ky. 418 724
v. Bermingham, 30 Kans. 312 117, 122
v. Evans, 8 Cal. 424 420
v. Giles, 161 N. Car. 541 434
v. Lee, 161 Mo. 52 719
v. Lindell, 22 Mo. 202 65
v. Richmond, 90 Iowa 695 286
Leeper v. Neagle, 94 N. Car. 338 49
Leese v. Clark, 20 Cal. 387 221
Leger v. Doyle, 11 Rich. (S. Car.) 109 123
Lego v. Medley, 79 Wis. 211 674
Lehigh Valley R. Co. v. McFarlan, 31 N. J. Eq. 706 102
Lehigh & N. E. R. Co. v. Hanhauser, 222 Pa. 248 566
Lehman v. Chambersburg &c. R. Co., 224 Pa. 276 677
v. Collins, 69 Ala. 127 417
Lehman-Durr Co. v. Griel Bros. Co., 119 Ala. 262 371
Lehndorf v. Cope, 122 Ill. 317 48, 304
Leigh v. Leigh, 15 Ves. 92 89
Leland v. Adams, 9 Gray (Mass.) 171 46
Le Marchel v. Teagarden, 152 Fed. 662 228
Lembeck & Bretz Eagle Brewing Co. v. Kelly, 63 N. J. Eq. 401 119
Lemen, In re, 208 Fed. 80 378
Lemon v. Graham, 131 Pa. St. 447 45, 268, 309
v. Staats, 1 Cow. (N. Y.) 592 122
Lenders v. Thomas, 35 Fla. 518 546
Lenfers v. Henke, 73 Ill. 405 675
Lenning v. White (Va.), 20 S. E. 831 637
Lenox v. Reed, 12 Kans. 223 358
Leonard v. Adams, 119 Mass. 366 61
v. Leonia Hights Land Co., 81 N. J. Eq. 489 438
v. Lining, 57 Iowa 648 87
Leon Loan &c. Co. v. Equalization Board, 86 Iowa 127 36
Leprell v. Kleinschmidt, 49 Hun. (N. Y.) 605 668
Le Roy v. Beard, 8 How. (U. S.) 451 336
v. Jamison, 3 Sawy. (U. S.) 369 223
Les Bois v. Bramell, 4 How. (U. S.) 449 214
Lese v. Lamprecht, 196 N. Y. 32 399
Leslie v. Hinson, 83 Ala. 266 122
Lessell v. Goodman, 97 Iowa 681 66
Lessenich v. Sellers, 119 Iowa 314 735
Lester v. Brown, 57 Ga. 79 568
Levengood's Estate, 38 Pa. Super. Ct. 491 612
Levi v. Thompson, 4 How. (U. S.) 17 197
Leviston v. Swan, 33 Cal. 480 578
Levy v. McCartee, 6 Pet. (U. S.) 102 732
v. McDonnell, 92 Ark. 324 297
Lewis v. Baird, 3 McLean (U. S.) 56 124
v. Boskins, 27 Ark. 61 417
v. Chamberlain, 61 Ore. 150 957
v. Gorman, 5 Pa. St. 164 708
v. Harrower, 197 Ill. 315 470
v. Hawkins, 23 Wall. (U. S.) 119 392
v. Hinman, 56 Conn. 55 122
v. Shaw, 70 Fed. 289 205
v. Shearer, 189 Ill. 184 306
v. Ward, 99 Ill. 525 638
Lewis' Estate, In re, 32 La. Am. 385 456
Lewis F. Perry &c. Co., In re, 172 Fed. 745 372, 375, 379
Lewis, In re, 29 Ont. 609 737
Liberty v. Burns, 114 Mo. 426 147
Lich v. Lich, 158 Mo. App. 400 466, 713
Lichter v. Thiers, 139 Wis. 481 466
Lickbarrow v. Mason, 6 East. 20, 24 518
Lidgerding v. Zignego, 77 Minn. 421 61
Ligare v. Semple, 32 Mich. 438 325
Lightcap v. Bradley, 186 Ill. 510 416, 520, 598
Lightfoot v. Horst (Tex. Civ. App.), 122 S. W. 606 622
Liginger v. Field, 78 Wis. 367 737
Lignoski v. Crooker, 86 Tex. 324 122
Likens v. McCormick, 39 Wis. 313 661
Lilly v. Boyd, 72 Ga. 83 18
v. Wooley, 94 N. Car. 412 736
Lime Rock Nat. Bank v. Mowry, 66 N. H. 598 428
Lincoln v. Lincoln, 107 Mass. 590 46
v. Perry, 149 Mass. 368 456, 464, 466
v. Thompson, 75 Mo. 613 101
Lincoln Bldg. & Sav. Assn. v. Hass, 10 Nebr. 581 132
Lind v. Burke, 56 Nebr. 785 719
Lindenmayer v. Gunst, 70 Miss. 693 694
Lindley v. O'Reilly, 50 N. J. L. 636 584
v. Smith, 46 Ill. 523 324
Lindsay v. Eastwood, 72 Mich. 336 526
v. Wilson, 103 Md. 252 460, 734
Lindsey v. Booge, 144 Iowa 168 642
Lindt v. Uihlein, 116 Iowa 48 687
Lineheck v. Vos, 160 Fed. 540 193
Lineberger v. Tidwell, 104 N. Car. 506 324
Lines v. Darden, 5 Fla. 51 59, 480
Lingen v. Lingen, 45 Ala. 410 718, 719
Link v. MacNabb, 111 Md. 641 274
Linton v. Wanke, 118 N. Y. S. 965 634
Lippincott v. Lippincott, 19 N. J. Eq. 121 359
v. Mitchell, 94 U. S. 767 320
v. Ridgway, 10 N. J. Eq. 164 60
v. Tilton, 14 N. J. L. 364 310
Lippitt v. Thames Loan &c. Co., 88 Conn. 185 316
Lisenby v. Newton, 120 Cal. 571 397
Litsey v. Phelps, 5 Ky. L. 513 722
Little v. Bennett, 58 N. Car. 156 479
v. Downing, 37 N. H. 355 690
v. Paddleford, 13 N. H. 167 299
Littlefield v. Tinsley, 26 Tex. 353 74
Livermore v. Maxwell, 87 Iowa 705 439
Livingston v. Murphy, 187 Mass. 315 301
v. Ruff, 65 S. Car. 284 70
v. Tanner, 14 N. Y. 64 52
Lloyd v. Tench, 2 Vesey 215 86
Lockerby v. Amon, 64 Wash. 24 397
Lockie v. Mutual Union Tel. Co., 103 Ill. 401 110
Lockridge v. McCommon, 90 Tex. 234 475

[References are to Sections.]

Lockwood v. Lockwood, 22 Conn. 425 51, 53
v. Noble, 113 Mich. 418 374
v. Title Ins. Co., 73 Misc. (N. Y.) 296 22
Lodge v. Fitch, 72 Nebr. 652 737
v. Swampscott, 216 Mass. 260 277
Loeser v. Savings Deposit Bank & Trust Co., 163 Fed. 212 568
Loftis v. Glass, 15 Ark. 680 731
Logan v. Davis, 147 Iowa 441 100
v. Pannill, 90 Va. 11 563
Logan, In re, 131 N. Y. 456 471
Logansport v. Case, 124 Ind. 254 633
Logue v. Hutson, 24 Ore. 528 699
Lomax v. Pickering, 173 U. S. 26 223
v. Pickering, 165 Ill. 431 119
Lombard v. Chicago Sinai Cong., 64 Ill. 477 333
v. Culbertson, 59 Wis. 433 135
Lone Tree Ditch Co. v. Rapid City Electric &c. Co., 16 S. Dak. 451 665
Long v. Abeles, 77 Ark. 156 535
v. Barnes, 87 N. Car. 329 321
v. Barton, 236 Ill. 551 676
v. Boast, 153 Ala. 428 645
v. Brown, 4 Ala. 622 208, 209
v. Buchanan, 27 Md. 502 62
v. Langsdale, 56 Ark. 239 692
v. Long, 142 N. Y. 545 601
v. Mostyn, 65 Ala. 543 431
Long Beach Land Co. v. Richardson, 70 Cal. 206 104, 272
Long-Bell Lumber Co. v. Martin, 11 Okla. 192 215
Longshore v. Longshore, 200 Ill. 470 735
Looker v. Peckwell, 38 N. J. L. 253 432
Loomis v. Jackson, 130 Mich. 594 36
Loosing v. Loosing, 85 Nebr. 66 47
Lord v. Comstock, 240 Ill. 492 338
Lorenz v. Orlady, 87 Pa. St. 226 375
Lorimer v. Wayne Circuit Judge, 116 Mich. 682 738
Loring v. Groomer, 110 Mo. 632 129
v. Oxford, 18 Tex. Civ. App. 415 25
v. Taylor, 50 Mo. App. 80 50
Loser v. Plainfield Sav. Bank, 149 Iowa 672 433
Losey v. Simpson, 11 N. J. Eq. 246 126, 128
Lothrop v. Foster, 51 Maine 367 325
Lott v. Wykoff, 2 N. Y. 355 42
Lougheed v. Dykeman's Baptist Church, 129 N. Y. 211 458
Loughridge v. Bowland, 52 Miss. 546 687, 692
Louisiana Ry. & Nav. Co. v. Madere, 124 La. 635 630
Louisiana Western R. Co. v. Crossman, 111 La. 611 677
Louisville & N. R. Co. v. Cullen, 32 Ky. L. 1110 270
v. Philyaw, 88 Ala. 264 691
v. Smith, 128 Fed. 1 694
v. Smith, 31 Ky. Law 1 693
Love v. Love, 8 Ore. 23 202
Lovejoy v. Albee, 33 Maine 414 655
v. Lunt, 48 Maine 377 661
v. Raymond, 58 Vt. 509 119
Loveland v. Loveland, 136 Ill. 75 311
Lovell v. Wall, 31 Fla. 73 201
Loveren v. Donaldson, 69 N. H. 639 734
Lovett v. Steam Saw Mill Assn., 6 Paige (N. Y.) 54 330
Lovin v. Carver, 150 N. Car. 710 185
Lovingston v. St. Clair Co., 64 Ill. 56 103
Low v. Fox, 56 Iowa 221 443
Lowe v. Maccubbin, 1 Harr. & J. (Md.) 550 730
v. Wiseman, 46 Ind. App. 405 737
Lowenstun v. Page, 16 Philippine 84 955
Lowery v. Baker, 141 Ala. 600 201
v. Harlow, 22 Colo. App. 73 720
v. Hawker, 22 N. Dak. 318 720
v. Peterson, 75 Ala. 109 392
Lowrie v. Ryland, 65 Iowa 584 49
Lowry v. Harris, 12 Minn. (Gil. 166) 255 119
Lucas v. Claffin, 76 Va. 269 117
v. Tucker, 17 Ind. 41 456
Luce v. Harris, 79 Pa. St. 432 730
v. Parsons, 192 Mass. 8 957
Luch's Appeal, In re, 44 Pa. St. 519 131
Lucier v. Marsales, 133 Mass. 454 444
Ludlow v. Park, 4 Ohio 5 583
Luetchford v. Lord, 132 N. Y. 465 436
Luhrs v. Hancock, 181 U. S. 567 307
Lum v. McCarty, 39 N. J. L. 287 137
Lumbard v. Aldrich, 8 N. H. 31 336
Lumpkin v. Muncey, 66 Tex. 311 124
Lundy v. Lundy, 24 Can. Sup. Ct. 650 733
Lunt v. Lunt, 71 Maine 377 436
Lurman v. Hubner, 75 Md. 268 699
Lusk v. Carlin, 4 Scam. (Ill.) 395 12, 21
Lyell v. Kennedy, 14 App. Cas. 437 709
Lyford v. Laconia, 75 N. H. 220 43
v. Ross, 33 Maine 197 437
Lyman v. Suburban R. Co., 190 Ill. 320 668
Lynch v. Livingston, 8 Barb. (N. Y.) 463 299
v. Lynch, 132 Cal. 214 730
v. Melton, 150 N. Car. 595 54
v. Pfeiffer, 110 N. Y. 33 428
v. United States, 13 Okla. 142 229
Lynch, In re, 132 Cal. 214 730
Lynde v. Williams, 68 Mo. 360 689
Lyon v. Clark, 132 Mich. 521 530
v. Harden, 129 Ala. 643 66
v. Kain, 36 Ill. 362 91, 262
v. Lyon, 88 Maine 395 714
Lytle v. Arkansas, 9 How. (U. S.) 314 117
v. Lytle, 48 Ind. 200 676
v. Lytle, 10 Watts (Pa.) 259 45

M

Maatta v. Kippola, 102 Mich. 116 66
Mabbett v. Vick, 53 Wis. 158 659
McAfee v. Reynolds, 130 Ind. 33 564
McAlister v. Burgess, 161 Mass. 269 466
McAllister v. Okanogan County, 51 Wash. 647 213
v. Tate, 11 Rich. L. (S. Car.) 509 46
McAlpine v. Reicheneker, 56 Kans. 100 31, 32
v. Smith, 68 Maine 423 659
McArthur v. Allen, Fed. Cas. No. 8659 48
v. Gallaher, 8 Ohio 512 203
v. Scott, 113 U. S. 340 49
Macauley v. Smith, 132 N. Y. 524 566
McBreen v. McBreen, 154 Mo. 323 64
McCabe v. Grey, 20 Cal. 509 125
McCabe, In re, 15 R. I. 330 708
McCalla v. Bane, 45 Fed. 828 311
McCallister v. Ross, 155 Mo. 87 357
McCall's Admr. v. Hampton, 98 Ky. 166 334
McCampbell v. Mason, 151 Ill. 500 138, 548
McCan, Succession of, 48 La. Ann. 145 480
McCann v. Rathbone, 8 R. I. 403 51

[*References are to Sections.*]

McCaraher v. Commonwealth, 5 Watts & S. (Pa.) 21 21
McCartney v. Osburn, 118 Ill. 403 456, 466, 584
McCauley v. Fulton, 44 Cal. 355 328
v. Mahon, 174 Ill. 384 668
McCaw v. Burk, 31 Ind. 56 737
McClain v. Capper, 98 Iowa 145 483
McClanahan v. Williams, 136 Ind. 30 91
McClaskey v. Barr, 54 Fed. 781 491
McClave v. McClave, 60 Nebr. 464 737
McCleery v. Lewis, 104 Maine 33 289
McClellan v. Mackenzie, 126 Fed. 701 476
v. Taylor, 54 S. Car. 430 667
McClelland v. Gasquet, 122 La. 241 676
McClenahan v. Stevenson, 118 Iowa 106 318
McClintock v. Joyner, 77 Miss. 678 408
McClung v. Steen, 32 Fed. 373 192
McClure v. Fairfield, 153 Pa. St. 411 65
v. Raben, 125 Ind. 139 334, 714
v. Smith, 14 Colo. 297 419
v. Spivey, 123 N. Car. 678 491
McComas v. Amos, 29 Md. 132 711
McConihe v. Fales, 107 N. Y. 404 316
McConnel v. Smith, 23 Ill. 611 46
McCord v. Eastern R. Co., 136 Wis. 254 109
v. Hames, 38 Tex. Civ. App. 239 722
v. Massey, 155 Ill. 123 521
McCormack v. First Nat. Bank, 53 Ind. 466 662
McCormick v. Parsons, 195 Mo. 91 426
v. Stephany, 57 N. J. Eq. 257 722
v. Wheeler, 36 Ill. 114 128
McCorry v. King, 3 Humph. (Tenn.) 267 54
McCoy v. Barns, 136 Ind. 378 273, 321, 470
McCracken v. Flanagan, 127 N. Y. 493 661
v. Rogers, 6 Wis. 278 87, 730
McCrae v. McCrae, 103 Tenn. 719 66
McCraney v. McCraney, 5 Iowa 232 65
McCrea v. Newman, 46 N. J. Eq. 473 316
McCrea, In re, 180 Pa. St. 81 714
McCready v. Sexton, 29 Iowa 356 643, 644
McCullough v. Lee, 7 Ohio 15 731
McCune v. Essig, 118 Fed. 273 200
v. Goodwillie, 204 Mo. 306 638
McCurdy v. Neall, 42 N. J. Eq. 333 455
v. Otto, 140 Cal. 48 58
McCurdy's Appeal, In re, 65 Pa. St. 290 674
McCusker v. McEvey, 9 R. I. 528 8, 99
McDaniel v. Texarkana Cooperage & Mfg. Co., 94 Ark. 235 631
McDill v. Meyer, 94 Ark. 615 268, 274
McDonald v. Cooper, 32 Fed. 745 661
v. Dexter, 234 Ill. 517 655
v. Dodge, 97 Cal. 112 502
v. Eggleston, 26 Vt. 154 337
v. Hannah, 51 Fed. 73 633
v. Rankin, 92 Ark. 173 551
v. Shaw, 81 Ark. 235 481
McDonough v. Martin, 88 Ga. 675 278, 301
McDougal v. Musgrave, 46 W. Va. 509 291
McDowell v. Addams, 45 Pa. St. 430 87, 89
v. People, 204 Ill. 499 504
McDuffie v. Montgomery, 128 Fed. 105 480
McEndree v. McEndree, 12 Ind. 97 571
McFarland v. McFarland, 177 Ill. 208 43, 46
McFarlane v. Kerr, 10 Bosw. (N. Y.) 249 689
McFarran v. Knox, 5 Colo. 217 119
McGahan v. Bank, 156 U. S. 218 262, 328
McGarrahan v. New Idria Min. Co., 49 Cal. 331 222
McGary v. McGary (Ky. App.), 105 S. W. 891 363
McGaw v. Gortner, 96 Md. 489 576
McGonigal v. Colter, 32 Wis. 614 714
McGovern v. Knox, 21 Ohio St. 551 318
v. McGovern, 75 Minn. 314 460
McGraw's Estate, In re, 111 N. Y. 66 458
McGreal v. Taylor, 167 U. S. 688 307
McGregor v. Comstock, 3 N. Y. 408 732
McGriff v. Porter, 5 Fla. 373 60
McGugin v. Ohio River R. Co., 33 W. Va. 63 534
McGuire v. Brown, 41 Iowa 650 719
v. Bryant Lumber &c. Co., 53 Wash. 425 560
v. Westmoreland, 36 Ala. 594 717
McGunnigle v. McKee, 77 Pa. St. 81 719
Machold v. Farnan, 20 Idaho 80 672
Machu, In re, 21 Ch. Div. 838 55
McIlhinny v. McIlhinny, 137 Ind. 411 48
McIlvaine v. Smith, 42 Mo. 45 57
McIlwrath v. Hollander, 73 Mo. 105 546
McInery v. Reed, 23 Iowa 410 636
McIntosh v. Bowers, 143 Wis. 74 434
v. Thurston, 25 N. J. Eq. 242 535
McIntyre v. Gelvin, 77 Kans. 779 730
v. McIntyre, 147 Mich. 365 101
v. Park, 11 Gray (Mass.) 102 337
v. Thompson, 4 Hughes (U. S.) 562 73
Mack v. Hill, 28 Mont. 99 672
McKean & Elk Land Imp Co. v. Mitchell, 35 Pa. St. 269 120
McKee v. Jones, 6 Pa. St. 425 64
v. Perchment, 69 Pa. St. 349 108
v. Wilcox, 11 Mich. 358 66
McKeithen v. Blue, 149 N. Car. 95 350
Mackellar v. Pillsbury, 48 Minn. 396 375
McKelvey v. McKelvey, 75 Kans. 325 65, 620
McKenna's Estate, In re, 168 Cal. 339 730
McKenzie v. Budd, 125 Cal. 600 583
Mackey v. Mackey, 71 N. J. Eq. 686 491
McKinney v. Mellon, 3 Houst. (Del.) 277 730
v. Miller, 19 Mich. 142 129
v. Rodgers (Tex. Civ. App.), 29 S. W. 407 335
v. Settles, 31 Mo. 541 290
McKinny v. Abbott, 49 Tex. 371 731
McKinzie v. Perrill, 15 Ohio St. 162 127
v. Stafford, 8 Tex. Civ. App. 121 284
McLanahan v. Reeside, 9 Watts (Pa.) 508 99
McLane v. Paschal, 47 Tex. 365 358
McLaren v. Clark, 80 Ga. 423 417
v. Jones, 89 Tex. 131 100
McLaughlin v. McLaughlin, 22 N. J. Eq. 505 67
McLean v. McLean, 92 Kans. 326 724
McLeod v. Lloyd, 43 Ore. 260 93
McLeran v. Benton, 73 Cal. 329 51
McLouth v. Hurt, 51 Tex. 115 120
v. Rathbone, 19 Ohio 21 345
McMahan v. Bowe, 114 Mass. 140 314
v. Jacoway, 105 Ala. 585 408
v. Kimball, 3 Blackf. (Ind.) 1 65
McMahon v. McGraw, 26 Wis. 614 638
v. Rowley, 238 Ill. 31 957
v. Russell, 17 Fla. 698 520
McMaken v. Niles, 91 Iowa 628 128
McMamee v. Huckabee, 20 S. Car. 190 123
McManus v. Carmichael, 3 Iowa 1 272
McMasters v. Negley, 152 Pa. St. 303 64
McMichael v. McMichael, 51 S. Car. 555 49

[*References are to Sections.*]

McMichael
v. Murphy, 12 Okla. 155 200
McMicken v. United States, 97 U. S. 204 180
McMillan v. Cox, 109 Ga. 42 472
v. Edwards, 75 N. Car. 81 348
v. First Nat. Bank, 56 Tex. Civ. App. 45 1
v. Peacock, 57 Ala. 127 320
v. Richards, 9 Cal. 365 520
v. State, 160 Ala. 115 723
McMillen v. Anderson, 95 U. S. 37 42
McMinn v. O'Connor, 27 Cal. 238 120
McMullen v. Eagan, 21 W. Va. 233 284
McMurphy v. Adams, 67 N. H. 440 316
McNally v. McNally, 23 R. I. 180 467
McNamara v. Culver, 22 Kans. 661 418
v. Fink, 71 Minn. 66 646
v. Seaton, 82 Ill. 498 271
McNaught v. McAllister, 93 Ind. 114 664
McNeal v. Sherwood, 24 R. I. 314 730
McNeely v. Langan, 22 Ohio St. 32 691
Macomb v. Miller, 9 Paige (N. Y.) 265 731
Macon &c. R. Co. v. Riggs, 87 Ga. 158 109
McParland v. Peters, 87 Nebr. 829 434
McPheeters v. Ronning, 95 Minn. 164 119
McPherson v. Hayward, 81 Maine 329 420
v. Rollins, 107 N. Y. 316 125
McPike v. Pen, 51 Mo. 63 636
McQuerry v. Gilliland, 89 Ky. 434 671
McQuesten v. Commonwealth, 198 Mass. 172 954, 955
McQuinn v. McQuinn, 110 Ky. 321 65
Macrae v. Goodbar, 80 Miss. 315 119
McRee v. Means, 34 Ala. 349 59
McSurley v. Venters, 31 Ky. L. 963 719
McVay v. Tousley, 20 S. Dak. 258 549
McVeigh v. Chicago Mill &c. Co., 96 Ark. 480 13
McWhirter v. Roberts, 40 Ark. 283 633
Maday v. Roth, 160 Mich. 289 399
Madison v. Larmon, 170 Ill. 65 712
Maeck v. Sinclair, 10 Vt. 103 602
Magaw v. Lothrop, 4 Watts & S. (Pa.) 316 34
Magee v. Doe, 9 Fla. 382 87, 214
Magee, In re, 63 Cal. 414 719
Magness v. Arnold, 31 Ark. 103 87
Magruder v. Esmay, 35 Ohio St. 221 192, 644
Magsocay v. Fernando, 17 Philippine 120 957
Maguire v. Bissell, 119 Ind. 345 423
v. Moore, 108 Mo. 267 710
Mahan v. Smith, 151 Ala. 482 314
Maher v. James Hanley &c. Co., 23 R. I. 323 51
Maher, In re, 169 Fed. 997 515
Mahoney v. Middleton, 41 Cal. 41 126
v. Neff, 124 Ind. 380 564
Maitlen v. Maitlen, 44 Ind. App. 559 705
Major v. Bukley, 51 Mo. 227 45, 274
Majot, In re, 199 N. Y. 29 705, 724
Mallett v. Page, 8 Ind. 364 443
Mallory v. Ferguson, 50 Kans. 685 21, 22
Malone v. Marriott, 64 Ala. 486 546
Malsby v. Gamle, 61 Fla. 310 93
Manaudas v. Mann, 25 Ore. 597 126
Mandlebaum v. McDonell, 29 Mich. 78 47, 478
Mangold v. Barlow, 61 Miss. 593 117, 122
Manifold v. Jones, 117 Ind. 212 525
Manly v. Slason, 21 Vt. 271 530
Mann v. Hyde, 71 Mich. 278 709
v. Jackson, 84 Maine 400 477
Manners v. Manners, 20 N. J. L. 142 722
Manning v. Pippen, 86 Ala. 357 671
v. Perkins, 86 Maine 419 281
Mansfield v. Neff, 43 Utah 258 720
v. Shelton, 67 Conn. 390 461
v. Turpin, 32 Ga. 260 493
Manson v. Duncanson, 166 U. S. 533 600
Manternach v. Studt, 240 Ill. 464 364
Marbury v. Ehlen, 72 Md. 206 129
v. Madison, 1 Cranch (U. S.) 137 223
Mardt v. Scharmach, 65 Misc. (N. Y.) 124 676
Marionneaux v. Dupuy, 48 La. 496 719
Markey v. Markey, 108 Iowa 373 719
Markle v. Akron, 14 Ohio 586 652
Markle's Estate, In re, 187 Pa. St. 639 471
Markoe v. Andras, 67 Ill. 34 516, 530
Marks v. Dickson, 20 How. (U. S.) 501 198
Marlow v. King, 17 Tex. 177 87, 730
Marr v. Given, 23 Maine 55 336
Marsellis v. Thalhimer, 2 Paige (N. Y.) 35 721
Marsh v. Nelson, 101 Pa. St. 51 635, 692
v. Waupaca County, 38 Wis. 250 723
Marshall v. Rench, 3 Del. Ch. 239 737
v. Rose, 86 Ill. 374 705
v. Trumbull, 28 Conn. 183 275
Marston v. Catterlin, 239 Mo. 390 11
Martel v. Somers, 26 Tex. 551 127
Martin v. Baird, 175 Pa. St. 540 339
v. Bates, 20 Ky. L. 1798 117
v. Berry, 37 Cal. 222 377
v. Bonsack, 61 Mo. 556 346
v. Caldwell, 49 Ind. App. 1 266
v. Castle, 193 Mo. 183 446
v. Cauble, 72 Ind. 67 129
v. Evansville, 32 Ind. 85 104
v. Gray, 142 U. S. 236 662
v. Harris (Tex. Civ. App.), 26 S. W. 91 336
v. Hoff, 7 Ariz. 247 215
v. Hunter's Lessee, 1 Wheat. (U. S.) 304 650
v. Kelly, 59 Misc. 652 595, 597
v. Marks, 97 U. S. 345 207
v. Mercer University, 98 Ga. 320 471
v. O'Brien, 34 Miss. 21 104
v. Perkins, 56 Miss. 204 491
v. Poague, 4 B. Mon. (Ky.) 524 354
v. Pond, 30 Fed. 15 674
v. Renaker, 10 Ky. L. 469 64
v. Roberts, 127 Iowa 218 31
v. Roberts, 57 Tex. 564 533
v. Royse, 21 Ky. L. 775 90
v. Splivalo, 69 Cal. 611 316
v. Stovall, 103 Tenn. 1 493
v. Thomas, 56 W. Va. 220 399
v. Turner (Ky. App.), 115 S. W. 833 314
v. Walker, 102 Ga. 72 429
v. Ward, 60 Ark. 510 442, 447
v. Wilbourne, 2 Hill (S. Car.) 395 346
Martindale v. Palmer, 52 Ind. 411 502
v. Price, 14 Ind. 115 408
v. Waas, 8 Fed. 854 395
Martinet v. Duff, 178 Ill. App. 199 672
Marvin v. Brewster Iron Min. Co., 55 N. Y. 538 63
Maryland v. West Virginia, 217 U. S. 577 694
Mashburn v. Dannenberg Co., 117 Ga. 567 364
Mason v. Baily, 6 Del. Ch. 129 714
v. Black, 87 Mo. 329 129
v. Brock, 12 Ill. 273 283
v. Daly, 117 Mass. 403 578
v. Mullahy, 145 Ill. 383 127, 692
v. Ross, 75 N. J. Eq. 136 100
Mason-Seaman Transportation Co., In re, 235 Fed. 974 380

[References are to Sections.]

Masterson v. Munroe, 105 Cal. 431 241
v. Townshend, 123 N. Y. 458 463
Massey v. Huntington, 118 Ill. 80 59
Massie v. Hiatt, 82 Ky. 314 721
Mather v. McMillian, 60 Wis. 546 373
v. Mather, 103 Ill. 607 470
Mathews v. Blake, 16 Wyo. 116 643
Matlock v. Lock, 38 Ind. App. 281 43
Matson v. Johnson, 48 Wash. 256 364
Matt v. Matt, 156 Iowa 503 433
Matter of Kiernan, 38 Misc. (N. Y.) 394 724
McGraw, 111 N. Y. 66 113
McMillan, 126 App. Div. (N. Y.) 155 708
Nichols' Estate, 60 Misc. (N. Y.) 299 711
Underhill, 62 Misc. (N. Y.) 456 711
Matthews v. Goodrich, 102 Ind. 557 192
v. Ward, 10 Gill & J. (Md.) 443 72
Matthewson v. Hevel, 82 Kans. 134 638
Mattlage v. Mulherin, 106 Ga. 834 433
Mattocks v. Brown, 103 Pa. St. 16 49
v. Stearns, 9 Vt. 326 49
Mattox v. Hightshue, 39 Ind. 95 100
Maul v. Hellman, 39 Nebr. 322 601
Mauzy v. Hinrichs, 89 Nebr. 280 722
v. Hinrichs, 90 Nebr. 735 722
Maxwell v. Campbell, 45 Ind. 360 362
v. Harper, 51 Wash. 351 286, 297, 311
Maxwell Land-Grant Case, 121 U. S. 325 229
May v. Dobbins, 166 Ind. 331 687
v. Lewis, 132 N. Car. 115 714
v. May, 28 Ala. 141 678
v. Parham, 68 Ala. 253 736
Mayburry v. Brien, 15 Pet. (U. S.) 21 65
Mayer v. Wilkins, 37 Fla. 244 375
Mayham v. Coombs, 14 Ohio 428 126
Maynard v. Davis, 127 Mich. 571 325
v. Maynard, 10 Mass. 452 120
Mayo v. Wood, 50 Cal. 171 317
Maywood &c. Co. v. Maywood, 118 Ill. 61 105
Meacham v. Bunting, 156 Ill. 586 64
Mead v. Fox, 6 Cush. (Mass.) 199 35
Meader v. Archer, 65 N. H. 214 718
v. Norton, 11 Wall. (U. S.) 442 106
Meadowcroft v. Winnebago Co., 181 Ill. 504 111, 714, 719
Meagher v. Drury, 89 Iowa 366 124
Mechanics' Bldg. Assn. v. Whitacre, 92 Ind. 547 21, 22
M. E. Church v. Hoboken, 33 N. J. L. 13 105
v. Mayor &c. of Hoboken, 33 N. J. L. 13 105
Meddock v. Williams, 12 Ohio 377 284
Mee v. Benedict, 98 Mich. 260 121
Meech v. Fowler, 14 Ark. 29 265
Meeker v. Draffen, 137 App. Div. 537 466
v. Wright, 76 N. Y. 262 321
Megerle v. Ashe, 33 Cal. 74 196
Meier v. Lee, 106 Iowa 303 458, 731
v. Meier, 105 Mo. 411 446
Meigs v. Roberts, 162 N. Y. 371 289
Mellen v. Moline Iron Works, 131 U. S. 352 651
Mellon v. Reed, 114 Pa. St. 647 327
Melross v. Scott, 18 Ind. 250 119
Melton v. Davidson, 86 Tenn. 129 721, 728
v. St. Louis, I. M. & S. R. Co., 99 Ark. 433 568
v. Turner, 38 Tex. 81 124
Melvin v. Martin, 18 R. I. 650 718
v. Melvin, 8 Cal. App. 684 286
Memmert v. McKeen, 112 Pa. St. 315 278
Memphis Land & Timber Co. v. Ford, 58 Fed. 452 394
Menage v. Jones, 40 Minn. 254 362
Menard v. Campbell, 180 Mich. 583 322
Menger v. Carruthers, 3 Kans. App. 75 112
Mercantile Nat. Bank v. Parson, 54 Minn. 56 129
Mercantile Safe Deposit Co. v. Huntington, 89 Hun (N. Y.) 465 286
Merchants' Loan & Trust Co. v. Northern Trust Co., 250 Ill. 86 354
Merchants' Nat. Bank v. Greene, 150 Mass. 317 674
Merchants' & Farmers' State Bank of Sullivan v. Dawdy, 230 Ill. 199 434
Mercier v. Missouri &c. R. Co., 54 Mo. 506 45
Meredith v. Joans, 3 Cro. Cas. 244 58
Meriden v. Maloney, 74 Conn. 90 632
Merillat v. Hensey, 34 App. (D. C.) 398 575
Merriam v. Bachioni, 112 Cal. 191 133
Merrick v. Merrick, 37 Ohio St. 126 272
v. Wallace, 19 Ill. 486 117
Merrifield v. Western Cottage Piano &c. Co., 238 Ill. 526 614
Merrill v. Dearing, 32 Minn. 479 640
v. Hartwell, 11 Mich. 200 203
v. Houghton, 51 N. H. 61 671
v. Luce, 6 S. Dak. 354 119, 438
Merriman v. Hyde, 9 Nebr. 113 118
Merritt v. Brown, 19 N. J. Eq. 286 418
v. Bunting, 107 Va. 174 187
v. Harris, 102 Mass. 328 301
v. Merritt, 62 Mo. 150 736
v. Westerman, 165 Mich. 535 691
Meserve v. Haak, 191 Mass. 220 483
Mesick v. Sunderland, 6 Cal. 297 394
Meskimen v. Day, 35 Kans. 46 120
Messer v. Jones, 88 Maine, 349 719, 724
v. Oestreich, 52 Wis. 684 278
Messmore v. Williamson, 189 Pa. St. 73 40
Metcalf v. First Parish in Framingham, 128 Mass. 370 487
Methodist Church v. Hoboken, 33 N. J. L. 13 105
Mette v. Feltgen (Ill.), 27 N. E. 911 326
Meyer v. Kinzer, 12 Cal. 247 320
Meyers v. Croft, 13 Wall. (U. S.) 291 193, 196, 198
Michigan Mutual Life Ins. Co. v. Conant, 40 Mich. 530 127
Michigan Trust Co. v. Ferry, 175 Fed. 667 576
Michoud v. Girod, 45 U. S. 502 363
Middlecoff v. Cronise, 155 Cal. 185 654
Middleton v. Findla, 25 Cal. 76 262
Middleton, In re, 72 Iowa 424 491
Middletown Savings Bank v. Bacharach, 46 Conn. 513 638
v. Fellowes, 42 Conn. 36 535
Middleworth v. Ordway, 191 N. Y. 404 718
Midland R. Co. v. Wilcox, 122 Ind. 84 537
Midyette v. Grubbs, 145 N. Car. 85 722
Milburn v. Beaty, 81 Kans. 696 643
Miles v. Stehle, 22 Nebr. 740 447
Milheim v. Baxter, 46 Colo. 155 407
Miller v. Anderson, 1 S. Dak. 539 632
v. Bayless, 194 Mo. 630 303
v. Carlisle, 90 Ky. 205 466
v. Cooch, 5 Del. Ch. 161 473
v. Davis, 106 Mich. 300 73
v. Emans, 19 N. Y. 384 306
v. Goodin (Ky. App.), 124 S. W. 818 350
v. Grunsky, 141 Cal. 441 228
v. Hanna, 89 Nebr. 224 736

[*References are to Sections.*]

Miller
v. Holt, 68 Mo. 584 487
v. Indianapolis, 123 Ind. 196 105, 244
v. Levi, 44 N. Y. 489 56
v. Louisville &c. R. Co., 83 Ala. 274 673
v. McElwee, 12 La. Ann. 476 90
v. Marx, 55 Ala. 322 66
v. Metcalf, 77 Conn. 176 466
v. Miller, 234 Ill. 16 676
v. Miller, 63 Iowa 387 346
v. Miller, 151 Ky. 563 466
v. Miller, 105 La. 257 715
v. Miller, 91 N. Y. 315 719
v. Miller, 89 N. Car. 402 346
v. Moss, 65 Tex. 179 185
v. Quick, 158 Mo. 495 310
v. Sherry, 2 Wall. (U. S.) 237 353
v. Speer, 38 N. J. Eq. 567 87
v. Stoddard, 50 Minn. 272 535
v. Talley, 48 Mo. 503 67
v. Texas &c. R. Co., 132 U. S. 662 203
v. Tobin, 16 Ore. 540 221
v. Tunica County, 67 Miss. 651 273
v. Warren, 94 App. Div. (N. Y.) 192 687
v. Williams, 66 Ill. 91 719
Miller, In re, 64 Misc. (N. Y.) 467 550
Millett v. Lagomarsino, 107 Cal. 102 73
Milligan v. O'Conor, 19 Ill. App. 487 372
Millikan v. Patterson, 91 Ind. 515 636
Mills v. Catlin, 22 Vt. 98 291
v. Davison, 54 N. J. Eq. 659 55, 482
v. Dow's Admr., 133 U. S. 423 266
v. Seattle &c. R. Co., 10 Wash. 520 54
v. Van Voorhies, 20 N. Y. 412 65
v. Zion Chapel, 119 Md. 510 694
Milne v. Milne, 17 La. 46 458
Mims v. Machlin, 53 S. Car. 6 59
Minneapolis Mill Co. v. Tiffany, 22 Minn. 463 72
Mires v. Laubenheimer, 271 Ill. 296 735
Missouri-American Elec. Co. v. Hamilton-Brown Shoe Co., 165 Fed. 283 370, 378
Missouri River Tel. Co. v. First Nat. Bank, 74 Ill. 217 650
Mitchell v. Bartlett, 51 N. Y. 447 265
v. Hagge (Iowa), 160 N. W. 287 27
v. Jones, 50 Mo. 438 670
v. Kimbrough, 98 Tenn. 535 457
v. Minnequa Town Co., 41 Colo. 367 633
v. Pinckney, 13 S. Car. 203 34
v. State, 63 Ind. 574 723
v. Thorne, 134 N. Y. 536 713
v. Warner, 5 Conn. 497 61
v. Winslow, 2 Story (U. S.) 630 432
Mittel v. Karl, 133 Ill. 25 321
Mix v. Hotchkiss, 14 Conn. 32 426
Mizell v. Burnett, 49 N. Car. 249 54
Moale v. Baltimore, 5 Md. 314 105
Mobile Transportation Co. v. Mobile, 187 U. S. 479 214
Mobley v. Mobley, 85 S. Car. 319 471
Moen v. Moen, 16 S. Dak. 210 719
Mofat v. Henderson, 18 J. & S. (N. Y.) 211 527
Mohr v. Tulip, 40 Wis. 66 583
Molineaux v. Raynolds, 55 N. J. Eq. 187 485
Mollyneaux v. Wittenberg, 39 Nebr. 547 313
Monmouth County Electric Co. v. McKenna, 68 N. J. Eq. 160 432
Monnett v. Turpie, 132 Ind. 482 652, 671
Monroe v. Jones, 8 R. I. 526 467
v. West, 12 Iowa 119 536
Monson v. Hutchin, 194 Ill. 431 318
Montague v. Marunda, 71 Nebr. 805 691
v. Priester, 82 S. Car. 492 429
Montana v. Rice, 204 U. S. 291 193
Montana Nat. Bank v. Schmidt, 6 Mont. 609 431
Montandon v. Deas, 14 Ala. 33 536
Montgomery v. Dorion, 7 N. H. 475 111
v. Johnson, 31 Ark. 74 600
v. Keppel, 75 Cal. 128 126, 127
v. McCumber, 128 Ind. 374 301
v. Robinson, 49 Cal. 258 350
v. Sturdivant, 41 Cal. 290 45, 274
v. United States, 36 Fed. 4 205
Montignani v. Blade, 145 N. Y. 111 714
Moody v. Farr, 33 Miss. 195 40
v. Macomber, 158 Mich. 209 669
v. Moody, 11 Maine 247 602
v. Walker, 3 Ark. 147 469
v. Wright, 13 Metc. (Mass.) 17 432
Mooers v. White, 6 Johns. Ch. (N. Y.) 360 111, 732
Mooney v. Olsen, 21 Kans. 691 722
Moore v. Carey, 116 Ga. 28 363
v. Childress, 58 Ark. 510 695
v. Cottingham, 113 Ala. 148 600
v. Coulter, 31 Ga. 278 192, 195
v. Crandall, 146 Iowa 25 447
v. Crose, 43 Ind. 30 61
v. Empire Land Co., 181 Ala. 344 11
v. Flack, 77 Nebr. 52 719
v. Jourdan, 14 La. Ann. 414 692
v. Kerr, 46 Ind. 468 327
v. Moore, 99 Cal. 18 668
v. Moore, 155 Ind. 261 360, 524
v. Moore, 30 Ky. L. 383 719
v. Moore, 169 Mo. 432 719
v. Moore, 35 Vt. 98 718
v. Morrow, 28 Cal. 551 52
v. Neil, 39 Ill. 256 350
v. Page, 111 U. S. 117 323
v. Perry, 42 S. Car. 369 54
v. Rake, 26 N. J. L. 584 99
v. Ransdel, 156 Ind. 658 59
v. Sharpe, 91 Ark. 407 314
v. Trott, 156 Cal. 353 286
v. Williams, 115 N. Y. 586 75
Moore, In re, 14 R. I. 38 718
Moot v. Business Men's Assn., 157 N. Y. 201 6, 35
Mooy v. Gallagher, 36 R. I. 405 472
Moran v. Chicago &c. R. Co., 83 Nebr. 680 693
v. Stewart, 132 Mo. 73 718
Moran, In re, 151 Mo. 555 718
Morange v. Mix, 44 N. Y. 315 17, 18
Morano v. Shaw, 23 La. Ann. 379 22
More v. Smedburgh, 8 Paige (N. Y.) 600 26
Moreland v. Houghton, 94 Mich. 548 436
Morgan v. Dalrymple, 59 N. J. Eq. 22 530
v. Eaton, 59 Fla. 562 671
v. Mason, 20 Ohio 402 61
v. Meuth, 60 Mich. 238 61
v. Mitchell, 104 Ga. 596 696
v. Robbins, 152 Ind. 362 471
v. Rogers, 79 Fed. 577 58
v. Spangler, 14 Ohio St. 102 100
v. Wattles, 69 Ind. 260 363
v. Wickliffe, 115 Ky. 226 620
Morgan County School v. Schroll, 120 Ill. 509 208
Morganton Hardware Co. v. Morganton Graded School, 150 N. Car. 680 536
Morin v. Holliday, 39 Ind. App. 201 714
Morrill v. Hopkins, 36 Tex. 686 66

[References are to Sections.]

Morrill
v. Mackman, 24 Mich. 279 61
v. Morrill, 53 Vt. 74 126
v. Phillips, 142 Mass. 240 710
Morris v. Goodwin, 1 Ind. App. 481 362
v. Gregory, 80 Kans. 626 638
v. Linton, 61 Nebr. 537 395
v. Linton, 74 Nebr. 411 59
v. Mowatt, 2 Paige (N. Y.) 586 74
v. Peck, 73 Wis. 482 436
v. Potter, 10 R. I. 58 708
v. Schollsville &c. Tpk. Rd., 6 Bush (Ky.) 671 110
v. Wadsworth, 17 Wend. (N. Y.) 103 125, 433
v. Williams, 39 Ohio St. 554 719
Morrison v. Bank of Commerce, 81 Ind. 335 638
v. Bartlett, 148 Ky. 833 487
v. Chambers, 122 N. Car. 689 400
v. Clarksburg C. &c. Co., 52 W. Va. 331 46
v. Kinstra, 55 Miss. 71 362
v. Morrison, 38 Iowa 73 316
v. Roehl, 215 Mo. 545 436
v. Schorr, 197 Ill. 554 470
v. Session's Estate, 70 Mich. 297 718
v. Waggy, 43 W. Va. 405 77
Morrow v. Dows, 28 N. J. Eq. 459 632
v. Scott, 7 Ga. 535 721
v. Whitney, 95 U. S. 551 186, 221, 272
Morrow's Estate, In re, 204 Pa. 479 487
Morse v. Blood, 68 Minn. 442 47
v. Carpenter, 19 Vt. 613 261, 263, 328
v. Curtis, 140 Mass. 112 8, 126
v. Hayden, 82 Maine 227 474, 734
v. Hill, 136 Mass. 60 363
v. Lambe, 23 Ont. 608 13
v. Lowe (White), 182 Mich. 607 91, 466
v. Osborne, 75 N. H. 487 712
Morsell v. First Nat. Bank, 91 U. S. 357 566
Morton v. Barrett, 22 Maine 257 58, 714
v. Morton, 120 Ky. 251 467
v. Morton, 62 Nebr. 420 718
v. Woodbury, 153 N. Y. 243 485
Moseley v. Rambo, 106 Ga. 597 357, 442
Moser v. Cochrane, 107 N. Y. 35 524
Moses v. Johnson, 88 Ala. 517 391
Moss v. Helsley, 60 Tex. 426 485
v. Jenkins, 146 Ind. 589 619
Mossestad v. Gunderson, 140 Iowa 290 737
Mott v. Ackerman, 92 N. Y. 539 359
Moulton v. Cornish, 138 N. Y. 133 447, 674
Mt. Pleasant v. Eversole, 29 Ky. L. 830 501
Mudge v. Livermore (Iowa), 123 N. W. 199 613
Muhle v. New York &c. R. Co., 86 Tex. 459 110, 677
Muir v. Galloway, 61 Cal. 498 324
Muldrow v. Robinson, 58 Mo. 331 124
Mulford v. Le Franc, 26 Cal. 88 227
v. Rowland, 45 Colo. 172 335
Mullan v. United States, 118 U. S. 271 208
Muller v. Dows, 94 U. S. 444 655
Mulliken v. Graham, 72 Pa. St. 484 127
Mullin v. Atherton, 61 N. H. 20 611
Mulvane v. Rude, 146 Ind. 476 472
Munger v. Curtis, 42 Hun (N. Y.) 465 535
Munson v. Cole, 98 Ind. 502 359
v. Munson, 30 Conn. 425 429
v. Wray, 7 Blackf. (Ind.) 403 406
Murdock v. Murdock, 74 N. H. 77 712
Murphey v. Harker, 115 Ga. 77 667
Murphy v. Adams, 71 Maine 113 537
v. Crowley, 140 Cal. 141 91
v. Delano, 95 Maine 229 354, 359
v. Doyle, 37 Minn. 113 687
v. Hendricks, 57 Ind. 593 120, 423
v. Henry, 35 Ind. 442 87, 707, 708
v. McKeon, 53 N. J. Eq. 406 483
v. Myar, 95 Ark. 32 405
Murray v. Beal, 23 Utah 548 330
v. Brokaw, 67 Ill. App. 402 443
v. Cazier, 23 Ind. App. 600 722
v. Cherrington, 99 Mass. 229 50
v. Green, 64 Cal. 363 313
v. Hill, 60 Ill. App. 80 531
v. Montana &c. Mfg. Co., 25 Mont. 14 228
Murray Ferris & Co. v. Blackledge, 71 N. Car. 492 328
Murto v. Lemon, 19 Colo. App. 314 443
Musconetcong Iron Works v. Delaware &c. R. Co., 76 N. J. L. 717 100
Musgrove v. Bonser, 5 Ore. 313 127, 132
Mushback v. Ryerson, 11 N. J. L. 346 616
Mutual Benefit Co., In re, 174 Pa. St. 1 90
Mutual Benefit Life Ins. Co. v. Grace Church, 53 N. J. Eq. 413 47
v. Huntington, 57 Kans. 744 439
Mutual Life Ins. Co. v. Corey, 54 Hun (N. Y.) 493 97, 282
v. Dake, 87 N. Y. 257 122, 132
v. Nicholas, 144 App. Div. (N. Y.) 95 419
Myers v. Croft, 13 Wall. (U. S.) 291 197, 198
v. Myers, 167 Ill. 52 58
v. Norman, 20 Ky. L. 343 467
v. Pierce, 86 Ga. 786 451, 524
Mynes v. Mynes, 47 W. Va. 681 429
Myrick v. Bill, 5 Dak. 167 66

N

Nagle v. Hirsch, 59 Ind. App. 282 477
Nall v. Conover, 223 Mo. 477 698
Narron v. Wilmington &c. R. Co., 122 N. Car. 856 694
Nash v. Cutler, 16 Pick. (Mass.) 491 727
Nason v. First Bangor Christian Church, 66 Maine 100 481
National Bank v. Matthews, 98 U. S. 621 113
v. Scriven, 63 Hun (N. Y.) 375 328
v. Tenn. Coal &c. R. Co., 62 Ohio St. 564 421
National Broadway Bank v. Denny, 133 Ga. 227 350, 612
National Ins. Co. v. Butler, 61 Nebr. 449 426
National Life Ins. Co. v. Minch, 53 N. Y. 144 128
National Safe Deposit Co. v. Stead, 250 Ill. 584 86
National Sav. Bank v. Ward, 100 U. S. 195 16, 17
National Shoe & Leather Bank v. Small, 7 Fed. 837 432
National Surety Co. v. Walker, 127 Iowa 518 638
Naylor v. Godman, 109 Mo. 543 476
Neal v. Davis, 53 Ore. 423 699, 720
v. Kayser, 12 Ariz. 118 200
v. Wideman, 59 Ark. 5 643
Neeley v. Wise, 44 Iowa 544 730
Neff v. Elder, 84 Ark. 277 428
Negus, In re, 7 Wend. (N. Y.) 499 15

[*References are to Sections.*]

Neill v. Cody, 26 Tex. 286 600
Neil's Appeal, In re, 92 Pa. St. 193 719
Neilson v. Brett, 99 Va. 673 717
v. Lagow, 12 How. (U. S.) 98 338
Nellis v. Nellis, 99 N. Y. 505 48
Nelson v. Bush, 9 Dana (Ky.) 104 710
v. Davidson, 160 Ill. 254 695
v. Hayner, 66 Ill. 487 363
v. Murfee, 69 Ala. 598 524, 602, 736
v. Nelson, 36 Ind. App. 331 484
Nesbit v. Stevens, 161 Ind. 519 508
Nesbitt v. Delamar's Nevada Gold Min. Co., 24 Nev. 273 613
Neslin v. Wells, 104 U. S. 428 121, 125
Nesmith v. Dinsmore, 17 N. H. 515 737
Nevada Nickle Syndicate v. National Nickle Co., 103 Fed. 391 591
Nevin's Estate, In re, 192 Pa. St. 258 59
Newark Sav. Inst. v. Jones, 37 N. J. Eq. 449 398
Newberry v. French, 98 Va. 479 74, 531
New Britain v. Marines' Sav. Bank, 67 Conn. 528 526
Newbury v. Rutter, 38 Iowa 179 426
Newcomb v. Bonham, 1 Vern. 7 420
v. Newcomb, 108 Ky. 582 493
Newell v. Burnside Banking Co., (Ky. App.), 118 S. W. 267 427
New England Hospital v. Boston, 113 Mass. 518 107
New Eng. Mfg. Co. v. Starin, 60 Conn. 369 659, 663
New England Mtg. Sec. Co. v. Clayton, 119 Ala. 361 437, 439
New Haven County v. New Haven Trinity Church, 82 Conn. 378 73, 462
Newhouse v. Simino, 3 Wash. 648 215
Newkirk v. Marshall, 35 Kans. 77 201
Newlin v. McAfee, 64 Ala. 357 417
Newman v. Fidelity Savings &c. Assn., 14 Ariz. 354 438
v. Samuels, 17 Iowa 528 358, 441
Newman, In re, 75 Cal. 213 712, 718
Newman's Estate, 75 Cal. 213 676
Newnam v. Cincinnati, 18 Ohio 323 661
New Orleans v. Baltimore, 13 La. Ann. 162 462
v. Hardie, 43 La. Ann. 251 483
v. United States, 10 Pet. (U. S.) 662 72
New Orleans Nat. Bank Assn. v. Adams, 109 U. S. 211 424
Newport v. Cooper, 10 La. 155 195
Newton v. Emerson, 66 Tex. 142 280
v. Fisher, 98 N. Car. 20 137
v. McKay, 29 Mich. 1 263
v. Newton, 11 R. I. 390 418
New Vienna Bank v. Johnson, 47 Ohio St. 306 417
New York v. Carleton, 113 N. Y. 284 694
v. Goss, 124 App. Div. (N. Y.) 680 631
v. Hart, 95 N. Y. 443 104
v. Stone, 20 Wend. (N. Y.) 139 40
New York &c. Gas Coal Co. v. Plumer, 96 Pa. St. 99 392
New York &c. R. Co. v. Aldridge, 135 N. Y. 83 224
v. Long, 69 Conn. 424 109
v. Untermyer, 133 App. Div. (N. Y.) 146 677
New York Mutual Life Ins. Co. v. Armstrong, 117 U. S. 591 733
Niblack v. Goodman, 67 Ind. 174 658
Nicholls v. Wentworth, 100 N. Y. 455 102
Nichols v. Hampton, 46 Ga. 253 123
v. New England Furniture Co., 100 Mich. 230 241
Nichols
v. Nichols, 28 Vt. 228 670
v. Patten, 18 Maine 231 662
v. Reynolds, 1 R. I. 30 117, 122
Nichols, In re, 128 Pa. St. 428 714
Nicholson v. Bettle, 59 Pa. St. 384 48
v. Caress, 59 Ind. 39 737
v. Congdon, 95 Minn. 188 192
v. Lieber (Tex. Civ. App.), 153 S. W. 641 1
Nicholson, In re, 115 Iowa 493 471
Nicodemus v. Young, 90 Iowa 423 262
Nicoll v. New York &c. R. Co., 12 N. Y. 121 54
Nicrosi v. Phillipi, 91 Ala. 291 64, 458
Nidever v. Ayers, 83 Cal. 39 301
Nightingale v. Burrell, 15 Pick. (Mass.) 104, 111 469
v. Hidden, 7 R. I. 115 274
Niles v. Cedar Point Club, 175 U. S. 300 192, 195, 226
v. Cooper, 98 Minn. 39 434
Nixon v. Hyserott, 5 Johns. (N. Y.) 58 336
Noble v. Grandin, 125 Mich. 383 655
v. McGinnis, 55 Ind. 528 653
Noland v. Barrett, 122 Mo. 181 590, 601
v. Chambers, 84 Ky. 516 479
Norman v. Beekman, 58 Fla. 325 643
v. Eastburn, 230 Mo. 168 611
v. Heist, 5 Watts & S. (Pa.) 171 724
Non-She-Po v. Wa-Win-Ta, 37 Ore. 213 718
Noon v. Finnegan, 29 Minn. 418 723
Nordyke & Marmon Co. v. Hawkeye Woolen Mills Co., 53 Iowa 521 536
Norris v. Dains, 52 Ohio St. 215 280
v. Hensley, 27 Cal. 439 465, 472
v. Kidd, 28 Ark. 485 66
v. Letchworth, 140 Mo. App. 19 100
v. Moulton, 34 N. H. 392 66
North v. Graham, 235 Ill. 178 722
v. Knowlton, 23 Fed. 163 433
North Birmingham St. R. Co. v. Calderwood, 89 Ala. 247 503
Northcraft v. Oliver, 74 Tex. 162 723
Northcut v. Whipp, 12 B. Mon. (Ky.) 65 64, 65
North Dakota Horse & Cattle Co. v. Serumgard, 17 N. Dak. 466 446
Northern Bank v. Roosa, 13 Ohio 334 566
Northern Lumber Co. v. O'Brien, 124 Fed. 819 182
Northern Pac. R. Co. v. Majors, 5 Mont. 111 106
v. Musser &c. Co., 68 Fed. 993 212
Northern Trust Co. v. Buck, 263 Ill. 222 86
North's Estate, In re, 48 Conn. 583 727
Northwestern Nat. Bank v. Stone, 97 Iowa 183 429
Nortnass v. Pioneer Townsite Co., 82 Nebr. 382 65
Norton v. Birge, 35 Conn. 250 133, 546, 551
v. McDevit, 122 N. Car. 755 64
v. Reardon, 67 Kans. 302 345, 590
Norwood v. Cobb, 37 Tex. 141 737
v. Leeves (Tex. Civ. App.), 115 S. W. 53 667
v. Mills, 3 Ohio S. & C. P. Dec. 356 734
Nothe v. Nomer, 54 Conn. 326 33
Nottingham v. McKendrick, 38 Ore. 495 537
Nowlin Lumber Co. v. Wilson, 119 Mich. 406 62
Noyes v. Hall, 97 U. S. 34 447, 692

[References are to Sections.]

Noyes
v. Johnson, 139 Mass. 436 7, 395
v. Sturdivant, 18 Maine 104 119
Noyes' Estate, In re, 40 Mont. 178 457
Nugent v. Cloon, 117 Mass. 219 60
v. Powell, 4 Wyo. 173 718
v. Riley, 1 Metc. (Mass.) 117 419
Nye v. Moody, 70 Tex. 434 120, 567

O

Oak Creek Valley Bank v. Helmer, 59 Nebr. 176 428
Oakes v. DeLancey, 71 Hun (N. Y.) 49 104, 257
v. Yonah Land & Min. Co., 89 Fed. 243 673
Oakey v. Cook, 41 N. J. Eq. 350 75
Oakland v. Oakland Water Front Co., 118 Cal. 160 187, 227
Oakley v. Shaw (N. J. Eq.), 69 Atl. 462 591
Oakman v. Walker, 69 Vt. 344 54
Oaksmith's Lessee v. Johnston, 92 U. S. 343 693
Oats v. Walls, 28 Ark. 244 117, 122
Ober v. Gallagher, 93 U. S. 199 530
Oberholtzer's Appeal, In re, 124 Pa. St. 583 124
Oblenis v. Creeth, 67 Fed. 303 272
O'Brian v. Fry, 82 Ill. 87 598
O'Brien v. Bugbee, 46 Kans. 1 714
v. Moffitt, 133 Ind. 660 674
O'Connell v. Pinnacle Gold Min. Co., 140 Fed. 854 722
O'Connor v. Current River R. Co., 111 Mo. 185 537
v. Nadel, 117 Ala. 595 424
Oconto Co. v. Jerrard, 46 Wis. 317 132
Ogden v. Ogden, 60 Ark. 70 64
v. Walters, 12 Kans. 282 125, 349, 592
Ogden City St. R. Co. v. Wright, 31 Ore. 150 354
Ogilvie v. Copeland, 145 Ill. 98 147
Ogle v. Tayloe, 49 Md. 158 463
Oglesby Coal Co. v. Pasco, 79 Ill. 164 730
Ohio River R. Co. v. Johnson, 50 W. Va. 499 694
v. Pennsylvania Co., 222 Pa. 573 668
Okanogan County v. Cheetham, 37 Wash. 682 213
Olcott v. Gabert, 86 Tex. 121 45, 268
v. Tope, 115 Ill. App. 121 338
Old Town Bank v. McCormick, 96 Md. 341 377
Olin v. Denver &c. R. Co., 25 Colo. 177 272
Oliver v. Dougherty, 8 Ariz. 65 347
v. Hook, 47 Md. 301 61
v. Pitman, 98 Mass. 46 61
v. Robinson, 58 Ala. 46 636
v. Vance, 34 Ark. 564 708
Olson v. Leibpke, 110 Iowa 594 547
v. United States, 133 Fed. 849 205
Olson, In re, 63 Iowa 145 491
O'Mara v. McCarthy, 45 Ind. App. 147 28
Ommen v. Talcott, 180 Fed. 925 578
O'Neal v. Wilson, 21 Ala. 288 345
Ontario Land & Imp. Co. v. Bedford, 90 Cal. 181 426
Opdyke's Appeal, In re, 49 Pa. St. 373 719
Opel v. Shoup, 100 Iowa 407 477
Ordway v. Smith, 53 Iowa 589 362
Oregon Mtg. Co. v. Hersner, 14 Wash. 515 431
Oregon & W. Trust Inv. Co. v. Shaw, 5 Sawy. (U. S.) 336 438
Orford v. Benton, 36 N. H. 395 64
Orgain v. Irvine, 100 Tenn. 193 487
Ormsby v. Graham, 123 Iowa 202 77
Orr v. Hodgson, 4 Wheat. (U. S.) 453 732
v. O'Brien, 55 Tex. 149 492
v. Sutton, 119 Minn. 193 117
v. White, 106 Ind. 341 729
v. Wiley, 19 W. Va. 150 642
Orthwein v. Thomas, 127 Ill. 554 719
Osborne v. Gordon, 86 Wis. 92 60
Osgood v. Abbott, 58 Maine 73 276
Ostrom v. San Antonio, 77 Tex. 345 693
Oswald v. Wolf, 129 Ill. 200 638
Otis v. Epperson, 88 Mo. 131 661
v. McMillan, 70 Ala. 46 308
v. Smith, 9 Pick. (Mass.) 293 290
O'Toole v. Omlie, 8 N. Dak. 444 434
Otto v. Young, 227 Mo. 193 671
Ouerbacker v. Claflin, 96 Ky. 235 371
Oury v. Duffield, 1 Ariz. 509 723
Outland v. Bowen, 115 Ind. 150 56
Overall v. Taylor, 99 Ala. 12 127
Overdieck, In re, 50 Iowa 244 716, 734
Overing v. Russell, 32 Barb. (N. Y.) 263 687
Overland Machinery Co. v. Alpenfels, 30 Colo. 163 272
Overseers of Poor v. Sears, 22 Pick. (Mass.) 126 45
Overstreet v. Baxter, 30 Kans. 55 419
Overton v. Lea, 108 Tenn. 505 478
Overturf v. Dugan, 29 Ohio St. 230 86, 360, 723
Owen v. Baker, 101 Mo. 407 349, 350
v. Brookfort, 208 Ill. 35 99
v. Field, 102 Mass. 90 43, 55
v. Western Sav. Fund, 97 Pa. 47 23
Owens v. Claytor, 56 Md. 129 525
v. Jabine, 88 Ark. 468 64
v. McNally, 113 Cal. 444 671
v. Owens, 100 N. Car. 240 733
Owensboro & N. R. R. Co. v. Griffith, 92 Ky. 137 291
Owings v. Hunt, 53 S. Car. 187 722
Ownes v. Ownes, 23 N. J. Eq. 60 59
Owsley v. Matson, 156 Cal. 401 73, 699
Oxley v. Tryon, 25 Iowa 95 298
Ozark Land &c. Co. v. Franks, 156 Mo. 673 101

P

Pace v. Klink, 51 Ga. 220 718
Pacific Live Stock Co. v. Gentry, 38 Ore. 275 183
Pack v. Whitaker, 110 Va. 122 297
Packard v. Cleveland &c. R. Co., 46 Ill. App. 244 53
v. Old Colony R. Co., 168 Mass. 92 338
v. Tisdale, 50 Maine 376 636
v. Usher, 7 Gray (Mass.) 529 35
Packer v. Bird, 137 U. S. 661 104
Paddock v. Wallace, 117 Mass. 99 363
v. Wells, 2 Barb. Ch. (N. Y.) 331 89
Page v. Ellsworth, 44 Barb. (N. Y.) 636 408
v. Foust, 89 N. Car. 447 467
v. Greely, 75 Ill. 400 6, 395, 398
v. Hobbs, 27 Cal. 483 183
v. Parker, 61 N. H. 65 711
v. Rogers, 31 Cal. 294 78
v. Trutch, Fed. Cas. No. 10668 22
v. Waring, 76 N. Y. 463 547
Pahlman v. Shumway, 24 Ill. 127 566
Paige v. Akins, 112 Cal. 401 405
Paine v. Consumers' Storage Co., 71 Fed. 626 272

[*References are to Sections.*]

Paine
v. Meller, 6 Ves. 347 8
v. Root, 121 Ill. 77 546
v. Woods, 108 Mass. 160 104
Paldi v. Paldi, 84 Mich. 346 634
Palin v. Cooke, 125 Ga. 442 517
Palmer v. Ekins, 2 Ld. Raym. 1550 99
v. Mead, 7 Conn. 149 654
Pancake v. Couffman, 114 Pa. St. 113 118
Panton v. Tefft, 22 Ill. 366 290
Papin v. Goodrich, 103 Ill. 86 25
Park v. Park, 71 Ark. 283 431
Parke v. Neeley, 90 Pa. St. 52 129
Parker v. Allen, 4 Atl. (N. J.) 300 583
v. Betts, 47 Colo. 428 723
v. Churchill, 104 Ga. 122 471
v. Jones, 57 Ga. 204 99
v. Meredith (Tenn.) 59 S. W. 167 119
v. Nickerson, 137 Mass. 487 664
v. Page, 41 Ore. 579 53
v. Parker, 5 Metc. (Mass.) 134 46
v. Parker, 10 Tex. 83 715
v. Porter, 11 Ill. App. 602 6
Parkey v. Ramsey, 111 Tenn. 302 100
Parkhurst v. Harrower, 142 Pa. 432 712
Parks v. Kimes, 100 Ind. 148 719
Parlin v. Ware, 39 Maine 363 623
Parmenter v. Lomax, 68 Kans. 61 315
v. Oakley, 69 Iowa 388 438
Parmenter Mfg. Co. v. Hamilton, 172 Mass. 178 377
Parnell v. Thompson, 81 Kans. 119 493
Parret v. Shaubhut, 5 Minn. 323 120
Parsons v. Baltimore Bldg. &c. Assn., 44 W. Va. 335 119
v. Boyd, 20 Ala. 112 326
v. Lent, 34 N. J. Eq. 67 121
v. Noggle, 23 Minn. 328 420
v. Parsons, 52 Ohio St. 470 737
v. Parsons, 101 Wis. 76 718
v. Prudential Real Estate Co., 86 Nebr. 271 640
Paschal v. Perez, 7 Tex. 348 76
Pascoe v. Green, 18 Colo. 326 215
Pasquay v. Pasquay, 235 Ill. 48 484
Paterson v. Ellis, 11 Wend. (N. Y.) 259 44
v. Ogden, 141 Cal. 43 228
Paton v. Robinson, 81 Conn. 547 314
Patrick v. Patrick, 135 Ky. 307 59, 480
Patterson v. Carneal, 3 Marsh A. K. (Ky.) 618 290
v. De La Ronde, 8 Wall. (U. S.) 292 118
v. Earhart, 6 Ohio S. & C. P. Dec. 16 476
v. Harlan, 124 Pa. St. 67 423
v. Langston, 69 Miss. 400 223
v. Patterson, 135 Ky. 339 54
v. Tatum, 3 Sawy. (U. S.) 164 210
v. Trabue, 3 J. J. Marsh. (Ky.) 598 185
Pattison v. Dryer, 98 Mich. 564 52
Patton v. Ludington, 103 Wis. 629 459
Patton's Exr. v. Smith, 130 Ky. 819 614
Patty v. Middleton, 82 Tex. 586 70
Paul v. Cragnaz, 25 Nev. 293 405
v. Davis, 100 Ind. 422 718
v. Philbrick, 73 N. H. 237 476
Paulding v. Grimsley, 10 Mo. 210 197
Paxson v. Brown, 61 Fed. 874 125, 138
v. Heron, 41 Colo. 147 347
Payne v. Parker, 10 Maine 178 280
v. Sheets, 75 Vt. 335 63
v. Wilson, 74 N. Y. 348 417
Peabody v. Brown, 10 Gray (Mass.) 45 422
Peabody Bldg. &c. Assn. v. Houseman, 89 Pa. St. 261 21
Peabody Heights Co. v. Wilson, 82 Md. 186 313
Peacock v. Eastland, L. R. 10 Eq. 17 58
v. Smart, 17 Mo. 402 708
Peacock, In re, 178 Fed. 851 381
Peadro v. Carriker, 168 Ill. 570 73
Peagler v. Stabler, 91 Ala. 308 420
Peake v. Jenkins, 80 Va. 293 453
v. Young, 40 S. Car. 41 353
Pearce v. Moore, 114 N. Y. 256 314
Pearl Street, In re, 111 Pa. St. 565 317
Pearsol v. Maxwell, 68 Fed. 513 714
Pearson v. Carlton, 18 S. Car. 47 721
v. Gooch, 69 N. H. 208 442
v. Hartman, 100 Pa. St. 84 62
v. Howey, 11 N. J. L. 12 65
v. Seay, 38 Ala. 643 418
Pearson, In re, 110 Cal. 524 708
Pease v. Christ, 31 N. Y. 141 529
Peasley v. McFadden, 68 Cal. 611 692
Peck v. Clapp, 98 Pa. St. 581 687
v. Jenness, 7 How. (U. S.) 612 522
v. Peck, 66 Mich. 586 676
v. Smith, 1 Conn. 103 61
Peckham v. Lego, 57 Conn. 553 472
v. Stewart, 97 Cal. 147 262
Peden v. Chicago &c. R. Co., 73 Iowa 328 113
Peers v. McLaughlin, 88 Cal. 294 417
Peet v. Spencer, 90 Mo. 384 375
Peet's Estate, In re, 99 Iowa 314 473
Peevy v. Hurt, 32 Tex. 146 203
Pegram v. Owens, 64 Tex. 475 119
Peirce v. Grice, 92 Va. 763 53
Pekin Mining & Milling Co. v. Kennedy, 81 Cal. 356 623
Pelham v. Murray, 64 Tex. 477 653
Pemberton v. Klein, 43 N. J. Eq. 98 376
Pembroke Academy v. Epsom School Dist., 75 N. H. 408 59, 480
Pendergrass v. Burris, 77 Cal. 19 418
Pendleton v. Kinney, 65 Conn. 222 471
Pengra v. Munz, 29 Fed. 830 212
Peninsular Naval Stores Co. v. Cox, 57 Fla. 505 549
Penn v. Rhoades, 124 Ky. 798 363
Pennington v. Martin, 146 Ind. 635 546, 549
Pennisson v. Pennisson, 22 La. Ann. 131 653
Pennoyer v. Neff, 95 U. S. 714 658, 661
Pennsylvania Co. v. Pittsburgh, 226 Pa. 322 630
Pennsylvania Consol. Coal Co., In re, 163 Fed. 579 378
Pennsylvania Ins. Co. v. Bauerle, 143 Ill. 459 357
Pennsylvania Min. Co. v. Thomas, 204 Pa. 325 35
Pennsylvania Mtg. Inv. Co. v. Gilbert, 13 Wash. St. 684 613
Pennsylvania R. Co. v. St. Louis &c. R. Co., 118 U. S. 290 331
Penrose v. Cooper, 86 Kans. 597 434
Penzel Co. v. Jett, 54 Ark. 428 371
People v. Bristol, 35 Mich. 28 117
v. Conklin, 2 Hill (N. Y.) 67 111
v. Creiger, 138 Ill. 401 503
v. Crissman, 41 Colo. 450 955, 956
v. Duffy-McInnery Co., 122 App. Div. 336 631
v. Edwards, 56 Hun (N. Y.) 377 640
v. Folsom, 5 Cal. 373 180
v. Huber, 20 Cal. 81 661
v. Ingham Co., 20 Mich. 95 645
v. Irwin, 14 Cal. 428 418

[*References are to Sections.*]

People
v. Liscomb, 3 Hun (N. Y.) 760 650
v. Livingston, 8 Barb. (N. Y.) 253 180
v. McClay, 2 Nebr. 7 66
v. Madison Co., 125 Ill. 9 104
v. Miller, 79 Mich. 93 301
v. O'Brien, 111 N. Y. 1 677
v. O'Loughlin, 136 N. Y. S. 339 957
v. O'Loughlin, 79 Misc. (N. Y.) 650 443
v. Pearis, 37 Cal. 259 634
v. Rardin, 171 Ill. App. 226 736
v. Richards, 99 N. Y. 620 137
v. Simon, 176 Ill. 165 955, 956, 957
v. Snyder, 41 N. Y. 397 120
v. Sperry, 116 Cal. 593 244
v. Storms, 97 N. Y. 364 120
v. Swift, 96 Cal. 165 229
v. Warner, 116 Mich. 228 207
v. Watkins, 106 Mich. 437 93
People ex rel. Underhill v. Saxton, 15 App. Div. (N. Y.) 263 227
Peoples v. Evens, 8 N. Dak. 121 53
People's Bldg. & Loan Assn. v. Billing, 104 Mich. 186 321
People's Trust Co. v. Tonkonogy, 144 App. Div. (N. Y.) 333 438
Perciful v. Platt, 36 Ark. 456 328
Perdue v. Perdue, 124 N. Car. 161 473
Perine v. Teague, 66 Cal. 446 51
Perkins v. Dibble, 10 Ohio 433 346
v. George, 45 N. H. 453 456
v. Simonds, 28 Wis. 90 727, 730
v. Strong, 22 Nebr. 725 122, 132
Perre v. Castro, 14 Cal. 519 429
Perrin v. Reed, 35 Vt. 2 124
Perry v. Baker, 61 Nebr. 841 439
v. Big Rapids, 67 Mich. 146 36
v. Clark, 157 Mass. 330 270
v. Fisher, 30 Ind. App. 261 438
v. Morris, 65 N. Car. 221 563
v. Paschal, 103 Ga. 134 393, 397
v. Selma &c. R. Co., 58 Ala. 546 636
v. Strawbridge, 209 Mo. 621 733
Person's Appeal, In re, 74 Pa. St. 121 87, 737
Peter v. Byrne, 175 Mo. 233 325
Peters v. Cartier, 80 Mich. 124 278, 301
v. Duluth, 119 Minn. 96 952, 957
v. Farnsworth, 15 Vt. 155 336
v. Ham, 62 Iowa 656 120, 126
v. Lohr, 24 S. Dak. 605 643
Peterson v. Bean, 22 Utah 43 109
v. Jackson, 196 Ill. 40 48
Petray v. Howell, 20 Ark. 615 562
Pettibone v. Griswold, 4 Conn. 158 424
Pettit v. Black, 13 Nebr. 142 491
Petty v. Ducker, 51 Ark. 281 491
v. Malier, 15 B. Mon. (Ky.) 591 87
Peugh v. Davis, 96 U. S. 322 420
Peyton v. Desmond, 129 Fed. 1 182
Pfeiffer v. Lindsay, 66 Tex. 123 347
Pharis v. Leachman, 20 Ala. 662 67
Phelan v. Anderson, 118 Cal. 504 51
v. Boylan, 25 Wis. 679 638
v. Fitzpatrick, 84 Wis. 240 419
Phelps v. Funkhouser, 39 Ill. 401 723
v. Grady, 168 Cal. 73 723, 736
v. Phelps, 17 Md. 120 270
v. Phelps, 143 N. Y. 197 65
v. Robbins, 40 Conn. 250 455
v. Townsley, 10 Allen (Mass.) 554 437
Philadelphia v. Anderson, 142 Pa. St. 357 12, 20, 174
Philadelphia Co. v. Dickinson, 33 App. D. C. 338 669
Philbrick v. Ewing, 97 Mass. 133 61
v. Spangler, 15 La. Ann. 46 487
Phillips v. Brown, 16 R. I. 279 459
v. Carpenter, 79 Iowa 600 714
v. Carter, 135 Cal. 604 204
v. Ferguson, 85 Va. 509 477
v. Gannon, 246 Ill. 98 276
v. Grayson, 23 Ark. 769 478
v. McConica, 59 Ohio St. 1 712, 718
v. People, 11 Ill. App. 340 283
v. Phillips, 30 Colo. 516 325
v. Schall, 21 Mo. App. 38 530
v. Warner, 4 Tex. Civ. App. 147 66
Phillips' Estate, In re, 205 Pa. 504 459
Phillis v. Gross, 32 S. Dak. 438 434
Philly v. Sanders, 11 Ohio St. 490 99
Phinizy v. Foster, 90 Ala. 262 466
Phinney v. Donahue, 67 Iowa 192 659
Phoenix Ins. Co. v. Rowe, 117 Ind. 202 28
Pickett v. Gleed, 39 Tex. Civ. App. 71 66
Pierce v. Jackson, 56 Ala. 599 119
v. Keator, 70 N. Y. 419 61, 63
v. Knight, 182 Mass. 72 471
v. Low, 51 Cal. 580 644
v. Parrish, 111 Ga. 725 417
Pierson v. Armstrong, 1 Iowa 282 290
Pike v. Collins, 33 Maine 38 129
v. Galvin, 29 Maine 183 99
Pillow v. King, 55 Ark. 633 655
Pimel v. Betjemann, 99 App. Div. (N. Y.) 559 734
Pina v. Peck, 31 Cal. 359 719
Pinckney v. Pinckney, 114 Iowa 441 119
Pinkham v. Pinkham, 55 Nebr. 729 65
Pinney v. Fellows, 15 Vt. 525 339
Pique v. Arendale, 71 Ala. 91 692
Pirie, In re, 133 App. Div. (N. Y.) 431 602
Pitkin v. Reibel, 104 Mo. 505 643
Pitman v. Thornton, 66 Maine 469 445
Pitts v. Melser, 72 Ind. 469 492
v. Sheriff, 108 Mo. 110 323
Pittsburgh Junction R. Co. v. Allegheny R. Co., 146 Pa. St. 297 109
Pittsburg &c. Co. v. Reed, 44 Ind. App. 635 87
Pittsfield Sav. Bank v. Berry, 63 N. H. 109 58
Pitzman v. Boyce, 111 Mo. 387 62
Pizzala v. Campbell, 46 Ala. 35 67
Place v. People, 192 Ill. 160 76
Planters' Bank of Tennessee v. Davis, 31 Ala. 626 64
Planters' Loan & Sav. Bank v. Dickinson, 83 Ga. 711 431
Platner v. Sherwood, 6 Johns. Ch. (N. Y.) 118 706
Platt v. Brickley, 119 Ind. 333 602
v. Eggleston, 20 Ohio St. 414 507
v. Platt, 42 Conn. 330 276
Plumb v. Robinson, 13 Ohio St. 298 640
Plume v. Bone, 13 N. J. L. 63 123
Plumel's Estate, In re, 151 Cal. 77 455
Plummer v. Russell, 2 Ribb. (Ky.) 174 262
v. Shepherd, 94 Md. 466 464
Plunkett v. Meredith, 72 Ark. 3 506
Policemen's Benevolent Assn. v. Ryce, 213 Ill. 9 90
Pollak v. Davidson, 87 Ala. 551 127
Pollak Co. v. Muscogee Mfg. Co., 108 Ala. 467 375
Pollard v. Barnes, 2 Cush. (Mass.) 191 102
v. Hagan, 3 How. (U. S.) 212 180
v. Merrill, 15 Ala. 169 479
v. Slaughter, 92 N. Car. 72 65
Pollock v. Speidel, 17 Ohio St. 439 48, 464
Pomeroy v. Mills, 3 Vt. 279 61
v. Pomeroy, 93 Wis. 262 737

[*References are to Sections.*]

Pond v. Bergh, 10 Paige (N. Y.) 140 87
v. Irwin, 113 Ind. 243 87
v. Sheean, 132 Ill. 312 401
Pool v. Blakie, 53 Ill. 495 479
v. Ellis, 64 Miss. 555 596
v. Simmons, 134 Cal. 621 109
Poole v. Engelke, 61 N. J. L. 124 52
v. Koons, 252 Ill. 49 671
Pope v. Henry, 24 Vt. 560 120
Poplin v. Hawke, 8 N. H. 124 492
Poppers v. Meagher, 148 Ill. 192 50
Poppleton's Estate, In re, 34 Utah 285 477
Porch v. Fries, 18 N. J. Eq. 204 64
Porcher v. Daniel, 12 Rich. Eq. (S. Car.) 349 322
Porter v. Armour, 241 Ill. 145 667
v. Askew, 11 Gill & J. (Md.) 346 711
v. Frenchman's Bay &c. Co., 84 Maine 195 651
v. Ourada, 51 Nebr. 510 439
v. Perkins, 5 Mass. 233 301
v. Porter, 51 Maine 376 737
v. Read, 19 Maine 363 309
v. Rice (Ky.), 128 S. W. 70 552
Portington's Case, 5 Coke 41 55
Portis v. Cummings, 14 Tex. 171 715
Portsmouth v. Shackford, 46 N. H. 423 60
Posner v. Bayless, 59 Md. 56 335
Post v. Weil, 115 N. Y. 361 290
Postal Telegraph-Cable Co. v. Chicago &c. R. Co., 30 Ind. App. 654 109
Potlatch Lumber Co. v. Runkel, 16 Idaho 192 552
Potomac Power Co. v. Burchell, 109 Va. 676 54
Potrero Nuevo Land Co. v. All Persons Claiming, 155 Cal. 371 669
Potter v. Couch, 141 U. S. 296 47
v. Dooley, 55 Vt. 512 122
v. Rowland, 8 N. Y. 448 550
v. Small, 47 Maine 293 444
v. Stransky, 48 Wis. 235 120
v. Worley, 57 Iowa 66 722
Potts v. Reynolds, 131 La. 421 672
Powe v. McLeod, 76 Ala. 418 66
Powell v. Campbell, 20 Nev. 232 676
v. Cosby, 28 Ky. L. 619 476
v. Huey, 241 Ill. 132 398
v. Powell, 30 Ala. 697 456
v. Woodcock, 149 N. Car. 235 457
Power v. Dougherty, 83 Ky. 187 708
v. Hafley, 85 Ky. 671 89, 718
v. Lester, 23 N. Y. 527 428
Powers v. Harlow, 53 Mich. 507 62
v. Kite, 83 N. Car. 156 719
v. Sharling, 64 Kans. 339 487
Powers' Appeal, In re, 63 Pa. St. 443 737
Prairie Development Co. v. Leiberg, 15 Idaho 379 399
Prasser's Will, In re, 140 Wis. 92 459
Prather v. Hairgrove, 214 Mo. 142 565
v. Prather, 58 Ind. 141 713, 716, 729
Pratt v. Atwood, 108 Mass. 40 707, 719
v. Douglas, 38 N. J. Eq. 516 456, 724
v. McGhee, 17 S. Car. 428 734
v. Pratt, 96 Ill. 184 302
v. Skolfield, 45 Maine 386 65, 436
Prentice v. Duluth Storage & Forwarding Co., 58 Fed. 437 290
Presby v. Benjamin, 169 N. Y. 377 408
Preshyterian Church v. Allison, 10 Pa. St. 413 536
Prescott v. Beyer, 34 Minn. 493 118, 119
v. Carr, 29 N. H. 453 708, 730
Preston v. Bosworth, 153 Ind. 458 276
v. Hirsch, 5 Cal. App. 485 641
Preston
v. Preston, 202 Pa. St. 515 339
v. Smith, 26 Fed. 884 48, 667
Prestwood v. Carlton, 162 Ala. 327 407
Price v. Bell, 91 Ala. 180 692
v. Dennis, 159 Ala. 625 203
v. Griffin, 150 N. Car. 523 714
v. Price, 52 N. J. Eq. 326 473
v. Price, 124 N. Y. 589 65
Prichard v. James, 93 Ky. 306 48
v. Mulhall, 140 Iowa 1 671
Prickett v. Parker, 3 Ohio St. 394 707, 708
Prichitt v. Kirkman, 2 Tenn. Ch. 390 730
Priddy v. Smith, 106 Ark. 79 415
Primm v. Stewart, 7 Tex. 178 739
Prince v. Antle, 90 Ky. 138 98, 561
v. Barrow, 120 Ga. 810 59, 480
v. Case, 10 Conn. 381 62, 99
Princeton Loan & Trust Co. v. Munson, 60 Ill. 371 446
Prindle v. Beveridge, 7 Lans. (N. Y.) 225 48
Pringle v. Dunn, 37 Wis. 449 120, 132
Pritchard v. Elton, 38 Conn. 434 420
v. Pritchard, 76 W. Va. 91 735
Pritchett v. Jackson, 103 Md. 696 291
Proctor v. Dicklow, 57 Kans. 119 480
v. Nance, 220 Mo. 104 643
v. Proctor, 215 Ill. 275 671
v. Walker, 12 Ind. 660 660
Proctor, In re, 103 Iowa 232 708
Prosser v. Warner, 47 Vt. 667 676
Protestant Episcopal Church v. E. E. Lowe Co., 131 Ga. 666 430
Prout v. Burke, 51 Nebr. 24 431
Providence County Sav. &c. Bank v. Hall, 16 R. I. 154 53
Provident Inst. for Savings v. Jersey City, 113 U. S. 506 527
Provident Loan Trust Co. v. Wolcott, 5 Kans. App. 473 23
Pruitt v. Holland, 92 Ky. 641 48
Prutsman v. Baker, 30 Wis. 644 101
Puckett v. Waco Abstract &c. Co., 16 Tex. Civ. App. 329 16, 19, 24
Puget Sound Nat. Bank v. Fisher, 52 Wash. 246 329, 654
Pugh v. Pugh, 105 Ind. 552 466
Pulitzer v. Livingston, 89 Maine 359 482
Pulliam v. Pulliam, 10 Fed. 25 40
Purdy v. Evans, 156 Ky. 342 457
Purser v. Cady, 120 Cal. 214 592
Putbrees v. James, 162 Iowa 618 724
Putnam v. Story, 132 Mass. 205 359
v. Tyler, 117 Pa. St. 570 635
v. White, 76 Maine 551 119
Putzel v. Van Brunt, 40 N. Y. Super. Ct. 501 297

Q

Qualifications of Electors, In re, 19 R. I. 387 57
Quarles v. Quarles, 4 Mass. 680 735, 737
Quartermous v. Kennedy, 29 Ark. 544 420
Quick v. Milligan, 108 Ind. 419 118, 692
v. Rufe, 164 Mo. 408 697
Quimby v. Dill, 40 Maine 528 54
v. Wood, 19 R. I. 571 527
Quinby v. Conlan, 104 U. S. 420 198
v. Higgins, 14 Maine 309 711
Quincy v. Attorney-General, 160 Mass. 431 458
Quinn v. Quinn, 5 S. Dak. 328 718
v. Shields, 62 Iowa 129 59, 480
v. Valiquette, 80 Vt. 434 407

[References are to Sections.]

R

Raab, In re, 79 Misc. (N. Y.) 185 471
Rabb v. Griffin, 26 Miss. 579 64
Racine v. Case Plow Co., 56 Wis. 539 241
Rackemann v. Taylor, 204 Mass. 394 456, 724
Rackley v. Roberts, 147 N. Car. 201 592
Racouillat v. Sansevain, 32 Cal. 376 120
Raggio v. Palmtag, 155 Cal. 797 66
Ragland v. Conqueror Zinc Cas., 136 Mo. App. 631 407
Ragle v. Dedinan, 50 Ind. App. 359 278
Ragley-McWilliams Lumber Co. v. Hare, 61 Tex. Civ. App. 509 100
Railsback v. Walke, 81 Ind. 409 53
Raines v. Walker, 77 Va. 92 99, 120, 265
Raleigh v. Peace, 110 N. Car. 32 630
Rambo v. Bell, 3 Ga. 207 67
Ramsey v. Jones, 41 Ohio St. 685 118
v. Ramsey, 7 Ind. 607 85
Ranck's Appeal, In re, 113 Pa. St. 98 87
Rand v. Davis (Tex.), 27 S. W. 939 128
Randal v. Gould, 225 Pa. 42 616
Randall v. Bradley, 65 Maine 43 444
v. Ghent, 19 Ind. 271 266
v. Lingwall, 43 Ore. 383 434
v. Sanders, 87 N. Y. 578 313
Randall Co. v. Glendenning, 19 Okla. 475 438
Randel v. Chesapeake &c. Canal Co., 1 Har. (Del.) 151 278
Randell v. Chubb, 46 Mich. 311 408
Randolph v. State, 82 Ala. 527 137
v. Vails, 180 Ala. 82 723
Rankin v. Schaeffer, 4 Mo. App. 108 15, 23
Rankin's Appeal, In re, 1 Monag. (Pa.) 308 667
Ransdell v. Boston, 172 Ill. 439 474
Ransom v. Ransom, 30 Mich. 328 323
Rapp v. Matthias, 35 Ind. 332 602
Rash's Estate, In re (Pa.), 2 Pars. Eq. Cas. 160 40
Ratcliff v. Marrs, 87 Ky. 26 312
Ratcliffe v. Ratcliffe, 7 Mart. (N. S.) 335 711
Ratteree v. Conley, 74 Ga. 153 127
Rauer v. Fay, 110 Cal. 361 537
Raulet v. Northwestern Nat. Ins. Co., 157 Cal. 213 723
Rawlings v. Bailey, 15 Ill. 178 353
Ray v. Alexander, 146 Pa. St. 242 48
v. Murdock, 36 Miss. 692 644
v. Pease, 95 Ga. 153 271
Raymond v. Pauli, 21 Wis. 531 119
Read v. French, 28 N. Y. 285 660
v. Loftus, 82 Kans. 485 33, 34
Reading v. Waterman, 46 Mich. 107 446
Ready v. Schmith, 52 Ore. 196 671
Reasoner v. Edmundson, 5 Ind. 393 123
Reaume v. Chambers, 22 Mo. 36 45, 309
Reclamation District No. 70 v. Sherman, 11 Cal. App. 399 207
Rector v. Gaines, 19 Ark. 70 95
v. Waugh, 17 Mo. 13 45, 268
Rector & Wilhelmy Co. v. Maloney, 15 S. Dak. 271 643
Reddick v. Lord, 131 Ind. 336 46, 464
Redmond v. Burroughs, 63 N. Car. 242 729
Reed v. Acton, 120 Mass. 130 117
v. Crocker, 12 La. Ann. 436 715
v. Gannon, 50 N. Y. 345 127
v. Lewis, 74 Ind. 433 50
v. Merriam, 15 Nebr. 323 642
v. Siddall, 89 Minn. 417 956, 957
v. Woodward, 11 Phil. (Pa.) 541 487
Reel v. Elder, 62 Pa. St. 308 65
Reeves v. Brayton, 36 S. Car. 384 58
v. Brooks, 80 Ala. 26 67
v. Estes, 124 Ala. 303 119
v. Hayes, 95 Ind. 521 438, 439
v. Reeves, 117 Mich. 526 676
v. School Dist. 59, 24 Wash. 282 46
Reichert v. Missouri &c. Coal Co., 231 Ill. 238 341, 354
Reichle v. Steitz, 64 N. J. Eq. 789 734
Reid v. Abernethy, 77 Iowa 438 429
v. Corrigan, 143 Ill. 402 451, 473
v. Gordon, 35 Md. 174 58, 60
v. Hart, 45 Ark. 41 289
v. Holmes, 127 Mass. 326 570
Reiff's Appeal, In re, 124 Pa. St. 145 463
Reilly v. Union Protestant Infirmary, 87 Md. 664 481
Reilley v. Wright, 117 Cal. 77 613
Reinders v. Koppelman, 68 Mo. 482 718
Reindollar v. Flickinger, 59 Md. 469 538
Reinhart v. Lugo, 86 Cal. 395 662
Reis v. Graff, 51 Cal. 86 634
Reitenbaugh v. Chester Valley R. Co., 21 Pa. St. 100 677
Reith's Estate, In re, 144 Cal. 314 480
Remey v. Iowa Cent. R. Co., 116 Iowa 133 110
Remington v. Metropolitan Sav. Bank, 76 Md. 546 456
Remmington v. Lewis, 8 B. Mon. (Ky.) 606 719
Renfro v. Adams, 62 Ala. 302 443
Renick v. Dawson, 55 Tex. 102 129
Renkert v. Title Guaranty Trust Co., 102 Mo. App. 267 16, 17
Renton, In re, 10 Wash. 533 734
Republican River Bridge Co. v. Kansas Pac. R. Co., 12 Kans. 409 186, 187
Rerick v. Kern, 14 Serg. & R. (Pa.) 267 62
Reuter v. Stuckart, 181 Ill. 529 289
Reydell v. Reydell, 10 Misc. (N. Y.) 273 685
Reynolds v. Atlanta Nat. Bldg. &c. Assn., 104 Ga. 703 674
v. Borel, 86 Cal. 538 75
v. Kirk, 105 Ala. 446 434
v. Shaver, 59 Ark. 299 301
v. Strong, 82 Hun (N. Y.) 202 77
Reynolds, In re, 57 Maine 350 711
Rhea v. Bagley, 63 Ark. 374 737
v. Planters' Mut. Ins. Assn., 77 Ark. 57 286
R. H. Herron Co. v. Superior Court, 136 Cal. 279 377
Rhinehart v. Schuyler, 7 Ill. 473 119
Rhoades v. Barnes, 54 Wash. 145 693
Rhoads v. Rhoads, 43 Ill. 239 457
Rhode Island v. Massachusetts, 4 How. (U. S.) 591 694
Rhode Island Hospital Trust Co. v. Harris, 20 R. I. 408 61, 65
Rhodes v. Bouldrey, 138 Mich. 144 48
v. Dutcher, 6 Hun (N. Y.) 453 593
v. Gunn, 35 Ohio St. 387 644
Rice v. Boston &c. R. Corp., 12 Allen (Mass.) 141 54
v. Minnesota &c. R. Co., 1 Black (U. S.) 358 212
v. Rice, 36 Fed. 858 530
v. Rice, 68 Ala. 216 452
v. Rice, 108 Ill. 199 66
v. Sioux City &c. R. Co., 110 U. S. 695 207
v. White, 8 Ohio 216 641
Richard v. Boyd, 124 Mich. 396 655

[*References are to Sections.*]

Richards v. McClelland, 29 Pa. St. 385 322
v. Richards, 90 Iowa 606 54
Richardson v. Clements, 89 Pa. St. 503 61
v. De Giverville, 107 Mo. 422 320
v. Martin, 55 N. H. 45 716
v. Stodder, 100 Mass. 528 58
v. Tobey, 121 Mass. 457 507
v. Wren, 11 Ariz. 395 417
Richey v. Sinclair, 167 Ill. 184 422
Richmond v. Brookings, 48 Fed. 241 662
v. State, 5 Ind. 334 467
Rico v. Brandenstein, 98 Cal. 465 323
Ridgely v. Iglehart, 3 Bland (Md.) 540 515
v. Stillwell, 25 Mo. 570 51
Ridgway's Appeal, In re, 15 Pa. St. 177 581
Riegel v. Riegel, 243 Ill. 626 286
Riehl v. Bingenheimer, 28 Wis. 88 66
Riesenberg, In re, 116 Mo. App. 308 466
Riggin v. Love, 72 Ill. 553 45, 274, 312
Riggs v. Cragg, 89 N. Y. 479 653
v. Palmer, 115 N. Y. 506 458, 733
v. Sally, 15 Maine 408 48
Rigney v. Chicago, 102 Ill. 64 109
Riley v. Kepler, 94 Ind. 308 364, 601
Rines v. Mansfield, 96 Mo. 394 45, 274, 312
Ringgold v. Bryan, 3 Md. Ch. 488 127
Ringrose v. Gleadall, 17 Cal. App. 664 59
Ringo v. Rotan, 29 Ark. 56 207
Rioux v. Cormier, 75 Wis. 566 272
Ripley v. Seligman, 88 Mich. 177 318
Ritch v. Talbot, 74 Conn. 137 734
Ritchie v. Griffiths, 1 Wash. 429 122, 132
v. Kansas &c. R. Co., 55 Kans. 36 54
Ritter v. Phillips, 53 N. Y. 586 316
v. Worth, 58 N. Y. 627 120
Riverbank Imp. Co. v. Bancroft, 209 Mass. 217 667
Rivers v. Rivers, 36 S. Car. 302 709
Rixey v. Stuckey, 129 Mo. 377 471
Roach v. Roach, 25 R. I. 454 720
v. Sanborn Land Co., 135 Wis. 354 436
Roads v. Symmes, 1 Ohio 281 221
Roan v. Holmes, 32 Fla. 295 620
Roane v. Baker, 120 Ill. 308 118
Robards v. Brown, 167 Mo. 447 476
Robbins v. Barron, 32 Mich. 36 633
v. Boulder County Comrs., 50 Colo. 610 462
v. Bunn, 54 Ill. 48 198
Rober v. Michelsen, 82 Nebr. 48 655
Roberson v. Downing Co., 120 Ga. 833 287
v. Simons, 109 Ga. 360 53
Robert v. Corning, 89 N. Y. 225 43
v. West, 15 Ga. 122 465
Roberts v. Bassett, 105 Mass. 409 75
v. Bauer, 35 La. Ann. 453 120
v. Flanagan, 21 Nebr. 503 491
v. Lion Loan &c. Co., 63 Iowa 76 16, 18
v. McFadden, 32 Tex. Civ. App. 47 77
v. Press, 97 Iowa 475 371
v. Robinson, 49 Nebr. 717 596
v. Sterling, 4 Mo. App. 593 17
v. Stevens, 84 Maine 325 478
v. Vornholt, 126 Ind. 511 28
v. Wyatt, 2 Taunt. 268 30
Roberts' Appeal, 92 Pa. St. 407 339
Roberts' Estate, In re, 163 Pa. St. 408 473
Roberts' Estate, In re, 84 Wash. 163 717
Robertson v. Burrell, 40 Ind. 328 730
v. Fleming, 57 N. Car. 387 722
v. Hefley, 55 Tex. Civ. App. 368 266
v. Howard, 82 Kans. 588 385
v. Moore, 10 Idaho 115 538
v. Robertson, 25 Iowa 350 323
Robertson
v. Vancleave, 129 Ind. 217 40, 70
Robins v. Bunn, 34 N. J. L. 322 533
v. Quinliven, 79 Pa. St. 333 714
Robinson v. Brennan, 115 Mass. 582 423
v. Cogswell, 192 Mass. 79 59, 480
v. Gantt, 1 Neb. (Unoff.) 51 668
v. Govers, 138 N. Y. 425 561
v. Jones, 31 Nebr. 20 183
v. Kerrigan, 151 Cal. 40 955, 956, 957
v. Le Grand, 65 Ala. 111 462
v. Perry, 21 Ga. 183 408
v. Randolph, 21 Fla. 629 46, 478
v. Rippey, 111 Ind. 112 647
v. Robinson, 89 Va. 916 49
v. Salt Lake City, 37 Utah 520 568
Robinson, In re, 6 Mich. 137 662
Robinson's Estate, In re, 149 Pa. St. 418 48
Robison v. Miller, 158 Pa. St. 177 349
Robley v. Withers, 95 Miss. 318 433
Robson v. Thomas, 55 Mo. 581 582
Rochester v. Rochester R. Co., 182 N. Y. 99 647
Rocker v. Metzger, 171 Ind. 364 705
Rock Island & Pac. R. Co. v. Dimick, 144 Ill. 628 127
Rock Island Nat. Bank v. Thompson, 173 Ill. 593 563
Rockwell v. Rockwell, 81 Mich. 493 65
Rocky Mountain Fuel Co. v. Kovaics, 26 Colo. App. 554 714
Rodefer v. Pittsburgh &c. R. Co., 72 Ohio St. 272 62
Rodgers v. Bonner, 45 N. Y. 379 562
v. Cavanaugh, 24 Ill. 583 120
v. Palmer, 33 Conn. 155 70
Rodman v. Robinson, 134 N. Car. 503 65, 325
Roe v. Roe, 52 Kans. 724 676
v. Vingut, 117 N. Y. 204 470
Roger, In re, 131 Pa. St. 382 711
Rogers v. Clark Iron Co., 104 Minn. 198 192, 223, 224
v. Cox, 96 Ind. 157 62
v. Coy, 164 Mass. 391 405
v. Hillhouse, 3 Conn. 398 306
v. Jones, 8 N. H. 264 127
v. Palmer, 102 U. S. 263 128
v. Pell, 154 N. Y. 518 283
Rogers' Estate, In re, 131 Pa. St. 382 87
Rohrbach v. Sanders, 212 Pa. 636 43
Roll v. Rea, 50 N. J. L. 266 118, 577
Rollins v. Henry, 78 N. Car. 342 546
Rolph v. Fargo, 7 N. Dak. 640 647
Roney v. Moss, 76 Ala. 491 324
Ronk v. Higginbotham, 54 W. Va. 137 353
Root v. Monroe, 5 Blackf. (Ind.) 594 553
Ropes v. Upton, 125 Mass. 258 57
Rose v. Hale, 185 Ill. 378 477
v. Munie, 4 Cal. 173 535
v. Rose, 104 Ky. 48 49
v. Watson, 10 H. L. Cas. 672 531
Rose's Estate, In re, 63 Cal. 346 583
Roseboom v. Van Vechten, 5 Denio (N. Y.) 414 49
Rosenthal v. Mounts (Tex. Civ. App.), 130 S. W. 192 612, 613
Rosher, In re, 26 Ch. Div. 801 47
Ross v. Ross, 129 Mass. 243 718, 719
v. Wilson, 58 Ga. 249 65
v. Worthington, 11 Gil. (Minn.) 438 129, 316
Ross, In re, 140 Cal. 282 734
Rossbach v. Micks, 89 Nebr. 821 435
Rosser v. Cheney, 61 Ga. 468 129
Roth v. Michalis, 125 Md. 325 338
Rothe v. Bellingrath, 71 Ala. 55 536

[References are to Sections.]

Roth Grocery Co. v. Hotel Monticello Co., 148 Mo. App. 513 372
Rothschild v. Title Guarantee &c. Co., 139 App. Div. (N. Y.) 672 100
Rotmanskey v. Heiss, 86 Md. 633 710
Roulston v. Hall, 66 Ark. 305 65
Roundtree v. Denson, 59 Wis. 522 327
Rountree v. Pursell, 11 Ind. App. 522 86, 87, 714
Rourke v. McNally, 98 Cal. 291 201
Roush v. Wensel, 15 Ohio C. C. 133 487
Rowan, In re, 6 Pa. Co. Ct. 461 712
Rowe v. Allison, 87 Ark. 206 720
v. Ware, 30 Ga. 278 335
Rowell v. Jewett, 69 Maine 293 672
v. Williams, 54 Wis. 636 126
Rowland v. Miller, 139 N. Y. 93 313
v. Rowland, 93 N. Car. 214 312, 326
Rowley v. Stray, 32 Mich. 70 730
Rowsey v. Lynch, 61 Mo. 560 15
Roy v. Moore, 85 Conn. 159 667
v. Segrist, 19 Ala. 810 491
Royce v. Adams, 123 N. Y. 402 354
Rozier v. Graham, 146 Mo. 352 714
Rubeck v. Gardner, 7 Watts (Pa.) 455 111
Rubel v. Title &c. Co., 101 Ill. App. 439 546
Rubel, In re, 166 Fed. 131 382
Ruch v. Biery, 110 Ind. 444 737
Rucker v. Jackson, 180 Ala. 109 729
v. Tennessee Coal &c. R. Co., 176 Ala. 456 723
Rudd v. Thompson, 22 Ark. 363 660
Rudolph v. Rudolph, 207 Ill. 266 483, 734
v. Saunders, 111 Cal. 233 553
Rufner v. McConnel, 14 Ill. 168 279
Rugg v. Lemley, 78 Ark. 65 516
Ruggles v. Lesure, 24 Pick. (Mass.) 187 62
Ruleman v. Pritchett, 56 Tex. 482 284
Runey v. Edmands, 15 Mass. 291 708
Runlet v. Otis, 2 N. H. 167 419
Runyan v. Snyder, 45 Colo. 156 261
Russ v. Steel, 40 Vt. 310 61
Russell v. Bates, 181 Mass. 12 59
v. Bell, 160 Ala. 480 640
v. Bruer, 64 Ohio St. 1 708
v. Cole, 167 Mass. 6 315
v. Doyle, 84 Ky. 386 314
v. Hudson, 28 Kans. 99 633
v. Mandell, 73 Ill. 136 29
v. Nall, 2 Tex. Civ. App. 60 118
v. Polk County Abstract Co., 87 Iowa 233 15, 23
v. Roberts, 121 N. Car. 322 722
v. Russell, 84 Ala. 48 466
v. Tucker, 136 Ga. 136 672
Russell, In re, 168 N. Y. 169 471
Russell's Appeal, In re, 15 Pa. St. 319 119
Russell's Estate, In re, 150 Cal. 604 483
Rust v. Electric Lighting Co., 124 Ala. 202 432
Rutaced Co., In re, 137 App. Div. (N. Y.) 716 372
Rutter v. Carothers, 223 Mo. 631 560
Ryan v. Andrews, 21 Mich. 229 708, 730
v. Carter, 93 U. S. 78 189
v. Egan, 156 Ill. 224 458
v. Freeman, 36 Miss. 175 64
v. Martin, 91 N. Car. 464 263
Ryan's Estate, In re, 14 Wkly. Notes Cas. (Pa.) 79 716
Rydalch v. Anderson, 37 Utah 99 669
Ryder v. Lyon, 85 Conn. 245 480
Ryker v. Vawter, 117 Ind. 425 593
Ryland v. Banks, 151 Mo. 1 322

S

Sabichi v. Chase, 108 Cal. 81 371
Sackett v. Rose (Okla.), 154 Pac. 1177 22
Saeger v. Bode, 181 Ill. 514 46
Safe Deposit & Trust Co. v. Marburg, 110 Md. 410 699
Safford v. Stubbs, 117 Ill. 389 73
Sage v. Central R. Co., 99 U. S. 334 578
v. Rudnick, 67 Minn. 362 108
Sahler v. Signer, 44 Barb. (N. Y.) 606 428
St. Clair v. Cox, 106 U. S. 350 652
v. Craig, 77 Kans. 394 638
St. Croix Land & L. Co. v. Ritchie, 73 Wis. 409 122
St. John v. Andrews Institute, 191 N. Y. 254 481
v. Conger, 40 Ill. 535 124
v. Dann, 66 Conn. 401 469
v. East St. Louis, 50 Ill. 92 647
St. John's Parish v. Bostwick, 8 App. D. C. 452 487
St. Joseph v. Seel, 122 Mich. 70 687
St. Louis v. Gorman, 29 Mo. 593 73
St. Louis Smelting & Refining Co. v. Kemp, 104 U. S. 636 224
St. Louis &c. R. Co. v. Nugent, 152 Ill. 119 690
v. Ramsey, 53 Ark. 314 103, 272
St. Paul v. Chicago &c. R. Co., 45 Minn. 387 694
St. Paul &c. R. Co. v. Brown, 24 Minn. 517 227
v. Greenhalgh, 26 Fed. 563 212
v. Hinckley, 53 Minn. 398 698
v. Northern Pac. R. Co., 139 U. S. 1 212
St. Peter's Roman Catholic Congregation v. Germain, 104 Ill. 440 329
St. Stephen's Evangelical Lutheran Church v. Pierce (Del.), 68 Atl. 194 270
Salina Stock Co. v. United States, 85 Fed. 339 183
Salisbury Sav. Soc. v. Cutting, 50 Conn. 113 97, 99, 125, 427
Sallee v. Corder, 67 Cal. 174 204
Saltonstall v. Riley, 28 Ala. 164 617
Salvage v. Haydock, 68 N. H. 484 428
Samish River Boom Co. v. Union Boom Co., 32 Wash. 586 109
Sampson v. Randall, 72 Maine 109 470
San Antonio v. Gould, 34 Tex. 49 503
Sanborn v. Rice, 129 Mass. 387 313
Sanders v. Betts, 7 Wend. (N. Y.) 287 303
v. Cassady, 86 Ala. 246 437
v. Richardson, 14 Pick. (Mass.) 522 52
v. Sutlive, 163 Iowa 172 434
San Domingo Gold Min. Co. v. Grand Pac. Gold Min. Co., 10 Cal. App. 415 350
Sandon v. Sandon, 123 Wis. 603 720
Sands v. Davis, 40 Mich. 14 119
v. Lynham, 27 Grat. (Va.) 291 111
Sanford v. Dick, 17 Conn. 213 658
v. Johnson, 24 Minn. 172 51
v. People, 102 Ill. 374 634
v. Sanford, 139 U. S. 642 224
San Francisco v. Buckman, 111 Cal. 25 502
v. Lawton, 18 Cal. 465 301
San Francisco Mut. Loan Assn. v. Bowden, 137 Cal. 236 443
San Francisco Protestant Orphan Asylum v. Superior Ct., 116 Cal. 443 491
Sansberry v. McElroy, 6 Bush (Ky.) 440 721
Santa Cruz v. Enright, 95 Cal. 105 109

[*References are to Sections.*]

Saranac Land & Timber Co. v. Roberts, 195 N. Y. 303 634
Sargent v. Hubbard, 102 Mass. 380 129
v. Tuttle, 67 Conn. 162 647
Sartwell v. Sowles, 72 Vt. 270 51
Satcher v. Grice, 53 S. Car. 126 451
Satterfield v. Malone, 35 Fed. 445 127, 128
v. Tate, 132 Ga. 256 469
Saunders v. Blythe, 112 Mo. 1 266
v. Hart, 57 Tex. 8 100
v. Niswanger, 11 Ohio St. 298 203
v. Saunders, 109 Va. 191 471
Saunders, In re, 129 App. Div. (N. Y.) 406 100
Sauter v. Dollman, 46 Minn. 504 286
Savage v. Savage, 19 Ore. 112 670
Savings & Loan Soc. v. Deering, 66 Cal. 281 357
Savings Bank v. Ward, 100 U. S. 195 22
Sawyer v. Adams, 8 Vt. 172 121
v. Freeman, 161 Mass. 543 483
v. Hanson, 24 Maine 542 50
Saxton v. St. Joseph, 60 Mo. 153 502
Sayers v. Hoskinson, 110 Pa. St. 473 65
Saylor v. Frantz, 17 Okla. 37 193
Sayre v. Mohney, 30 Ore. 238 57
v. Sage, 47 Colo. 559 643
Sayward v. Thompson, 11 Wash. 706 119, 223
Scadden Flat Gold Min. Co. v. Scadden, 121 Cal. 33 59
Scanlan v. Grimmer, 71 Minn. 352 422
v. Wright, 13 Pick. (Mass.) 523 111
Scarboroug v. Holder, 127 Ga. 256 593
Scarborough v. Arrant, 25 Tex. 129 119
Schaale v. Wasey, 70 Mich. 414 617
Schade v. Gehner, 133 Mo. 252 22, 23
Schaefer v. Bernhardt, 76 Ohio St. 443 734
v. Schaefer, 141 Ill. 337 49
v. Eneu, 54 Pa. St. 304 718
Schaeffer v. Bond, 70 Md. 80 355
v. Messersmith, 10 Pa. Co. Ct. 366 475
Schaub v. Griffin, 84 Md. 557 90
Schedda v. Sawyer, 4 McLean (U. S.) 181 225
Schedel's Estate, In re, 73 Cal. 594 466
Scheerer v. Cuddy, 85 Cal. 270 692
Scheid v. Rapp, 121 Pa. St. 593 534
Schell v. Leland, 45 Mo. 289 661
Schenck v. Wicks, 23 Utah 576 77
Schermerhorn v. Negus, 1 Denio (N. Y.) 448 47
Schierl v. Newberg, 102 Wis. 552 424
Schissel v. Dickson, 129 Ind. 139 670
Schley v. Pullman Car Co., 25 Fed. 890 322
v. Pullman Palace Car Co., 120 U. S. 575 284
Schlosser v. Hempbill, 118 Iowa 452 207
Schlosser, In re, 116 N. Y. S. 796 87
Schmaunz v. Goss, 132 Mass. 141 713
Schmelzer v. Chicago Ave. Sash & Door Mfg. Co., 85 Ill. App. 596 534
Schmidt v. Zabrndt, 148 Ind. 447 433
Schmidtke v. Miller, 71 Tex. 103 736
Schmitt v. Weber, 239 Ill. 377 350
Schmucker v. Adams, 45 Pa. Super. Ct. 58 708
Schnebly v. Schnebly, 26 Ill. 116 65
Schneer v. Greenbaum, 27 Del. 97 46, 464
Schneider v. Botsch, 90 Ill. 577 691
v. Detroit, 135 Mich. 570 698
v. Holtzbauer, 134 Ky. 33 43
v. Hutchinson, 35 Ore. 253 208
Schofield v. Jennings, 68 Ind. 232 581
Scholl, In re, 100 Wis. 650 719
School District No. 11 v. Batsche, 106 Mich. 330 52
Schoonmaker v. Sheely, 3 Denio (N. Y.) 485 714
Schott v. Linscott, 80 Kans. 536 100, 611
Schreyer v. Schreyer, 91 N. Y. S. 1065 340
Schroeder v. Merchants &c. Ins. Co., 104 Ill. 71 658
Schultz v. Hastings Lodge No. 50, I. O. O. F., 90 Nebr. 454 405
Schurtz v. Colvin, 55 Ohio St. 274 286
Schuylkill v. Boyer, 125 Pa. St. 226 663
Scott v. Austin, 36 Minn. 460 364
v. Fowler, 227 Ill. 104 393
v. Jordan (Okla.), 155 Pac. 498 22
v. Key, 11 La. Ann. 232 718, 719
v. Michael, 129 Ind. 250 291
v. Scott, 80 Kans. 489 676
v. Trustees First M. E. Ch., 50 Mich. 528 333
v. West, 63 Wis. 529 359
Scottish American Mortg. Co. v. Butler, 99 Miss. 56 694
Scoville v. Mason, 76 Conn. 459 467
Scriver v. Smith, 100 N. Y. 471 506
Scrivner v. Dietz, 84 Cal. 295 428
Scroggs v. Stevenson, 100 N. Car. 354 737
Scruggs v. Driver's Exrs., 31 Ala. 274 673
Seaboard Air Line R. Co. v. Anniston Mfg. Co., 186 Ala. 264 277
v. Harby, 55 Fla. 555 568
Seager, In re, 92 Mich. 186 65
Seals v. Perkins, 96 Miss. 704 643
Seaman v. Harmon, 192 Mass. 5 340
v. Hax, 14 Colo. 536 420
Seattle & L. W. Waterway Co. v. Seattle Dock Co., 35 Wash. 503 182
Seaverns v. Costello, 8 Ariz. 308 643
Seay v. Cockrell, 102 Tex. 280 465
Sebald v. Mulholland, 155 N. Y. 455 507
Seberg v. Iowa Trust &c. Bank, 141 Iowa 99 100
Sebring v. Mersereau, 9 Cow. (N. Y.) 344 670
Security Abstract &c. Co. v. Longacre, 56 Nebr. 469 16, 17, 18
Security Trust Co. v. Dodd, 173 U. S. 624 376, 377
Sedgwick v. Laflin, 10 Allen (Mass.) 430 45
Seeger v. Mueller, 133 Ill. 86 100
Seibel v. Bath, 5 Wyo. 409 546
Selden v. Illinois Trust & Savings Bank, 239 Ill. 67 722
Sellers v. Corwin, 5 Ohio 398 563
v. Sellers, 35 Ala. 235 40
v. Sellers, 98 N. Car. 13 280, 288
Selman v. Robertson, 46 S. Car. 262 476
Semon v. Terhune, 40 N. J. Eq. 364 99, 132
Semper v. Coates, 93 Minn. 76 321
Semple v. Scarborough, 44 La. Ann. 257 432
Sena v. American Turquoise Co., 14 N. Mex. 511 214
Sengfelder v. Hill, 21 Wash. 371 297
Senter v. Lambeth, 59 Tex. 259 530
Sergeant v. Steinberger, 2 Ohio 305 326
Service v. McMahon, 42 Wash. 452 538
Sessions v. Peay, 23 Ark. 39 590
Seton v. New York, 130 App. Div. (N. Y.) 148 677
Sewall v. Wilmer, 132 Mass. 131 60, 456
Sewell v. Drake, 27 Ky. L. 571 566
Sexton v. Rhames, 13 Wis. 99 661
Seymour v. Darrow, 31 Vt. 122 129
v. Laycock, 47 Wis. 272 443

[References are to Sections.]

Seymour
v. McKinstry, 106 N. Y. 230 692
v. Seymour, 22 Conn. 272 600, 653
v. Slide & Spur Gold Mines, 42 Fed. 633 530
Shackelford v. Hall, 19 Ill. 212 477
v. Planters' &c. Bank, 22 Ala. 238 372
Shackelton v. Sehree, 86 Ill. 616 311
Shackleford v. Beck, 80 Va. 573 538
Shafer v. Shafer, 85 Md. 554 653
Shaffer v. Sutton, 5 Binn. (Pa.) 228 50
Shaffner v. Briggs, 36 Ind. 55 571
Shaft v. Carey, 107 Wis. 273 278
Shamp v. White, 106 Cal. 220 407
Shanks v. Mills, 25 S. Car. 358 717
Sharp v. Barker, 11 Kans. 381 426
v. Humphreys, 16 N. J. L. 25 46
Sharpely v. Plant, 79 Miss. 175 341
Shaw v. Canfield, 86 Mich. 1 357
v. Hoadley, 8 Blackf. (Ind.) 165 360, 723
v. Kellogg, 170 U. S. 312 186
v. Lindsey, 60 Ala. 344 420
v. Proffitt, 57 Ore. 192 61
v. Wilshire, 65 Maine 485 119
Shays v. Norton, 48 Ill. 100 418
Sheafe v. Cushing, 17 N. H. 508 49
Sheaffe v. O'Neil, 1 Mass. 256 111
Shearer v. Clay, 1 Litt. (Ky.) 260 185
Shedaker, In re, 74 N. J. Eq. 802 87
Sheehan v. Davis, 17 Ohio St. 571 119
Sheehy v. Miles, 93 Cal. 288 6, 7
v. Scott, 128 Iowa 551 66
Sheffey v. Bank, 33 Fed. 315 126
Sheffield v. Franklin, 151 Ala. 492 718
v. Lovering, 12 Mass. 490 730
Sheldon v. Carter, 90 Ala. 380 262
Shellenherger v. Ransom, 41 Nebr. 631 733
Shelton v. Franklin, 224 Mo. 343 643
v. Price, 174 Fed. 891 385
v. Wright, 25 Ga. 636 718
Shepard v. Shepard, 36 Mich. 173 127
Shepard Drainage District v. Eimerman, 140 Wis. 327 677
Shepherd v. Burkhalter, 13 Ga. 443 120
v. Kahle, 120 Wis. 57 99
Sheridan v. Schimpf, 120 Ala. 475 364
Sherin v. Brackett, 36 Minn. 152 691
Sherman v. American Cong. Assn., 98 Fed. 495 474
v. Buick, 45 Cal. 656 208
v. Sherman, 23 S. Dak. 486 301
Sherrer v. Harris (Ark.), 13 S. W. 730 419
Sherry v. Sampson, 11 Kans. 611 215
Sherwood v. Dunhar, 6 Cal. 53 443
v. Sherwood, 45 Wis. 357 678
v. Waller, 20 Conn. 262 314
Shields v. Norfolk &c. R. Co., 129 N. Car. 1 110
v. Shiff, 124 U. S. 351 113
v. Walker, 2 Overt. (Tenn.) 118n 196
Shillaber's Estate, In re, 74 Cal. 144 487
Shindler v. Robinson, 15 App. Div. (N. Y.) 875 470
Shine v. Olson, 110 Minn. 44 642
Shipley v. Fox, 69 Md. 572 429
Shipman v. Mitchell, 64 Tex. 174 53
v. Rollins, 98 N. Y. 311 484
Shirey v. Postlethwaite, 72 Pa. St. 39 46
Shirk v. Thomas, 121 Ind. 147 118
v. Whitten, 131 Ind. 455 546
Shiveley v. Gilpin, 23 Ky. L. 2090 124
Shively v. Bowlby, 152 U. S. 1 104, 272
Shockley v. Parvis, 4 Houst. (Del.) 568 43
Shoemaker v. McMonigle, 86 Ind. 421 270
Shortall v. Hinckley, 31 Ill. 219 64, 314
Short v. Caldwell, 155 Mass. 57 419
v. Conlee, 28 Ill. 219 284
v. Fogle, 42 Kans. 349 126
v. Galway, 83 Ky. 501 584
Shouse v. Taylor, 115 Ky. 22 656
Shreveport Creosoting Co. v. Shreveport, 119 La. 637 631
Shrigley v. Black, 66 Kans. 213 638
Shriver v. Shriver, 86 N. Y. 575 77
v. State, 65 Md. 278 721
Shryock v. Cannon, 39 Ark. 434 324
Shull v. Johnson, 55 N. Car. 202 466, 730
Shultz v. Houck, 29 Md. 24 491
v. Sanders, 38 N. J. Eq. 154 611
Shuman v. Shuman, 80 Wis. 479 730
Shute v. Patterson, 147 Fed. 509 380
v. Shute, 82 S. Car. 264 286
Sibly v. England, 90 Ark. 420 287
Sicard's Lessee v. Davis, 6 Pet. (U. S.) 124 283
Siders v. Siders, 169 Mass. 523 711
Siedschlag v. Griffin, 132 Wis. 106 669
Sielbeck v. Grothman, 248 Ill. 435 91
Siewers v. Commonwealth, 87 Pa. St. 15 21, 22
Sikes v. Work, 6 Gray (Mass.) 433 328
Silcox v. Jones, 80 S. Car. 484 654, 674
Sillyman v. King, 36 Iowa 207 192
Silshy v. Allen, 43 Vt. 172 53
Silverman v. Kristufek, 162 Ill. 222 263
Simis v. McElroy, 160 N. Y. 156 699
Simmons v. Augustin, 3 Port. (Ala.) 69 44
v. Cabanne, 177 Mo. 336 468
v. Jacobs, 52 Maine 147 664
v. McCarthy, 118 Cal. 622 643
v. Richardson, 107 Ala. 697 668
v. Spratt, 26 Fla. 449 451, 480
v. Wagner, 101 U. S. 260 193
Simmons Creek Coal Co. v. Doran, 142 U. S. 417 128, 129, 692
Simon v. Richard, 42 La. 842 696
v. Sewell, 64 Ala. 241 117
v. Simon's Estate, 158 Mich. 256 737
Simonds v. Simonds, 168 Mass. 144 46
Simons v. McLain, 51 Kans. 153 326
Simon's Will, In re, 55 Conn. 239 473
Simonton v. White, 93 Tex. 50 478
Simpson v. Blaisdell, 85 Maine 199 271
v. Erisner, 155 Mo. 157 341
v. Pearson, 31 Ind. 1 97
v. Simpson, 114 Ill. 603 737
v. Stoddard Co., 173 Mo. 421 207
Simpson, In re, 144 N. Y. 1099 708
Sims v. Boynton, 32 Ala. 353 91
v. Morrison, 92 Minn. 341 182
Simson v. Eckstein, 22 Cal. 580 358
Sinclair v. Sinclair, 79 Va. 40 532
v. Slawson, 44 Mich. 123 122
Singletary v. Hill, 43 Tex. 588 48
Singleton v. Close, 130 Ga. 716 676
Singly v. Warren, 18 Wash. 434 594
Sioux City & I. F. Town Lot & Land Co. v. Griffey, 72 Iowa 505 212
Sisk v. Smith, 1 Gil. (Ill.) 503 65
Sistrunk v. Ware, 69 Ala. 273 473
Sitler v. McComas, 66 Md. 135 120
Sixth Ward Bldg. Assn. v. Wilson, 41 Md. 506 123
Sjoli v. Dreschel, 199 U. S. 564 212
Skelton v. Sacket, 91 Mo. 377 581
Skinner v. Conant, 2 Vt. 453 664
v. Crawford, 54 Iowa 119 689
v. Dayton, 19 Johns. (N. Y.) 513 328
v. Fulton, 39 Ill. 484 714
v. Skinner, 38 Nebr. 756 50
Skyrme v. Occidental Mill & Mining Co., 8 Nev. 219 537

[*References are to Sections.*]

Slack v. Ray, 26 La. Ann. 674 636
Slater v. Breese, 36 Mich. 77 423
Slatterly v. Schwannecke, 118 N. Y. 543 128
Slaughter v. Cunningham, 24 Ala. 260 298
Slayton v. Blount, 93 Ala. 575 714
Slegel v. Lauer, 148 Pa. St. 236 43
Slemmer v. Crampton, 50 Iowa 302 465
Sloan v. Owens & Co., 70 Mo. 206 328
Sloane v. Stevens, 107 N. Y. 122 455
Slocum v. Bracy, 55 Minn. 249 390
v. McLaren, 109 Minn. 49 643
Small v. Field, 102 Mo. 104 323
v. Small, 16 S. Car. 64 531
v. Sproat, 3 Metc. (Mass.) 303 375
v. Thompson, 92 Maine 539 472
Smalley v. Reuken, 85 Iowa 612 426
Smallridge v. Hazlett, 112 Ky. 841 65
Smallwood v. Lewin, 15 N. J. Eq. 60 126
Smith v. Adams, 130 U. S. 167 650
v. Allen, 101 Iowa 608 27
v. Ayer, 101 U. S. 320 128
v. Barr, 76 Minn. 513 656
v. Bateman, 25 Colo. 241 393
v. Becker, 62 Kans. 541 706
v. Bradley, 154 Mass. 227 313
v. Branch Bank, 21 Ala. 125 118
v. Brown, 99 N. Car. 377 736
v. Cannell, 32 Maine 123 425
v. Chadwick, 111 Ala. 542 468
v. Clark, 100 Iowa 605 330
v. Crandall, 118 La. 1052 226
v. Cremer, 71 Ill. 185 397
v. Crosby, 86 Tex. 15 348
v. Curtis, 29 N. J. L. 345 459
v. Dall, 13 Cal. 510 120
v. Davis, 90 Cal. 25 655
v. Day, 2 Pennew. (Del.) 245 457
v. Dennis, 163 Ill. 631 467
v. Derr, 34 Pa. St. 126 719
v. Du Bose, 78 Ga. 413 458
v. Farr, 46 Colo. 364 630
v. Gaines, 35 N. J. Eq. 65 87
v. Gale, 144 U. S. 509 549
v. Glover, 50 Minn. 58 354
v. Godwin, 145 N. Car. 242 381
v. Green, 41 Fed. 455 423
v. Greenop, 60 Mich. 61 692
v. Hamilton County Comrs., 173 Ind. 364 630
v. Holden, 58 Kans. 535 487
v. Holmes, 54 Mich. 104 15, 16, 17, 21
v. Howard, 86 Maine 203 653
v. Hunter, 241 Ill. 514 359, 480
v. Hutchinson, 61 Mo. 83 467
v. Jones, 97 Ky. 670 278
v. Kelley, 27 Maine 237 437
v. Kelly, 23 Miss. 167 718
v. Kennedy, 89 Ill. 485 533
v. Lindsey, 89 Mo. 76 138
v. Littlefield, 51 N. Y. 539 52
v. Lowry, 113 Ind. 37 433
v. McClain, 146 Ind. 77 301
v. May, 3 Pennew. (Del.) 233 49
v. Mitchell, 21 Wash. 536 213
v. Moore, 102 Va. 260 516
v. Mundy, 18 Ala. 182 611
v. Myers, 109 Ind. 1 650, 663
v. Neilson, 13 Lea (Tenn.) 461 119
v. North Canyon Water Co., 16 Utah 194 696
v. Osage, 80 Iowa 84 100
v. Perry, 80 Va. 563 719
v. Phillips, 131 Ala. 629 46
v. Pipe, 3 Colo. 187 224
v. Pitts (Tex. Civ. App.), 122 S. W. 46 568
Smith
v. Pollard, 19 Vt. 272 99, 427
v. Porter, 10 Gray (Mass.) 66 265
v. Prall, 113 Ill. 308 642
v. Rainey, 9 Ariz. 362 417
v. Rudd, 48 Kans. 296 301
v. Runnels, 97 Iowa 55 467
v. Russell, 20 Colo. 554 433
v. Schwartz, 21 Utah 126 564
v. Schweigerer, 129 Ind. 363 127
v. Seiberling, 35 Fed. 677 323
v. Sherwood, 4 Conn. 276 98
v. Smith, 157 Ala. 79 476
v. Smith, 80 Cal. 323 419
v. Smith, 71 Mich. 633 312
v. Smith, 64 Nebr. 563 474
v. Smith, 25 Wend. (N. Y.) 405 429
v. Smith, 13 Ohio St. 532 121
v. Taylor, 82 Cal. 533 1, 5, 6, 10, 25, 35
v. Trimble, 27 Ill. 152 578
v. Wert, 64 Ala. 34 360, 596, 600
v. Winn, 38 S. Car. 188 597, 657
v. Winsor, 239 Ill. 567 716
v. Yule, 31 Cal. 180 692
Smith, In re, 131 Cal. 433 708, 730
Smith, In re, 4 Nev. 254 349
Smith's Estate, In re, 144 Pa. St. 428 59, 339, 480
Smith's Lessee v. Hunt, 13 Ohio 260 284
Smithwick v. Jordan, 15 Mass. 113 480
Smullin v. Wharton, 73 Nebr. 667 59
Sneed v. Ewing, 5 J. J. Marsh (Ky.) 460 719
Snelling v. Bryce, 41 Ga. 513 553
Snider v. Snider, 160 N. Y. 151 464
Snow v. Lake, 20 Fla. 656 427
v. Snow, 111 Mass. 389 87
v. Stevens, 15 Mass. 278 65
Snowden v. Wilas, 19 Ind. 10 506
Snyder v. Nesbitt, 77 Md. 576 46
v. Pike, 30 Utah 102 654, 674
v. Snover, 56 N. J. L. 20 693
v. Thieme & Wagner Brew. Co., 173 Ind. 569 517
Solis v. Williams, 205 Mass. 350 640, 669
Solt v. Anderson, 71 Nebr. 826 93
Souder v. Morrow, 33 Pa. St. 83 125
Soulard's Estate, In re, 141 Mo. 642 59, 480
Soule v. Borelli, 80 Conn. 392 537
v. Corbley, 65 Mich. 109 438
South Baltimore Harbor & Imp. Co. v. Smith, 85 Md. 537 394
Southern Cotton Oil Co. v. Henshaw, 89 Ala. 448 328
Southern Pac. R. Co. v. Lipman, 148 Cal. 480 212
v. Southern Cal. R. Co., 111 Cal. 221 109
Southern R. Co. v. Hayes, 150 Ala. 212 109
Southgate v. Annon, 31 Md. 113 719
South Mahoning Tp. v. Marshall, 138 Pa. St. 570 473
Southwestern Bldg. & Loan Assn. v. Acker, 138 Ala. 523 443
Southwestern Mfg. Co. v. Swan (Tex. Civ. App.), 43 S. W. 813 676
Southworth v. Scofield, 51 N. Y. 513 428
Sowden v. Craig, 26 Iowa 156 125
Sowles v. Butler, 71 Vt. 271 434
Spalding v. Hall, 6 D. C. 123 52
v. Kelly, 66 Mich. 693 654
Sparkman v. Davenport (Tex. Civ. App.), 160 S. W. 410 1
Sparks v. Pierce, 115 U. S. 408 224
Spaulding v. Elsworth, 39 Fla. 76 639
v. Scanland, 6 B. Mon. (Ky.) 353 122

[References are to Sections.]

Spawr v. Johnson, 49 Kans. 788 147
Speakman v. Forepaugh, 44 Pa. St. 363 77
Spear v. Orendorf, 26 Md. 37 407
v. Robinson, 29 Maine 531 89
Spect v. Gregg, 51 Cal. 198 276
Speer v. Phillips, 24 S. Dak. 257 399
Speidel v. Schlosser, 13 W. Va. 686 66
Spence v. Widney (Cal.), 46 Pac. 463 340, 341
Spencer v. O'Niell, 100 Mo. 49 64
v. Winselman, 42 Cal. 479 74
Speyrer v. Miller, 108 La. 204 66
Spiers v. Halstead, 71 N. Car. 209 661
Spivey v. Rose, 120 N. Car. 163 122
Splahn v. Gillespie, 48 Ind. 397 592
Spofford v. Hobbs, 29 Maine 148 337
v. True, 33 Maine 283 276
Sprague v. Birchard, 1 Wis. 457 658
v. Cochran, 144 N. Y. 104 417, 444
v. Lovett, 20 S. Dak. 328 439
v. Sprague, 13 R. I. 701 58
Sprayberry v. State, 62 Ala. 459 208
Springer v. Fortune, 2 Handy (Ohio) 52 728
Spring's Estate, In re, 216 Pa. 529 59
Sproul v. McCoy, 26 Ohio St. 577 66
Sproule v. Davies, 69 App. Div. (N. Y.) 502 77
Sproull v. Miles, 82 Ark. 455 397
Spurr v. Andrew, 6 Allen (Mass.) 420 316
Squint Eye v. Crooked Arm (Okla.), 155 Pac. 1147 731
Squires v. Kimball, 208 Mo. 110 434
v. Squires, 65 W. Va. 611 334, 735
Staacke v. Bell, 125 Cal. 309 656
Stafford v. Woods, 144 Ill. 203 66
Stahl v. Mitchell, 41 Minn. 325 341
Stall v. Macalester, 9 Ohio 19 616
Stalworth v. Blum, 41 Ala. 319 426
Stamm v. Bostwick, 122 N. Y. 48 458
Stanclift v. Norton, 11 Kans. 218 426
Standard Fuller's Earth Co., In re, 186 Fed. 578 378
Stang v. Redden, 28 Fed. 11 597
Stanley v. Chamberlin, 39 N. J. L. 565 128
v. Colt, 5 Wall. (U. S.) 119 356
Stannard v. Case, 40 Ohio St. 211 708
Stanwood v. Stanwood, 179 Mass. 223 483
Staples v. Fenton, 5 Hun (N. Y.) 172 434
v. Mead, 152 App. Div. (N. Y.) 745 471
v. White, 88 Tenn. 30 547
Starbuck v. Avery, 132 Mo. App. 542 408
Starbuck, In re, 63 Misc. (N. Y.) 156 64
Stark v. Conde, 100 Wis. 633 462, 474
v. Stark, 55 Pa. St. 62 87
v. Starrs, 6 Wall. (U. S.) 402 95, 202
Starnes v. Hill, 112 N. Car. 1 55, 465
Starrett v. McKim, 90 Ark. 520 717
State v. Beackmo, 6 Blackf. (Ind.) 488 732
v. Blasdell, 4 Nev. 241 208
v. Bradish, 14 Mass. 296 8
v. Chrisman, 2 Ind. 126 653
v. Cross Lake &c. Fisbing Club, 123 La. 208 185
v. Cunningham, 88 Wis. 81 208
v. De Hart, 109 La. 570 89
v. Delesdenier, 7 Tex. 76 504
v. District Court, 85 Minn. 283 656
v. District Court, 34 Mont. 96 584
v. Engle, 21 N. J. L. 347 714
v. Fidelity &c. Co., 35 Tex. Civ. App. 214 40
v. Flint &c. R. Co., 89 Mich. 481 100
v. Fort, 24 S. Car. 510 53
v. Grimes, 29 Nev. 50 137
State
v. Higgins, 60 Minn. 1 262, 581
v. Holcomb, 81 Kans. 879 631
v. Jennings, 47 Fla. 307 208
v. Kansas City &c. R. Co., 45 Iowa 139 102
v. Kennard, 57 Nebr. 711 180
v. Lanier, 47 La. Ann. 568 185
v. Little, 94 Ark. 217 630
v. McDonald, 59 Ore. 520 724
v. McDowell, 101 N. Car. 734 719
v. McMillan, 49 Fla. 243 13
v. Meyer, 63 Ind. 33 111
v. Milk, 11 Fed. 389 100
v. Morgan, 52 Ark. 150 222
v. Myers, 52 Wis. 628 645
v. Nashville University, 4 Humph. (Tenn.) 157 185
v. Newton, 5 Blackf. (Ind.) 455 208
v. Oritz, 99 Tex. 475 214
v. Portsmouth Sav. Bank, 106 Ind. 435 207
v. Record, 80 Ind. 348 563
v. Reeder, 5 Nebr. 203 111
v. Reeves, 97 Mo. 668 706
v. Riley, 219 Mo. 667 574
v. Rusk, 55 Wis. 465 212
v. Salyers, 19 Ind. 432 611
v. Sargent, 12 Mo. App. 228 112
v. Sponaugle, 45 W. Va. 415 637
v. Springfield Tp., 6 Ind. 83 208
v. Stark, 111 La. 594 208, 209
v. Stringfellow, 2 Kans. 263 208
v. Superior Court, 13 Wash. St. 187 656
v. Superior Court of King County, 63 Wash. 312 674
v. Tanner, 73 Nebr. 104 208
v. Twelfth Judicial Dist. Ct., 34 Mont. 96 491
v. Unknown Heirs of Goldberg, 113 Tenn. 298 638
v. Wells, 142 N. Car. 590 109
v. Westfall, 85 Minn. 437 954, 955, 956, 957
v. Wyman, 59 Vt. 527 730
State Bank v. Chapelle, 40 Mich. 447 441
v. Frame, 112 Mo. 502 127, 439
State Land Co. v. Mitchell, 162 Ala. 469 634
State Savings Bank v. Stewart, 93 Va. 447 241
Staubitz v. Lambert, 71 Minn. 11 87
Staunton v. Wooden, 179 Fed. 61 378
Steacy v. Rice, 27 Pa. St. 75 58
Stearns v. Edson, 63 Vt. 259 621
v. Godfrey, 16 Maine 158 55, 475
v. United States, 152 Fed. 900 201
Stearns Ranchos Co. v. McDowell, 134 Cal. 562 561
Stebbins v. Duncan, 108 U. S. 32 138
Steckel, In re, 64 Pa. St. 493 719
Steele v. Boone, 75 Ill. 457 138
v. Bryant, 132 Ky. 569 185, 272, 654
v. Friarson, 85 Tenn. 430 334
v. Williams, 12 Ky. L. 770 423
Steel, In re, L. R. (1903) 1 Ch. 135 467
Steeple v. Downing, 60 Ind. 478 224
Steifel v. Barton, 73 Md. 408 119
Stein v. Ashby, 24 Ala. 521 227
Steinberg v. Salzman, 139 Wis. 118 697
Steiner v. Coxe, 4 Pa. St. 13 224
Stein's Admr. v. Stein, 32 Ky. L. 664 719
Stell v. Barham, 87 N. Car. 62 45
Stengel v. Sergeant, 74 N. J. Eq. 20 393
Stephens v. Mansfield, 11 Cal. 363 108
v. Motl, 82 Tex. 81 98

[*References are to Sections.*]

Stephenson v. Cove, 24 S. Dak. 460 5, 10, 15, 16
v. Davis, 56 Maine 73 576
v. Thompson, 13 Ill. 186 349
Sterling v. Park, 129 Ga. 309 262
v. Warden, 51 N. H. 217 62
Stern v. Fountain, 112 Iowa 96 103
Sternberg's Estate, In re, 94 Iowa 305 491
Stetson v. Eastman, 84 Maine 366 326
Stevens v. Dennett, 51 N. H. 324 61
v. Ferry, 48 Fed. 7 654
v. Flower, 46 N. J. Eq. 340 473
v. Geiser, 71 Tex. 140 119
v. Gladding, 17 How. (U. S.) 447 36
v. Hampton, 46 Mo. 404 118
v. Morse, 47 N. H. 532 118
v. Owen, 25 Maine 94 65
v. Shannahan, 160 Ill. 330 358
v. Watson, 4 Abb. Dec. (N. Y.) 302 565
Stevenson v. Abington, 31 Beav. 305 466
v. Gray, 46 Ind. App. 412 87, 708, 730
v. McReary, 12 Sm. & M. (Miss.) 9 360
v. Montgomery, 104 N. E. 1075 90
v. Polk, 71 Iowa 278 1, 3, 6, 25, 35, 429
Steward v. Knight, 62 N. J. Eq. 232 46
Stewart v. Beard, 69 Ala. 470 282
v. Blalock, 45 S. Car. 61 66
v. Clark, 13 Metc. (Mass.) 79 49
v. Devries, 81 Md. 525 595
v. Hurd, 107 Maine 457 429
v. McLaughlin, 11 Colo. 458 417
v. McSweeney, 14 Wis. 468 124
v. Matheny, 66 Miss. 21 638
v. May, 111 Md. 162 669
v. Perkins, 110 Mo. 660 348
v. Ross, 50 Miss. 776 64
v. Smiley, 46 Ark. 373 723
v. Stewart, 5 Conn. 317 65
v. Stewart, 177 Mass. 493 455
v. United States, 206 U. S. 185 184
v. Wells, 47 Ind. App. 228 724
v. Wood, 63 Mo. 252 531
Stewart Contracting Co. v. Trenton &c. R. Co., 71 N. J. L. 568 536
Stickney's Will, In re, 85 Md. 79 482
Stidham v. Matthews, 29 Ark. 650 316
Still v. Lansingburgh, 16 Barb. (N. Y.) 107 331
Stillings v. Stillings, 67 N. H. 584 434
Stilphen v. Stilphen, 65 N. H. 126 321
Stimson Land Co. v. Rawson, 62 Fed. 426 220
Stinebaugh v. Wisdom, 13 B. Mon. (Ky.) 467 64
Stinnett v. House, 1 Posey Unrep. Cas. (Tex.) 484 124
Stinson v. Call, 163 Mo. 323 220
v. Connecticut Mut. L. Ins. Co., 174 Ill. 125 638
v. Doolittle, 50 Fed. 12 435
v. Ross, 51 Maine 556 347
Stitt v. Rat Portage Lumber Co., 96 Minn. 27 672
Stobaugh v. Irons, 243 Ill. 55 363
Stockbridge Iron Co. v. Hudson Iron Co., 107 Mass. 290 63
Stockton v. Frazier, 81 Ohio St. 227 87, 730
v. Weber, 98 Cal. 433 54
Stockwell v. Bowman, 23 Ky. L. 2304 485
v. McHenry, 107 Pa. St. 237 132
v. Shalit, 204 Mass. 270 286
v. State, 101 Ind. 1 126
Stogdon v. Lee, 60 L. J. Q. B. 669 479
Stokes v. Stokes, 240 Ill. 330 670
v. Weston, 142 N. Y. 433 476
Stoltz v. Doering, 112 Ill. 234 687, 719
Stone v. Ashley, 13 N. H. 38 336
v. Griffin, 3 Vt. 400 458
v. Houghton, 139 Mass. 175 277
v. Perkins, 217 Mo. 586 224, 568
Stonehill v. Hastings, 135 App. Div. (N. Y.) 48 286
Stoner v. Royar, 200 Mo. 444 180
Stoner, In re, 105 Fed. 752 385
Stonestreet v. Doyle, 75 Va. 356 720
Stonewall Phosphate Co. v. Peyton, 39 Fla. 726 228
Storch v. McCain, 85 Cal. 304 443
Storer v. Freeman, 6 Mass. 435 104
Story v. Palmer, 46 N. J. Eq. 1 59
Stoughton v. Leigh, 1 Taunt. 402 65
Stout v. Young, 217 Pa. 427 491
Stow v. Wyse, 7 Conn. 214 99
Stowe v. Stowe, 140 Mo. 594 491
Strain v. Murphy, 49 Mo. 337 621
Stramann v. Seheeren, 7 Colo. App. 1 516
Strand v. Stewart, 51 Wash. 685 457
Strashurger v. Hoffman, 175 Ill. App. 120 737
Strause v. Josephthal, 77 N. Y. 622 439
Streeter v. Paton, 7 Mich. 341 723
Stribling v. Ross, 16 Ill. 122 65
Stringfellow v. Cain, 99 U. S. 610 215
Strode v. Magowan, 2 Bush (Ky.) 64 719, 740
Strong v. Smith, 84 Mich. 567 734
Strother v. Lucas, 12 Pet. (U. S.) 454 186
Stroup v. Stroup, 140 Ind. 179 65
Strunk v. Pritchett, 27 Ind. App. 582 244
Stuart v. Allen, 16 Cal. 473 360
Stubblefield v. Boggs, 2 Ohio St. 216 225
Studdard v. Wells, 120 Mo. 25 54
Studebaker v. Johnson, 41 Kans. 326 662
Studer v. Seyer, 69 Ga. 125 401
Studstill v. Willcox, 94 Ga. 690 73
Stumpf v. Osterhage, 94 Ill. 115 689
Sturgis v. Work, 122 Ind. 134 460, 471
Stutt v. Building Assn., 12 Pa. Co. Ct. 344 632
Stuyvesant v. Western Mtg. &c. Co., 22 Colo. 28 424
v. Woodruff, 21 N. J. L. 133 61
Succession of Caldwell, 114 La. 195 718
Succession of Davis, 126 La. 178 724
Succession of Earhart, 50 La. Ann. 524 491
Succession of Herber, 128 La. 111 456
Succession of Hoggatt, 36 La. Ann. 337 570
Succession of McCan, 48 La. Ann. 145 480
Succession of Meyer, 44 La. Ann. 871 737
Succession of Nash, 48 La. 1573 595
Sudbury v. Stow, 13 Mass. 462 40
Sugg v. Thornton, 132 U. S. 524 660
Sullivan v. Chambers, 18 R. I. 799 58
v. Garesche, 229 Mo. 496 468, 469
v. Solis, 52 Tex. Civ. App. 464 193
v. Sullivan, 66 N. Y. 37 670
Sullivan-Sanders Lumber Co. v. Reeves, 58 Tex. Civ. App. 488 276
Sullivan's Estate, In re, 48 Wash. 631 726
Sulphur Mines Co. v. Thompson, 93 Va. 293 358
Sulzberger v. Sulzberger, 50 Cal. 385 66
Summer v. Mitchell, 29 Fla. 179 120
Summerfield v. White, 54 W. Va. 311 322
Summers v. Kilgus, 14 Bush (Ky.) 449 443
v. Smith, 127 Ill. 645 476
Summit v. Yount, 109 Ind. 506 475
Sumner v. Rhodes, 14 Conn. 135 120
Sumpter v. Carter, 115 Ga. 893 459

[*References are to Sections.*]

Sunderland, In re, 60 Iowa 732 718
Sundermann v. People, 148 App. Div. (N. Y.) 124 956
Sutherland v. Goodnow, 108 Ill. 528 408
v. Rose, 47 Barb. (N. Y.) 144 672
Sutphen v. Ellis, 35 Mich. 446 492
Sutton v. Calhoun, 14 La. Ann. 209 635
Swain v. Duane, 48 Cal. 358 479
v. Mitchell, 27 Tex. Civ. App. 62 357
Swallow v. Swallow, 27 N. J. Eq. 278 466
Swan v. Walden, 156 Cal. 195 66
Swann v. Jenkins, 82 Ala. 478 227
v. Lindsey, 70 Ala. 507 186
Swasey v. Antram, 24 Ohio St. 87 570
v. Jaques, 144 Mass. 135 729
Sweezey v. Willis, 1 Bradf. (N. Y.) 495 89
Swenson's Estate, In re, 55 Minn. 300 471
Sweringen v. St. Louis, 151 Mo. 348 103
Swift v. Boyd, 202 Mass. 26 52
v. Lee, 65 Ill. 336 348
v. Mulkey, 14 Ore. 59 73
v. Smith, 102 U. S. 442 439
Swinney v. Klippert, 20 Ky. L. 2014 719
Swisher v. Sensenderfer, 84 Mo. 104 203
Swofford Bros. Dry Goods Co., In re, 180 Fed. 549 377
Symns v. Cutter, 9 Kans. App. 210 26

T

Tabler v. Tabler, 62 Md. 601 487
Taft v. Taft, 130 Mass. 461 339
Taggart v. Risley, 3 Ore. 306 99
Talbott v. English, 156 Ind. 299 407
v. Woodford, 48 W. Va. 449 696
Tallmadge v. East River Bank, 26 N. Y. 105 277
Talpey v. Wright, 61 Ark. 275 22
Tankard v. Tankard, 79 N. Car. 54 692
Tanton v. Van Alstine, 24 Ill. App. 405 53
Tapley v. Tapley, 115 Ga. 109 355
Tapp v. Nock, 89 Ky. 414 25
Tappan's Appeal, In re, 52 Conn. 412 474
Tarbell v. West, 86 N. Y. 280 125, 126
Tarpey v. Desert Salt Co., 5 Utah 205 282
v. Madsen, 178 U. S. 215 196
Tartt v. Clayton, 109 Ill. 579 357, 358
v. Negus, 127 Ala. 301 66
Tarver v. Depper, 132 Ga. 798 699
Tasker v. Garrett County, 82 Md. 150 25
Tate v. Jay, 31 Ark. 576 521
v. Pensacola Land &c. Co., 37 Fla. 439 434
Tatro v. French, 33 Kans. 49 183
Tatum v. Tatum, 81 Ala. 388 93
Tavshanjian v. Abbott, 59 Misc. (N. Y.) 642 720
Tax Assessment of Delaware &c. R. Co., In re, 224 Pa. 240 630
Taylor v. Albemarle Steam Nav. Co., 105 N. Car. 484 119
v. Benham, 5 How. (U. S.) 233 356
v. Birmingham, 29 Pa. St. 306 321
v. Cleary, 29 Grat. (Va.) 448 45
v. Collins, 51 Wis. 123 674
v. Coots, 32 Nebr. 30 661
v. Cribbs, 174 Ala. 217 87
v. Hargous, 4 Cal. 268 66
v. Harrison, 47 Tex. 454 264, 301
v. Heitz, 87 Mo. 660 529
v. Lane, 18 Tex. Civ. App. 545 355
v. McGrew, 29 Ind. App. 324 564
v. Mitchell, 58 Kans. 94 433
v. Russell, 65 W. Va. 632 668
v. Stephens, 165 Ind. 200 466
v. Taylor, 223 Ill. 423 66
v. Taylor, 54 Ore. 560 676
Taylor
v. Waters, 7 Taunt. 374 61
v. Weston, 77 Cal. 534 198
v. Williams, 2 Colo. App. 559 1, 3, 5, 6, 10
v. Williams, 45 Mo. 80 25
v. Winona R. Co., 45 Minn. 66 215
Taylor, In re, 20 N. Y. S. 960 90
Tays v. Robinson, 68 Kans. 53 87, 730
Teague v. Sowder, 121 Tenn. 132 297
v. Whaley, 20 Ind. App. 26 506
Teal v. Walker, 111 U. S. 242 419
Tecumseh Iron Co. v. Camp, 93 Ala. 572 651
Tegarden v. Phillips (Ind.), 39 N. E. 212 89
Temple v. Ferguson, 110 Tenn. 84 338
Templeton v. Falls Land &c. Co., 77 Tex. 55 597
v. Twitty, 88 Tenn. 595 64
Tenbrook v. Jessup, 60 N. J. Eq. 234 620
Tendick v. Evetts, 38 Tex. 275 465
Tennant v. Tennant, 43 W. Va. 547 59
Tennessee Coal, I. & R. Co. v. Tutwiler, 108 Ala. 483 225
Tepper v. Supreme Council of Royal Arcanum, 59 N. J. Eq. 321 717
Terrell v. Martin, 64 Tex. 121 349
Territory v. Lee, 2 Mont. 124 180
Terry v. Cole, 80 Va. 695 590
Testart v. Belot, 31 La. Ann. 795 118
Teverbaugh v. Hawkins, 82 Mo. 180 583
Tewksbury v. Howard, 138 Ind. 103 398
Tewksbury Tp. v. Readington Tp., 8 N. J. L. 319 40
Texas Land & Loan Co. v. Blalock, 76 Tex. 85 431, 692
Texas & P. R. Co. v. Smith, 159 U. S. 66 220
Thalls v. Smith, 139 Ind. 496 97
Tharpe v. Holcomb, 126 N. Car. 365 696
Thatcher v. Thatcher, 17 Colo. 404 729
Thaxton v. Roberts, 66 Ga. 704 419
Thayer v. Finnegan, 134 Mass. 62 525
v. Roberts, 44 Maine 247 616
v. Spratt, 189 U. S. 346 193
v. Thayer, 14 Vt. 107 325
v. Wellington, 9 Allen (Mass.) 283 485
Thebaut v. Canova, 11 Fla. 143 671
Thieband v. Sebastian, 10 Ind. 454 493
Thiele v. Thiele, 57 N. J. Eq. 98 516
Thielman v. Carr, 75 Ill. 385 535
Thissell v. Schillinger, 186 Mass. 180 473
Thomas v. Bland, 91 Ky. 1 593
v. Caldwell, 50 Ill. 138 280
v. Carson, 46 Nebr. 765 5, 10, 14, 15, 17, 20, 22, 174
v. Feese, 21 Ky. L. 206 516
v. Fulford, 117 N. Car. 667 66
v. Glazener, 90 Ala. 537 611
v. Hanson, 59 Minn. 274 124
v. Higgins, 47 Md. 439 465
v. Ireland, 88 Ky. 581 662
v. Johnson, 137 Ind. 244 553
v. Livingston, 155 Ala. 546 419
v. Miller, 161 Ill. 60 85, 710
v. Schee, 80 Iowa 237 10, 11, 15, 16, 22, 174
v. Stuart's Exr., 91 Va. 694 287
v. Thomas, 97 Miss. 697 466
v. Thomas' Estate, 64 Nebr. 581 719
v. Title &c. Co., 81 Ohio St. 432 15, 22
v. Woods, 173 Fed. 585 378, 381
v. Wyatt, 31 Mo. 188 224
Thomas, In re, 199 Fed. 214 385
Thomassen v. De Goey, 133 Iowa 278 397

[*References are to Sections.*]

Thompson v. Basler, 148 Cal. 646 192, 201
v. Browne, 10 S. Dak. 344 374
v. Burhans, 79 N. Y. 93 73, 688
v. Burns, 15 Idaho 572 671
v. Carl, 51 Vt. 408 45, 312
v. Carr, 5 N. H. 510 331
v. Churchill, 60 Vt. 371 455
v. Dulles, 5 Rich. Eq. (S. Car.) 370 34
v. Ellenz, 58 Minn. 301 376
v. Garwood, 3 Whart. (Pa.) 287 60
v. Kauffelt, 110 Pa. St. 209 691
v. Kenyon, 100 Mass. 108 444
v. Maxwell, 16 Fla. 773 126
v. Miner, 30 Iowa 386, 571 61
v. Morgan, 6 Minn. (Gil. 199) 292 120
v. Penn, 149 Ky. 158 456
v. Pioche, 44 Cal. 508 127
v. Sanford, 13 Ga. 238 87
v. Shaw, 104 Maine 85 372
v. Simpson (Mo. App.), 127 S. W. 620 552
v. Southern California Motor Road Co., 82 Cal. 497 270
v. Thompson, 132 Ind. 288 676
v. Thompson, 27 Ky. L. 949 467
v. Thornton, 197 Mass. 273 483
Thompson, In re, 57 Hun (N. Y.) 419 110
Thompson's Appeal, In re, 101 Pa. St. 225 313
Thompson's Estate, In re, 6 S. Dak. 576 735
Thomson v. Locke, 66 Tex. 383 654
Thorn v. Maurer, 85 Mich. 569 654
v. Mayer, 12 Misc. (N. Y.) 487 122
Thornburg v. Doolittle, 148 Iowa 530 34
v. Wiggin, 135 Ind. 178 321
Thorndike v. Norris, 24 N. H. 454 436
Thorne, In re, 155 N. Y. 140 718
Thornton v. Ferguson, 133 Ga. 825 614
v. Krepps, 37 Pa. St. 391 64
v. Miskimmon, 48 Mo. 219 348
v. Thornton, 3 Rand. (Va.) 179 321
Thorp v. Hanes, 107 Ind. 324 715
Thorpe v. Durbon, 45 Iowa 192 392
Thrasher v. Ballard, 33 W. Va. 285 60, 493
Threat v. Moody, 87 Tenn. 143 66
Thrift v. Delaney, 69 Cal. 188 201
Throckmorton v. Price, 28 Tex. 605 117, 132
Thrush v. Graybill, 110 Iowa 585 239
Thurber v. Dwyer, 10 R. I. 355 53
Thygerson v. Whitbeck, 5 Utah 406 74
Tichenor v. Brewer's Exr., 98 Ky. 349 713
Tidd v. Rines, 26 Minn. 201 192
Tiddy v. Graves, 126 N. Car. 620 64
Tiernan v. Miller, 69 Nebr. 764 201
Tiffin v. Shawhan, 43 Ohio St. 178 324, 503
Tifft v. Buffalo, 82 N. Y. 204 645
Tilley v. Bridges, 105 Ill. 336 364, 601
v. King, 109 N. Car. 461 54, 474
Tillinghast v. Champlin, 4 R. I. 173 128
v. Coggeshall, 7 R. I. 383 708
Tillis v. Treadwell, 117 Ala. 445 506
Tilton v. Tilton, 196 Mass. 562 734
Timpson v. New York, 5 App. Div. (N. Y.) 424 698
Tindal v. Drake, 51 Ala. 574 58
Tinder v. Tinder, 131 Ind. 381 262, 263
Tinicum Fishing Co. v. Carter, 61 Pa. St. 21 63
Tinker v. Forbes, 136 Ill. 221 277
Tinsley v. Atlantic Mines Co., 20 Colo. App. 61 639
Tippecanoe Loan & Trust Co. v. Carr, 40 Ind. App. 125 360, 723
Tischler v. Robinson, 56 Fla. 699 611
Title Guarantee & Trust Co. v. Wrenn, 35 Ore. 62 535
Title Guarantee & Trust Co., In re, 195 N. Y. 339 459
Title &c. Co. v. Kerrigan, 150 Cal. 289 962
Toan v. Pline, 60 Mich. 385 51
Tobin's Estate, In re, 139 Wis. 494 436
Todd v. Johnson, 51 Iowa 192 425
v. Johnson, 99 Ky. 548 375
v. Nelson, 109 N. Y. 316 315
v. Outlaw, 79 N. Car. 235 120, 549
v. Pittsburgh &c. R. Co., 19 Ohio St. 514 105
v. Sawyer, 147 Mass. 570 47
v. Union Dime Sav. Inst., 118 N. Y. 337 281
Todhunter v. Klemmer, 134 Cal. 60 570
Tognazzini v. Morganti, 84 Cal. 159 147
Toledo D. & B. R. Co. v. Hamilton, 134 U. S. 296 432
Tolle v. Orth, 75 Ind. 298 53
Tolleston Club v. State, 141 Ind. 197 207
Tolman v. Hobbs, 68 Maine 316 637
v. Smith, 85 Cal. 280 577
Tombstone Town Site Cases, 2 Ariz. 272 215
Tomkins v. Henderson, 83 Ala. 391 127
v. Hyatt, 28 N. Y. 347 34
v. Little Rock & F. S. R. Co., 18 Fed. 344 632
v. Verplanck, 10 App. Div. (N. Y.) 572 466, 713
Tomlinson's Estate, In re, 133 Pa. St. 245 487
Tompson v. Tappan, 139 Mass. 506 444
Toms v. Williams, 41 Mich. 552 339
Toney v. Knapp, 142 Mich. 652 687
Tonopah Banking Corp. v. McKane Min. Co., 31 Nev. 295 364, 611
Toomey v. McLean, 105 Mass. 122 65
Torrans v. Hicks, 32 Mich. 307 596
Torrence v. Shedd, 112 Ill. 466 314
Torrey v. Deavitt, 53 Vt. 331 437
Totten v. Pocahontas Coal & Coke Co., 67 W. Va. 639 274
Toupin v. Peabody, 162 Mass. 473 434
Tousley v. Tousley, 5 Ohio St. 78 120
Tower v. Tower, 141 Ind. 223 670
Town v. Greer, 53 Wash. 350 272
Townsend v. Coxe, 151 Ill. 62 371, 376
v. Driver, 5 Cal. App. 581 669
v. Little, 109 U. S. 504 692
v. Meneley, 37 Ind. App. 127 719
v. Tallant, 33 Cal. 45 661
Townsend Sav. Bank v. Todd, 47 Conn. 190 100
Townshend v. Frommer, 125 N. Y. 446 479
v. Goodfellow, 40 Minn. 312 328
Township of Walcott v. Skauge, 6 N. Dak. 382 213
Toy v. McHugh, 62 Nebr. 820 632
Trafton v. Hawes, 102 Mass. 533 266
Trail v. Turner, 22 Ky. L. 100 693
Train v. Boston Disinfecting Co., 144 Mass. 523 527
Trammell v. Hudmon, 78 Ala. 222 534
Tranum v. Wilkinson, 81 Ala. 408 120
Trapnall v. Brown, 19 Ark. 39 59
Travis v. Supply Co., 42 Kans. 625 553
Trayer v. Setzer, 72 Nebr. 845 719
Traynor v. Palmer, 86 Ill. 477 279
Treadwell v. Reynolds, 47 Cal. 171 265
v. Salisbury Mfg. Co., 7 Gray (Mass.) 393 332

[*References are to Sections.*]

Tremmel v. Kleiboldt, 75 Mo. 255 479
v. Kleibolt, 6 Mo. App. 549 64
Trenouth v. San Francisco, 100 U. S. 251 196
Trenton v. Toman, 74 N. J. Eq. 702 61
Trimble v. Hunter, 104 N. Car. 129 566
v. King, 131 Ky. 1 100
v. Puckett, 93 Ky. 218 516
v. Stewart, 35 Mo. App. 537 16
Trine v. Pueblo, 21 Colo. 102 105
Tripe v. Marcy, 39 N. H. 439 125
Triplett v. Williams, 149 N. Car. 394 297, 671
Tripp v. Hopkins, 13 R. I. 99 20, 21
Trodick v. Northern Pac. R. Co., 164 Fed. 913 200
Trout v. Drawhorn, 57 Ind. 570 89
Trowbridge v. Cunningham, 63 Kans. 847 611
Troy &c. R. Co. v. Potter, 42 Vt. 265 110
Troyer v. Wood, 96 Mo. 478 661
Trucks v. Lindsey, 18 Iowa 504 418
Truelove v. Truelove, 172 Ind. 441 86, 719, 728
Truman v. Truman, 79 Iowa 506 428
Trusdell v. Lehman, 47 N. J. Eq. 218 49
Trustees of Presbytery of New York v. Westminster Presbyterian Church, 67 Misc. (N. Y.) 317 333
T. S. Faulk & Co. v. Steiner, 165 Fed. 861 382
Tualatin Academy v. Keene, 59 Ore. 496 481
Tubbs v. Wilhoit, 73 Cal. 61 207
Tuck v. Calvert, 33 Md. 209 392
Tucker v. Adams, 52 Ala. 254 405
v. Clarke, 2 Sandf. Ch. (N. Y.) 96 97
v. Harris, 13 Ga. 1 653
v. Jones, 8 Mont. 225 506
v. Moreland, 10 Pet. (U. S.) 58 298
v. Sellers, 130 Ind. 514 650
v. Whitehead, 58 Miss. 762 492
Tug River Coal and Salt Co. v. Brigel, 86 Fed. 818 674
Tulare Irrigation Dist. v. Shepard, 185 U. S. 1 647
Tull v. Royston, 30 Kans. 617 632
Tuller v. Leaverton, 143 Iowa 162 417
Tupper, In re, 163 Fed. 766 380
Turk v. Funk, 68 Mo. 18 8
v. Skiles, 45 W. Va. 82 106, 307
Turley v. Massengil, 7 Lea (Tenn.) 353 47
v. Turley, 11 Ohio St. 173 713
Turner v. Dupree, 19 Ala. 198 578
v. First Nat. Bank, 78 Ind. 19 622
v. Houpt, 53 N. J. Eq. 526 545, 547
v. McDonald, 76 Cal. 177 7, 491
v. St. John, 8 N. Dak. 245 509
v. Strinzel, 70 Cal. 28 534
v. Watkins, 31 Ark. 429 420
Turner, In re, 82 Misc. (N. Y.) 25 456
Turner's Appeal, 48 Mich. 369 737
Turpie v. Lowe, 114 Ind. 37 420
v. Lowe, 158 Ind. 314 622
Turpin v. Derickson, 105 Md. 620 438
Tusch v. German Sav. Bank, 20 Misc. (N. Y.) 571 339
Tustin v. Faught, 23 Cal. 237 262
Tuttle, In re, 77 Conn. 310 708
Twining v. New Jersey, 211 U. S. 78 962
Tydings v. Pitcher, 82 Mo. 379 129
Tyler v. Jewett, 82 Ala. 93 66
v. Judges, 175 Mass. 71 952, 954, 955, 956, 957
v. Moore, 42 Pa. St. 374 45, 312
v. Reynolds, 53 Iowa 146 718
Tyrrel v. Wheeler, 123 N. Y. 76 633

U

Uedelhofen v. Mason, 201 Ill. 465 426
Uhl v. Uhl, 52 Cal. 250 676
Ulfelder Clothing Co., In re, 98 Fed. 409 381
Underhill, In re, 62 Misc. (N. Y.) 456 711
Underwood v. Curtis, 127 N. Y. 533 484
Unfried v. Heberer, 63 Ind. 67 716
Union Co. v. Sprague, 14 R. I. 452 441
Union College v. Wheeler, 59 Barb. (N. Y.) 585 318
Union College, In re, 129 N. Y. 308 645
Union Mill & Mining Co. v. Ferris, 24 Fed. Cas. 6 182
Union Nat. Bank v. Bank of Kansas City, 136 U. S. 223 421
Union Nat. Sav. Assn. v. Helberg, 152 Ind. 139 538
Union Pac. R. Co. v. Colorado Postal Tel. &c. Co., 30 Colo. 133 110
v. DeBusk, 12 Colo. 294 663
v. Karges, 169 Fed. 459 184
Union Safe Deposit Co. v. Chisholm, 33 Ill. App. 647 1, 5, 6, 25, 194
Union Safe Deposit & Trust Co. v. Dudley, 204 Maine 297 466
Union Stock Yards Co. v. Nashville Packing Co., 140 Fed. 701 277
Union Trust Co. v. Electric Park Amusement Co., 168 Mich. 574 591
v. Weber, 96 Ill. 346 632
United States v. Arredondo, 6 Pet. (U. S.) 691 227
v. Ashton, 170 Fed. 509 184
v. Berrigan, 2 Alaska 442 180
v. Braddock, 50 Fed. 669 205
v. Budd, 43 Fed. 630 205
v. Budd, 144 U. S. 154 205, 229
v. Burlington &c. R. Co., 98 U. S. 334 229
v. California &c. Land Co., 148 U. S. 31 306
v. Chamberlin, 156 Fed. 881 630, 646
v. Crosby, 7 Cranch (U. S.) 115 724
v. Dastervignes, 118 Fed. 199 698
v. Ducros, 15 How. (U. S.) 38 214
v. Dunnington, 146 U. S. 338 112
v. Elliott, 12 Utah 119 208
v. Healy, 160 U. S. 136 204
v. Hyde, 132 Fed. 545 42
v. Illinois Cent. R. Co., 154 U. S. 225 244
v. King, 3 How. (U. S.) 773 180
v. Lair, 118 Fed. 98 202
v. Mackintosh, 85 Fed. 333 204
v. McLaughlin, 30 Fed. 147 100
v. Morant, 123 U. S. 335 214
v. Mullan, 10 Fed. 785 220
v. Northern Pac. R. Co., 41 Fed. 842 212
v. Pena, 175 U. S. 500 214
v. Perkins, 163 U. S. 625 457
v. Railroad Bridge Co., 6 McLean (U. S.) 517 193
v. Schurz, 102 U. S. 378 223, 752
v. Shannon, 151 Fed. 863 184
v. Southern Pac. R. Co., 39 Fed. 132 212
United States Fidelity &c. Co. v. Lentilhon, 64 Misc. (N. Y.) 299 615
United States Pipe Line Co. v. Delaware &c. R. Co., 62 N. J. L. 254 110, 668
United States Trust Co. v. Maresi, 33 Misc. (N. Y.) 539 480

[*References are to Sections.*]

United States Wind Engine &c. Co. v. Linville, 43 Kans. 455 17, 19, 24
University of Lewisburg v. Reber, 43 Pa. St. 305 536
Upington v. Corrigan, 69 Hun (N. Y.) 320 54
Upper Appomattox Co. v. Hamilton, 83 Va. 319 406
Upson v. Noble, 35 Ohio St. 655 718
Urmston v. Evans, 138 Ind. 285 656
Urton v. Woolsey, 87 Cal. 38 656
Utassy v. Geidinghagen, 132 Mo. 53 458
Utterback v. Terhune, 75 Ind. 363 715

V

Valentine v. Piper, 22 Pick. (Mass.) 85 119
v. Witherill, 31 Barb. (N. Y.) 655 707, 730
Valle v. Fleming, 19 Mo. 454 353
Vallette v. Tedens, 122 Ill. 607 11
Valley Falls Co. v. Dolan, 9 R. I. 489 61
Vamplew v. Chambers, 29 Nebr. 83 60
Van Aken v. Gleason, 34 Mich. 477 126
Vanatta v. Brewer, 32 N. J. Eq. 268 55
Van Bibber v. Julian, 81 Mo. 618 736
Van Brocklin v. Wood, 38 Wash. 384 720
Vance v. Maroney, 4 Colo. 47 600, 653
Vandercook v. Baker, 48 Iowa 199 99, 427, 439
Van Derlyn v. Mack, 137 Mich. 146 718
Van Deusen v. Frink, 15 Pick. (Mass.) 449 443
Vandiveer v. Stickney, 75 Ala. 225 687
Van Dyck v. Bloede, 128 Md. 330 722
Van Horn v. Van Horn, 107 Iowa 247 719
Van Horne v. Campbell, 100 N. Y. 287 43, 47
Van Husan v. Heames, 96 Mich. 504 118
Van Kleek v. O'hanlon, 21 N. J. L. 582 111
Van Matre v. Sankey, 148 Ill. 536 718
Van Meter v. Knight, 32 Minn. 205 124
Van Rensselaer v. Hays, 19 N. Y. 68 72
v. Kearney, 11 How. (U. S.) 297 97
v. Radcliff, 10 Wend. (N. Y. 639 63
Van Reynegan v. Bolton, 5 Otto (U. S.) 33 214
Van Schaick v. Sigel, 58 How. Pr. (N. Y.) 211 12
v. Sigel, 60 How. Pr. (N. Y.) 122 18
Van Sickle v. Gibson, 40 Mich. 170 730
Van Slooten v. Wheeler, 140 N. Y. 624 443
Van Syckel v. Van Syckel, 51 N. J. Eq. 194 466
Van Thorniley v. Peters, 26 Ohio St. 471 120, 121
Van Valkenburg v. McCloud, 21 Cal. 330 210
VanVleet v. DeWitt, 200 Ill. 153 676
Van Wagner v. Van Nostrand, 19 Iowa 422 278, 304
Van Wickle v. Landry, 29 La. Ann. 330 431
Vardeman v. Lawson, 17 Tex. 10 393, 398, 400
Varn v. Varn, 32 S. Car. 77 326
Varner's Appeal, In re, 80 Pa. St. 140 59
Varnon v. Varnon, 67 Mo. App. 534 487
Vary v. Sensabaugh, 156 Ala. 459 314
Vattier v. Hinde, 7 Pet. (U. S.) 252 298
Vaughan v. Marable, 64 Ala. 60 442
Vaughn v. Lovejoy, 34 Ala. 437 477
v. Moore, 89 Va. 925 122
v. Vaughn, 100 Tenn. 282 531
Vaughn
v. Yawn, 103 Ga. 557 667
Veeder v. McKinley &c. Trust Co., 61 Nebr. 892 727
Vejar v. Mound City Assn., 97 Cal. 659 271
Verden v. Coleman, 4 Ind. 457 226
Verdin v. Slocum, 71 N. Y. 345 566
Verges v. Giboney, 47 Mo. 171 443
Verplanck, In re, 91 N. Y. 439 653
Very v. Russell, 65 N. H. 646 442
Verzier v. Convard, 75 Conn. 1 318
Vestal v. Garrett, 197 Ill. 398 272
Vickers v. Henry, 110 N. Car. 371 65
v. Leigh, 104 N. Car. 248 45
Videan v. Griffin, 21 Cal. 389 335
Viele v. Judson, 82 N. Y. 32 438
Vigilancia, In re, 68 Fed. 781 433
Virginia Fire & Marine Ins. Co. v. Cottrell, 85 Va. 857 591
Vizard v. Moody, 119 Ga. 918 446
Vogler v. Anderson, 46 Wash. 202 213
Von Arb v. Thomas, 163 Mo. 33 65
Von Arx v. Boone, 193 Fed. 612 598
Von Hesse v. MacKaye, 136 N. Y. 114 340
Von Tobel v. Ostrander, 158 Ill. 499 538
Vose v. Bradstreet, 27 Maine 156 270
v. Handy, 2 Greenl. (Maine) 322 437
Voss v. Eller, 109 Ind. 260 419
v. King, 38 W. Va. 607 53
Vought v. Williams, 120 N. Y. 253 6, 77
Vowles v. Craig, 8 Cranch (U. S.) 371 203

W

Wacek v. Frink, 51 Minn. 282 5, 10, 15, 16
Wade v. Deray, 50 Cal. 376 291
v. Killough, 5 Stew. & P. (Ala.) 450 26
v. Miller, 32 N. J. L. 296 65
Wadleigh v. Glines, 6 N. H. 17 322
Wadsworth v. Wadsworth, 81 Cal. 187 676
Waggener v. Waggener, 3 T. B. Mon. (Ky.) 542 74, 280, 335
Wagner v. Varner, 50 Iowa 532 718
Wailes v. Cooper, 24 Miss. 208 127
Wait v. Baldwin, 60 Mich. 622 129
v. Kern River Min. &c. Co., 157 Cal. 16 671
v. Wait, 4 N. Y. 95 65
Waits v. Moore, 89 Ark. 19 100
Wakefield v. Chowen, 26 Minn. 379 5, 8, 10, 20, 161
Waldron v. Taylor, 52 W. Va. 284 87, 717
Walker v. Arnold, 71 Vt. 263 99
v. Atmore, 50 Fed. 644 451
v. Bowman, 27 Okla. 172 14, 23, 24
v. Bradbury, 15 Maine 207 91
v. Bruce, 44 Colo. 109 59
v. Converse, 148 Ill. 622 699
v. Deaver, 79 Mo. 664 736
v. Denison, 86 Ill. 142 337
v. Dunshee, 38 Pa. St. **430** 708, 728
v. Files, 94 Ark. 453 616
v. Hill, 73 N. H. 254 467
v. Maddox, 105 Ga. 253 400
v. Schreiber, 47 Iowa 529 128
Walkerly's Estate, In re, 108 Cal. 627 43, 482, 484
Walker's Estate, In re, 5 Ariz. 70 719
Walker's Estate, In re, 110 Cal. 387 457
Wall v. Fairley, 77 N. Car. 105 623
v. Pfanschmidt, 265 Ill. 180 733
v. Wall, 30 Miss. 91 96
Wallace v. Furber, 62 Ind. 103 423
v. Hudson, 170 Cal. 596 722
v. Industrial Trust Co., 29 R. I. 550 340

[References are to Sections.]

Wallace
v. Smith, 113 Ky. 263 478
v. Swepston, 74 Ark. 520 736
v. Weld, 145 Iowa 478 642
v. Wilson, 30 Mo. 335 192
Wallahan v. Ingersoll, 117 Ill. 123 111, 659
Wall Lumber Co. v. Lott-Lewis Co., 5 Ga. App. 604 612
Waln's Estate, In re, 189 Pa. St. 631 483
Walsh v. Anderson, 135 Mass. 65 445
Waltemate's Appeal, In re, 86 Pa. St. 219 719
Walters v. Defenbaugh, 90 Ill. 241 420
v. Jordan, 35 N. Car. 361 65
v. Walters, 73 Ind. 425 430
Walters' Will, In re, 64 Wis. 487 487
Walthall v. Rives, 34 Ala. 91 442
Walton v. Drumtra, 152 Mo. 489 58
v. Meeks, 120 N. Y. 79 738
Wambole v. Foote, 2 Dak. 1 324
Warburton v. Mattox, Morris (Iowa) 367 99
Ward v. Dougherty, 75 Cal. 240 265
v. Mathews, 122 Ala. 188 719
v. Mulford, 32 Cal. 365 180, 214
v. Necedah Lumber Co., 70 Wis. 445 331
v. Oates, 43 Ala. 515 493
v. Rapp, 79 Mich. 469 62
v. Small, 90 Ky. 198 120
v. Stow, 17 N. Car. 509 714
v. Ward, 120 Ill. 111 720
Wardell v. Watson, 93 Mo. 107 63
Wardell, In re, 57 Cal. 484 720
Warden v. Adams, 15 Mass. 233 436, 437
v. Lyons, 118 Pa. St. 396 42
v. Sahins, 36 Kans. 165 535
Ware v. Hager, 31 Ky. L. 728 193
v. Minot, 202 Mass. 512 459
v. Richardson, 3 Md. 505 58, 59
v. Schintz, 190 Ill. 189 441
v. Wisner, 50 Fed. 310 456
Warehime v. Graf, 83 Md. 98 595
Warfield v. Dorsey, 39 Md. 299 595
Warn v. Brown, 102 Pa. St. 347 45
Warner v. Bates, 98 Mass. 274 59
v. Bennett, 31 Conn. 468 54, 276
v. Frend, 138 Cal. 651 674
v. Gunnison, 2 Colo. App. 430 109
v. Norwegian Cemetery Assn., 139 Iowa 115 65
v. Rogers, 23 Minn. 34 61
v. Tanner, 38 Ohio St. 118 49
v. Williard, 54 Conn. 470 467
v. Winslow, 1 Sandf. Ch. (N. Y.) 430 121, 438
Warner Valley Stock Co. v. Calderwood, 36 Ore. 228 207
Warnock v. Harlow, 96 Cal. 298 118, 551
Warren v. Homestead, 33 Maine 256 437
v. Lovis, 53 Maine 463 419
v. Lyons, 152 Mass. 310 52
v. Prescott, 84 Maine 483 712, 718, 734
v. St. Paul &c. R. Co., 18 Minn. 384 677
v. Syme, 7 W. Va. 474 120
Washburn v. Van Steenwyk, 32 Minn. 336 456
Washington County Abstract Co. v. Harris, 48 Okla. 577 16, 17, 18
Wass v. Bucknam, 38 Maine 356 64
Waterbury v. Platt, 76 Conn. 435 110
Waterhouse v. Martin, Peck. (Tenn.) 392 89
Security State Bank v. Waterloo Lodge, 85 Nebr. 255 429
Waterman v. Carlton, 102 Tex. 510 724
v. Greene, 12 R. I. 483 46
Waters v. Bush, 42 Iowa 255 226
v. Spofford, 58 Tex. 115 120
Watkins v. Blount, 43 Tex. Civ. App. 460 734
v. Eaton, 30 Maine 529 640
v. Holman, 16 Pet. (U. S.) 25 652
v. Thornton, 11 Ohio St. 367 64
v. Wassell, 15 Ark. 73 99
v. Watkins (Ky. App.), 120 S. W. 341 468
v. Wilhoit, 104 Cal. 395 121, 122
Watkins Land Co. v. Creps, 72 Kans. 333 206
Watson v. Adams, 103 Ga. 733 570
v. Boyle, 55 Wash. 141 398
v. Grand Rapids &c. Co., 91 Mich. 198 447
v. Hutto, 27 Ala. 513 583
v. Mercer, 8 Pet. (U. S.) 88 106
v. Muirhead, 57 Pa. St. 161 16
v. O'Hern, 6 Watts (Pa.) 362 50
v. Richardson, 110 Iowa 673 719
v. Sherman, 84 Ill. 263 358
v. Sutro, 86 Cal. 500 616, 651
v. Turner, 89 Ala. 220 452
v. Violett, 63 Ky. 332 595
v. Watson, 225 Ill. 412 393
Watters v. Rome &c. R. Co., 133 Ga. 641 270
Watts v. Dull, 184 Ill. 86 718
v. Watts, 38 Ohio St. 480 473
Way v. Arnold, 18 Ga. 181 99
Weare v. Williams, 85 Iowa 253 127
Weart v. Cruser, 49 N. J. L. 475 48
Weatherford v. Weatherford, 20 Ala. 548 719
Weaver v. Carpenter, 42 Iowa 343 119
v. First Nat. Bank, 76 Kans. 540 66
Webb v. Bidwell, 15 Minn. (Gil. 394) 479 632
v. Haeffer, 53 Md. 187 442
v. Hayden, 166 Mo. 39 59
v. Hoselton, 4 Nebr. 308 358
v. Huff, 61 Tex. 677 283
v. Jackson, 6 Colo. App. 211 718
v. Janney, 9 App. D. C. 41 673
v. Robbins, 77 Ala. 176 129, 313
v. Seekins, 62 Wis. 26 51
v. Stone, 24 N. H. 282 424
v. Thompson, 23 Ind. 428 314
Webber v. Kastner, 5 Ariz. 324 119, 621
v. Pere Marquette Boom Co., 62 Mich. 626 224
Weber v. Christen, 121 Ill. 91 286
v. McCleverty, 149 Cal. 316 441
Webster v. Chicago, 62 Ill. 302 646
v. Cooper, 14 How. (U. S.) 488 58
v. Daniel, 47 Ark. 131 350
v. Vandeventer, 6 Gray (Mass.) 428 326
Webster City Steel Radiator Co. v. Chamberlin, 137 Iowa 717 536
Weed v. Woods, 71 N. H. 581 43
Weeden v. Hawes, 10 Conn. 50 578
v. Richmond, 9 R. I. 128 650
Weeks v. Brooks, 205 Mass. 458 957
v. Grace, 194 Mass. 296 110
v. Waldron, 64 N. H. 149 635
Weider v. Maddox, 66 Tex. 372 376
Weile v. United States, 7 Ct. of Cl. (U. S.) 535 337
Weiler v. Monroe County, 76 Miss. 492 185
Weir, In re, 9 Dana (Ky.) 434 714
Welborn v. Anderson, 37 Miss. 155 73
v. Kimmerling, 46 Ind. App. 98 668
Welch v. Ketcham, 48 Minn. 241 118
v. Spragins, 98 Ky. 279 66

[*References are to Sections.*]

Weldon v. Rogers, 157 Cal. 410 350
v. Tollman, 67 Fed. 986 433
Welland Canal v. Hathaway, 8 Wend. (N. Y.) 840 108
Wellhorn v. Weaver, 17 Ga. 267 311
Welles v. Bailey, 55 Conn. 292 103
Wellman v. Churchill, 92 Maine 193 275
Wells v. Caywood, 3 Colo. 487 323
v. Francis, 7 Colo. 396 392
v. Goss, 110 La. 347 715
v. Houston, 23 Tex. Civ. App. 629 468
v. Rice, 34 Ark. 346 595
v. Seeley, 47 Hun (N. Y.) 109 708, 728
v. Smith, 2 Utah 39 125
v. Thompson, 13 Ala. 793 64
v. Wells, 47 Barb. (N. Y.) 416 124
Wells' Estate, In re, 69 Vt. 388 583
Wells, In re, 113 N. Y. 396 734
Welsh v. Briggs, 204 Mass. 540 634
Wendt v. Martin, 89 Ill. 139 533
Wentworth v. Read, 166 Ill. 139 483
v. Wentworth, 69 Maine 247 65
Werner v. Werner, 59 Kans. 399 676
Wertheimer v. Thomas, 168 Pa. St. 168 434
West v. Duncan, 42 Fed. 430 640
v. Jordan, 62 Maine 484 570
v. Pine, 4 Wash. (U. S.) 691 99
v. Rassman, 135 Ind. 278 466
v. Roberts, 135 Fed. 350 207
v. Williams, 15 Ark. 682 708
v. Wright, 115 Ga. 277 96
West, In re, 128 Fed. 205 385
Wesner v. O'Brien, 56 Kans. 724 676
Wessels v. Colehank, 174 Ill. 618 61
Westbrook v. Gleason, 79 N. Y. 23 126
West Chicago St. R. Co. v. People, 214 Ill. 9 62
Western Loan &c. Co. v. Silver Bow Abstract Co., 31 Mont. 448 16, 17
Western Min. & Mfg. Co. v. Peytona Cannel Coal Co., 8 W. Va. 406 303
Western Transp. Co. v. Lansing, 49 N. Y. 499 50
Westervelt v. Wyckoff, 32 N. J. Eq. 188 129, 316
Westfaling v. Westfaling, 3 Atk. 460 467
Westhafer v. Patterson, 120 Ind. 459 673
West Jersey Title &c. Co. v. Barber, 49 N. J. Eq. 474 9
West Lumber Co. v. Lyon, 53 Tex. Civ. App. 648 382, 545
Weston v. Livezey, 45 Colo. 142 428
v. Weston, 38 Ohio St. 473 714, 716
West Virginia Pulp & Paper Co. v. Miller, 176 Fed. 284 458
Wetmore v. Wetmore, 149 N. Y. 520 676
v. Wetmore, 40 Ore. 332 676
Wetter v. Walker, 62 Ga. 142 89
Wever v. Parker, 131 Ga. 510 611
Weyer v. Beach, 79 N. Y. 409 538
Whaley v. Northern Pacific R. Co., 167 Fed. 664 200
Whalley v. Small, 25 Iowa 184 132
Wharton v. Hannon, 115 Ala. 518 667
Wheaton v. Andress, 23 Wend. (N. Y.) 452 464
Wheeler v. Aycock, 109 Ala. 146 432
v. Chicago, 68 Fed. 526 210
v. Clutterbuck, 52 N. Y. 67 707, 708
v. Duke, 1 Cr. & M. 210 48
v. Hotchkiss, 10 Conn. 225 64
v. Long, 128 Iowa 643 43
v. Smith, 50 Mich. 93 65
v. Walker, 2 Conn. 196 55
v. Wayne, 132 Ill. 599 304
Whipple v. Latrobe, 20 R. I. 508 708
Whitaker v. Erie Shootitng Club, 102 Mich. 454 689
Whitaker's Estate, 175 Pa. St. 139 711
Whitcher v. Webb, 44 Cal. 127 426
Whitcomb v. Rodman, 156 Ill. 116 460
White v. Brocaw, 14 Ohio St. 339 312
v. Clarke, 7 T. B. Mon. (Ky.) 640 67
v. Denman, 1 Ohio St. 110 120
v. Flynn, 23 Ind. 46 644
v. Gibson, 61 Misc. (N. Y.) 436 574
v. Hermann, 51 Ill. 243 423
v. Howard, 46 N. Y. 144 456
v. Keller, 68 Fed. 796 456
v. Luning, 93 U. S. 514 272
v. McGarahan, 87 Ga. 217 123
v. Massachusetts Inst. of Tech., 171 Mass. 84 466
v. Morris, 107 N. Car. 92 663
v. O'Bannon, 86 Ky. 93 553
v. Old, 113 Va. 709 466
v. Strahl, 17 Wis. 146 642
v. University Land Co., 49 Mo. App. 450 417
v. Walsh, 62 Misc. (N. Y.) 423 419
v. White, 19 Ohio St. 531 730
v. White, 64 W. Va. 30 737
v. White, 72 W. Va. 144 737
White, In re, 135 Fed. 199 380
Whitehead v. Park, 53 Ga. 575 473
v. Plummer, 76 Iowa 181 212
Whitenack v. Agartt, 56 Ill. App. 72 621
Whitfield v. Garriss, 131 N. Car. 148 46
Whitham v. Ellsworth, 259 Ill. 243 91
Whitley v. Barnett, 151 Iowa 487 416
Whitlock v. Johnson, 87 Va. 323 129
Whitman v. Huefner, 221 Mass. 265 724
v. Perkins, 56 Nebr. 181 399
Whitmer v. Schenk, 11 Idaho 702 101
Whitney v. Fitchburg R. Co., 178 Mass. 559 275, 506
v. Lowe, 59 Nebr. 87 433
v. Swett, 22 N. H. 10 51
v. Taylor, 158 U. S. 85 196
v. Union R. Co., 11 Gray (Mass.) 359 273, 277
v. Whitney, 45 N. H. 311 65
Whittaker v. Pendola, 78 Cal. 296 195
v. Thayer, 58 Tex. Civ. App. 282 697
Whittemore v. Gibbs, 24 N. H. 484 51
v. New York &c. R. Co., 174 Mass. 363 62
Whitten v. Whitten, 36 N. H. 332 670
Whittlesey v. Fuller, 11 Conn. 337 321, 326
Whitworth v. Pool, 29 Ky. L. 1104 393
Wickman v. Robinson, 14 Wis. 493 531
Widdicombe v. Childers, 124 U. S. 400 224
Widner v. State, 49 Ark. 172 203, 209
Wier v. Simmons, 55 Wis. 637 316
Wiesner v. Zaun, 39 Wis. 188 728
Wiggins v. Lusk, 12 Ill. 132 226
Wiggins Ferry Co. v. Ohio &c. R. Co., 94 Ill. 83 43
Wilburn v. Land, 138 Wis. 36 668
Wilcox v. First Nat. Bank, 93 Tex. 322 530
v. Jackson, 13 Pet. (U. S.) 498 184, 193, 221
v. Jackson, 109 Ill. 261 203
v. Rahen, 24 Nebr. 368 592
v. Wheeler, 47 N. H. 488 45, 268
Wilcoxon v. McGhee, 12 Ill. 381 227
Wildberger v. Cheek, 94 Va. 517 471, 734
Wilder v. Aurora &c. R. &c. Co., 216 Ill. 493 105
Wiley v. Gregory, 135 Ind. 647 472
Wilhelmi v. Leonard, 13 Iowa 330 428
Wilhite v. Hamrick, 92 Ind. 594 623

[References are to Sections.]

Wilkerson v. Bracken, 24 N. Car. 315 708
v. Clark, 80 Ga. 367 465
Wilkins v. Huse, 9 Ohio 154 351
Wilkinson v. Scott, 17 Mass. 249 318
Willamette Real Estate Co. v. Hendrix, 28 Ore. 485 614
Willard v. Cramer, 36 Iowa 22 120
v. Darrah, 168 Mo. 660 466
Willemin v. Dunn, 93 Ill. 511 429
Willet v. Brown, 65 Mo. 138 65
Willets v. Langhaar, 212 Mass. 573 61
Williams v. Childress, 25 Miss. 78 583
v. Cowden, 13 Mo. 211 477
v. Crocker, 36 Fla. 61 373
v. Cunningham, 52 Ark. 439 392
v. Daly, 33 Ill. App. 454 31
v. Davis, 154 Ala. 422 415, 421
v. Derair, 31 Mo. 13 53
v. Gause, 83 S. Car. 265 45
v. Gibson, 84 Ala. 228 63
v. Glenn, 87 Ky. 87 592
v. Glover, 66 Ala. 189 272
v. Hacker, 16 Colo. 113 98
v. Hanley, 16 Ind. App. 464 17, 19
v. Hutchinson & S. R. Co., 62 Kans. 412 562
v. Jackson, 107 U. S. 478 118
v. Jones, 166 N. Y. 522 475
v. Jones, 2 Swan (Tenn.) 620 47
v. Kemper, 4 Okla. 145 376
v. Keyes, 90 Mich. 290 438
v. Kimball, 35 Fla. 49 719, 724
v. Knight, 18 R. I. 333 718
v. Monroe, 125 Mo. 574 576, 658
v. Peters, 72 Md. 584 99
v. Peyton's Lessee, 4 Wheat. (U. S.) 77 599
v. Porter (Ky. App.). 21 S. W. 643 699
v. Rice, 60 Mich. 102 532
v. Teachey, 85 N. Car. 402 436, 437
v. Thurlow, 31 Maine 392 99
v. Weinbaum, 178 Mass. 238 537
v. Williams, 189 Ill. 500 460
v. Williams, 108 Iowa 91 59
Williams, In re, 62 Mo. App. 339 737
Williamson v. Berry, 49 U. S. 495 590
v. Brown, 15 N. Y. 354 127
v. Hall, 62 Mo. 405 257
v. Mayer, 117 Ala. 253 346
v. Roberts (Mo.), 187 S. W. 19 720
Willingham v. King, 23 Fla. 478 706
Willink v. Morris &c. Co., 4 N. J. Eq. 377 129
Willis v. Adams, 66 Vt. 223 129
v. Jenkins, 30 Ga. 167 717
v. Vallette, 4 Metc. (Ky.) 186 128
Will of Bank, In re, 87 Md. 425 469
Will of Barrett, In re, 111 Iowa 570 46
Will of Kopmier, In re, 113 Wis. 233 453
Will of Prasser, In re, 140 Wis. 92 459
Will of Simons, In re, 55 Conn. 239 473
Will of Stickney, In re, 85 Md. 79 482
Will of Walter, In re, 64 Wis. 487 487
Wills v. Wills, 85 Ky. 486 43
Willwbite v. Berry, 232 Ill. 331 695
Wilmarth v. Reed, 83 Mich. 44 480
Wilson v. Braden, 48 W. Va. 196 655
v. Byers, 77 Ill. 76 194
v. Campbell, 33 Ala. 249 347
v. Cochran, 48 Pa. St. 107 61
v. Fisher, 148 N. Car. 535 420
v. Fridenburg, 19 Fla. 461 66
v. Godfrey, 145 Iowa 696 433
v. Griess, 64 Nebr. 792 330
v. Hoffman (N. J. Ch.), 50 Atl. 592 594
v. Holt, 91 Ala. 204 97
Wilson
v. Kirkland, 172 Ala. 72 723
v. Logue, 131 Ind. 191 121
v. Miller, 16 Iowa 111 127
v. Otis, 71 N. H. 483 718
v. Piper, 77 Ind. 437 525
v. Plutus Min. Co., 174 Fed. 317 530
v. Rehm, 117 Ill. App. 473 419
v. St. Louis &c. R. Co., 108 Mo. 588 658
v. Simon, 91 Md. 1 533
v. Storthz, 117 Ark. 418 86, 724
v. Trenton, 53 N. J. L. 178 660
v. Vanstone, 112 Mo. 315 428
v. White, 109 N. Y. 59 591
v. Wilson, 85 Nebr. 167 283
Wilt v. Cutler, 38 Mich. 189 117
Wimpfheimer v. Prudential Ins. Co., 56 N. J. Eq. 585 672
Winans v. Peebles, 32 N. Y. 423 323
Winch v. Bolton, 94 Iowa 573 65
Winchester v. Hinsdale, 12 Conn. 88 677
v. United States, 14 Ct. Cl. 13 112
Windley v. Swain, 150 N. Car. 356 612
Wing v. Cooper, 37 Vt. 169 419
Wingo v. Parker, 19 S. Car. 9 99
Winn v. Strickland, 34 Fla. 610 98, 655
v. Tabernacle Inf., 135 Ga. 380 474
Winnipisiogee Paper Co. v. New Hampshire Land Co., 59 Fed. 542 270
Winona & St. P. R. Co. v. Barney, 113 U. S. 618 212
Winsor v. Mills, 157 Mass. 362 47
Winsted Sav. Bank &c. Assn. v. Spencer, 26 Conn. 195 282
Winston v. Browning, 61 Ala. 80 577
v. Hodges, 102 Ala. 304 280
Winter v. Gorsuch, 51 Md. 180 312
Wisby v. Bonte, 19 Ohio St. 238 105
Wisconsin Cent. R. Co. v. Forsythe, 159 U. S. 46 193, 212, 220
v. Price County, 133 U. S. 496 212
Witbeck v. Waine, 16 N. Y. 532 33
Witcher v. Conklin, 84 Cal. 499 195
Withers v. Jenkins, 14 S. Car. 597 64
Wittenbrock v. Wbeadon, 128 Cal. 150 197, 225
Witter, In re, 15 N. Y. S. 133 720
Wixon v. Devine, 91 Cal. 477 98
Wolbert v. Beard, 128 Wis. 391 59
Wolf v. Batchelder, 56 Pa. St. 87 534
v. Frost, 4 Sandf. Ch. (N. Y.) 72 61
Wolfe v. Dyer, 95 Mo. 545 120
v. Hatheway, 81 Conn. 181 483
v. Hines, 93 Ga. 329 359
v. Mueller, 46 Colo. 335 457
Woman's Union Missionary Soc. of America v. Mead, 131 Ill. 33 481
Wommack v. Whitmore, 58 Mo. 448 274
Wood v. Augustine, 61 Mo. 46 355
v. Boyd, 145 Mass. 176 275
v. Bullard, 151 Mass. 324 464
v. Cochrane, 39 Vt. 544 120
v. Colvin, 5 Hill (N. Y.) 228 615
v. Fowler, 26 Kans. 682 104
v. Goodridge, 6 Cush. (Mass.) 117 280
v. Hammond, 16 R. I. 98 458
v. Holly Mfg. Co., 100 Ala. 326 417
v. Kerkeslager, 227 Pa. 536 371
v. Little, 35 Maine 107 670
v. Lordier, 115 Ind. 519 123
v. Mann, 3 Sumn. (U. S.) 318 592
v. Matthews, 53 Ala. 1 492
v. Mitchell, 61 How. Pr. (N. Y.) 48 730
v. Pittman, 113 Ala. 207 223, 229
v. Price, 79 N. J. Eq. 620 434
v. Ruland, 10 Mo. 143 21

[References are to Sections.]

Wood
v. Rusher, 42 Minn. 389 301
v. Watson, 107 N. Car. 52 570
v. Wood, 150 Ind. 600 602
v. Wood, 83 N. Y. 575 320, 479
Woodbury v. Fisher, 20 Ind. 387 120
v. Manlove, 14 Ill. 213 124
Woodcock's Appeal, In re, 103 Maine 214 466
Woodgate v. Fleet, 44 N. Y. 1 98
Woodhull v. Longstreet, 18 N. J. L. 405 327
Woodman v. Madigan, 58 N. H. 6 43
Woodmere Cemetery v. Roulo, 104 Mich. 595 109
Woodruff v. Adair, 131 Ala. 530 358, 417
v. Pleasants, 81 Va. 37 59
v. Roysden, 105 Tenn. 491 694
v. Trenton Water Power Co., 10 N. J. Eq. 489 113
v. Woodruff, 44 N. J. Eq. 349 296
Woods v. Farmere, 7 Watts (Pa.) 382 99
v. Garnett, 72 Miss. 78 126
v. Wallace, 22 Pa. St. 171 419
v. West, 40 Nebr. 307 147, 241
v. Woods, 66 Maine 206 672
Wood's Appeal, In re, 18 Pa. St. 478 724
Wood's Appeal, In re, 82 Pa. St. 116 117, 122
Wood's Estate, In re, 36 Cal. 75 452
Woodward v. Boro, 16 Lea (Tenn.) 678 122
v. James, 115 N. Y. 346 59
v. Jewell, 140 U. S. 247 419
v. Sloan, 27 Ohio St. 592 644
Woodward, In re, 81 Conn. 152 718
Woodworth v. Fulton, 1 Cal. 295 214
Woolery v. Woolery, 29 Ind. 249 737
Woolfolk v. Graniteville Mfg. Co., 22 S. Car. 332 120
Woollacott v. Chicago, 187 Ill. 504 239
Woolverton v. Johnson, 69 Kans. 708 476
Wooster v. Handy, 23 Fed. 49 560
Wooten v. Steele, 109 Ala. 563 315
Worcester Nat. Bank v. Cheeney, 87 Ill. 602 117, 122
Work v. United Globe Mines, 12 Ariz. 339 699
Worsham v. Freeman, 34 Ark. 55 120
Worth v. Simmons, 121 N. Car. 357 668
Worthen v. Garno, 182 Mass. 243 62
Worthen & Aldrich v. White Spring Paper Co., 74 N. J. Eq. 647 61
Worthing v. Webster, 45 Maine 270 644
Worthington v. Lee, 61 Md. 530 671
W. P. Noble Mercantile Co. v. Mt. Pleasant Co-Op. Inst., 12 Utah 213 372
Wright v. Denn, 10 Wheat. (U. S.) 204 46
v. Edwards, 10 Oree. 298 600
v. Hutchinson, 156 Ill. 575 371
v. Lassiter, 71 Tex. 604 118
v. Lee, 2 S. Dak. 596 330
v. Lore, 12 Ohio St. 619 719
v. Mattison, 18 How. (U. S.) 50 73, 688
v. Roseberry, 121 U. S. 488 221
v. Shimek, 8 Kans. App. 353 438
v. Tichenor, 104 Ind. 185 73
v. Waheford, 17 Ves. (Jr.) 454a 280
v. Wright, 77 Fed. 795 286
v. Wright, 100 Tenn. 313 87
v. Young, 75 Kans. 287 491
v. Young, 6 Ore. 87 351
Wright Dalton-Bell-Anchor Store Co. v. St. Louis &c. R. Co., 142 Mo. App. 50 381
W. T. Bradley Co. v. Gaghan, 208 Pa. 511 536
Wunderle v. Wunderle, 144 Ill. 40 732
Wyeth v. Stone, 144 Mass. 441 718
Wyllie v. Pollen, 32 L. J. (N. S.) Ch. 782 128
Wylly-Gabbett Co. v. Williams, 53 Fla. 872 419
Wyman v. Taylor, 124 N. Car. 426 185
Wynne v. Wynne, 23 Miss. 251 456
Wythe v. Smith, 4 Sawy. (U. S.) 17 202

Y

Yackle v. Wightman, 103 Ill. 169 563, 566, 577
Yancey v. Radford, 86 Va. 638 321
Yanish v. Tarbox, 49 Minn. 268 272
Yarboroug v. Moore, 151 N. Car. 116 602
Yard v. Murray, 86 Pa. St. 113 720
v. Ocean Beach Assn., 49 N. J. Eq. 306 104
Yeager v. Groves, 78 Ky. 278 659
v. Tuning, 79 Ohio St. 121 61
Yellow Jacket &c. Co. v. Stevenson, 5 Nev. 224 51
Yerkes v. Hadley, 5 Dak. 324 427
v. Yerkes, 200 Pa. 419 484
Yetter v. King &c. Co., 66 N. J. L. 491 53
Yocum v. Siler, 160 Mo. 281 46
York v. Goodwin, 67 Maine 260 646
Youghrogheny River Coal Co. v. Pierce, 153 Pa. St. 74 63
Youmans v. Youmans, 26 N. J. Eq. 149 678
Young v. Bradley, 101 U. S. 782 338
v. Brand, 15 Nebr. 601 352
v. Lohr, 118 Iowa 624 16, 19, 22
v. Mahoning Co., 53 Fed. 895 268
v. Morehead, 94 Ky. 608 65
v. Pickens, 45 Miss. 553 570
v. Rathbone, 1 C. E. Green (N. J.) 224 595
v. Schofield, 132 Mo. 650 616
v. Sheldon, 139 Ala. 444 60, 335
Youngblood v. Vastine, 46 Mo. 239 118
Youngerman v. Polk County, 110 Iowa 731 275
Young's Estate, In re, 123 Cal. 337 487
Young Women's Christian Assn. v. Spencer, 9 Ohio C. C. (N. S.) 351 631
Younker v. Martin, 18 Iowa 143 439
Youtz v. Julliard, 10 Ohio Dec. 298 435

Z

Zacharia v. Cohen Co., 140 Iowa 682 283
Zann v. Haller, 71 Ind. 136 262
Zeigler v. Commonwealth, 12 Pa. St. 227 21
Zeile, In re, 74 Cal. 125 452
Zeischang v. Helmke (Tex. Civ. App.), 84 S. W. 436 392
Zeisweiss v. James, 63 Pa. St. 465 458
Zeust v. Staffan, 16 App. Cas. (D. C.) 141 64
Ziegler v. Commonwealth, 12 Pa. St. 227 12, 13, 20, 21
Zimmerer v. Stuart, 88 Nebr. 530 722
Zingsem v. Kidd, 29 N. J. Eq. 516 348
Zinkeisen v. Lewis, 71 Kans. 837 447
Zoeller v. Riley, 100 N. Y. 102 546
Zweigardt v. Birdseye, 57 Mo. App. 462 22

TITLES AND ABSTRACTS

CHAPTER I

ABSTRACTS IN GENERAL

SEC.
1. Abstracts defined.
2. Origin and history of abstracts.
3. The object of an abstract.
4. American and English methods distinguished.
5. General requisites of an abstract.
6. Sufficiency of abstract between vendor and vendee.
7. Abstract showing good title.
8. Period for which title should be shown.
9. Qualifications of abstracters.
10. Scope of abstracters' undertaking.
11. Relation of trust and confidence.
12. Who may make abstracts.
13. Compensation of abstracters.
14. Bond of abstracters.
15. Nature of abstracter's liability.
16. Liability for negligence or mistake.
17. Liability for failure to show liens or incumbrances.
18. Measure of damages against abstractee.
19. Actual damages sustained.
20. Limiting liability of an abstracter.
21. Liability of public officers examining title.
22. To whom an abstracter may be liable.
23. When right of action accrues.
24. Pleadings in action against abstracter.
25. Agreement to furnish abstract.
26. Duty to furnish abstract irrespective of agreement.
27. Contract by broker to furnish abstract.
28. Requiring abstracts of parties to real actions.
29. Abstract where records destroyed.
30. Property in the abstract.
31. Delivery of abstract.
32. Tender of abstract after expiration of agreed time.
33. Merger in deed of contract to deliver abstract.
34. Waiver of objections to title by taking possession.
35. Time in which to examine abstract.
36. Taxation of abstract books.

§ 1. **Abstracts defined.**—An abstract of title is a short methodically written or printed history of the title to a designated tract of land. It consists of a summary or an epitome of the material parts of every recorded instrument of conveyance which in any particular affects the land, or the title thereto, or any estate or interest therein, together with a brief statement of all liens and incumbrances to which the same may be subjected.[1] In short, it is a summary or an epitome of facts relied on as evidence of the title to real estate;[2] and may consist of a note of a single

[1] Smith v. Taylor, 82 Cal. 533, 23 Pac. 217; Heinsen v. Lamb, 117 Ill. 549, 7 N. E. 75.

[2] Taylor v. Williams, 2 Colo. App. 559, 31 Pac. 504; Geithman v. Eichler, 265 Ill. 579, 107 N. E. 180; McMillan

conveyance, as it always does where the grantee from the government furnishes an abstract of title.[3] Some authorities hold that an abstract is not only a statement, in substance of what appears on the public records affecting title, but also a statement, in substance, of such facts as do not appear upon the public records which are necessary to perfect the title.[4] But, as the term is generally used in this country, it may be defined as a synopsis of what appears on the public records affecting the title to a tract of realty.[5] In a legal sense, an abstract is a summary of facts relied on as evidence of title.[6] Such facts are usually arranged in chronological order, and are intended to show the origin, cause, and incidents of the title without the necessity of referring to the original instruments or the records wherein they are recorded.[7]

§ 2. **Origin and history of abstracts.**—While abstracts of title to real estate are now in general use throughout the civilized world, little can be said concerning their origin and history. Mention is made by English writers of their having been in use during the first half of the nineteenth century, but no attempt is made to fix a definite date when their use began. While titles were yet young and transfers comparatively few, there was little need for an abstract. Also when the value of landed property was comparatively insignificant, an abstract of the title was evidently regarded of little moment. But in the course of time transfers multiplied and values increased to such an extent that men became more concerned about their titles, and were loth to part with their money without assurance that the title proffered was free from defects. Before the adoption of a system of registration the examination of a title had to be made from the instruments themselves or from an abstract of such instruments. As these instruments or muniments of title were handed down from one owner to another there was great danger of some of them being lost or destroyed. The abstract not only obviated this

v. First Nat. Bank, 56 Tex. Civ. App. 45, 119 S. W. 709; Nicholson v. Lieber (Tex. Civ. App.), 153 S. W. 641.

[3] Heinsen v. Lamb, 117 Ill. 549, 7 N. E. 75.

[4] Hollifield v. Landrum, 31 Tex. Civ. App. 187, 71 S. W. 979; Sparkman v. Davenport (Tex. Civ. App.), 160 S. W. 410.

[5] Smith v. Taylor, 82 Cal. 533, 23 Pac. 217; Union Safe Deposit Co. v. Chisholm, 33 Ill. App. 647; Constantine v. East, 8 Ind. App. 291, 35 N. E. 844; Stevenson v. Polk, 71 Iowa 278, 32 N. W. 340.

[6] Geithman v. Eichler, 265 Ill. 579, 107 N. E. 180.

[7] Banker v. Caldwell, 3 Minn. 94.

danger, but greatly lessened the labor of counsel in passing upon the title.

Systems of registration of land titles, more or less complete, have for a long time prevailed in Germany and France, and perhaps in other European countries; but prior to the adoption of the Torrens system of registration of titles in England in 1875, no general system of registration was employed in that country. This probably accounts for the general use of abstracts in England prior to the above mentioned date, and such use probably originated from the grantor's unwillingness to allow his title papers to go out of his possession before he parted with the title.

There is no data giving the exact origin of abstracts in this country. In the earlier years of the republic little attention was given to titles to real estate. Purchasers usually relied upon an express warranty in the grantor's deed, and present possession was taken as a sufficient guarantee of ownership; but as land values increased, and the evidence of title began to multiply, purchasers began to part more cautiously with their money in exchange for titles. It became no longer possible to examine a title by an inspection of the original instruments, most of which were lost; nor was it practical to laboriously follow a chain of title through the records. It was this impossibility of preserving instruments affecting the title, as well as the impracticability of examining them in their entirety, that gave rise to the practice of assembling the essential parts of the recorded instruments in chronological order.

§ 3. **The object of an abstract.**—The object of an abstract is to afford a prospective purchaser or mortgagee of real estate a speedy and convenient means for ascertaining the condition of the title. By its use the purchaser, or his attorney, may readily pass upon the validity of the title in question[8] without having to make a specific inspection of all the original instruments affecting the title, or without resorting to a laborious search of the records.[9] "It is a well-known fact that few persons purchase real estate at the present time without first obtaining from the vendor

[8] Taylor v. Williams, 2 Colo. App. 559, 31 Pac. 504; Stevenson v. Polk, 71 Iowa 278, 32 N. W. 340; Fagan v. Hook, 134 Iowa 381, 105 N. W. 155, 111 N. W. 981; Kane v. Rippey, 22 Ore. 296, 23 Pac. 180; Burnaby v. Equitable Reversionary Interest Soc., 28 Ch. Div. 416.

[9] Banker v. Caldwell, 3 Minn. 94; Stevenson v. Polk, 71 Iowa 278, 32 N. W. 340.

an abstract of the vendor's title, and with the view of having such title passed upon by some one learned in the law."[10]

The value of an abstract of title consists not only in the information it contains, but also in the form and arrangement of such information so that it may be used with ease and safety. It should set forth the contents of every instrument of record affecting the title, so full that no reasonable inquiry shall remain unanswered, so brief that the mind of the examiner shall not be distracted by irrelevant details, so methodical that counsel may form an opinion on each conveyance as he proceeds in his perusal, and so clear that no new arrangement or dissection of the evidence shall be required. When thus prepared, abstracts will serve as a safe and convenient guide to purchasers or to investors in real estate securities.

§ 4. American and English methods distinguished.— While the terms "abstract" and "examination" are practically synonymous, and are used interchangeably by the profession, the latter term is given the preference by our abstracters in order to define the scope of their inquiry, as compared with the narrow and confined method employed by English abstracters. English abstracts show only the interest of some one individual in the property, rather than the general condition of the title. The origin and course of title to real property in England can not be shown for any considerable period of time owing to the nature of land tenures and the peculiar conditions attending the ownership of real estate in that country. The period covered by the abstract must be at least sixty years, and usually commences with a deed or will, and sometimes with a descent. Such an abstract would serve no useful purpose in this country, where title is frequently claimed through different channels from the same source, and where adverse titles often have an independent origin. While our abstracts are confined, as a rule, to matters of record, they present a far wider range by inquiring into every matter in any way affecting the title, in whomsoever it may rest, and regardless of how it may have been acquired. Hence the American abstract of title possesses none of the personal features that are characteristic of the English abstract, but is more in the nature of an examination in rem. English abstracts of title are prepared from

[10] Taylor v. Williams, 2 Colo. App. 559, 31 Pac. 504.

the original unrecorded instruments of conveyance and transfer, and from family histories or pedigrees. It is customary for the attorney for the vendor to prepare the abstract and deliver it, together with the original documents, to the vendee's attorney, who thereupon proceeds to compare the abstract with such original documents to ascertain if it contains a correct statement of all the circumstances disclosed by them relative to the title. Until such abstract and title-papers are furnished the vendee, he is not bound to accept a deed or pay the purchase-money. Upon the vendee, however, devolves the labor or expense of verifying the abstract and of ascertaining if it correctly sets forth the original instruments. He must determine if the title proffered is one which he is satisfied to accept. If he finds objections to the title he must certify his objections within a limited time, or be deemed to have waived them. But when these objections are signed by the attorney for the vendee and seasonably sent to the vendor or his attorney they become a part of the obstract.[11] In the eastern states of this country the English method of making abstracts is followed somewhat closely, but in the middle and western states abstracters have departed from the conventional system used in England and in the colonial states of this country. The laws of the various states require that deeds, mortgages, and other evidences of title be filed for record in the office of an official elected for the purpose of copying them in permanent books prepared and kept for this purpose. These books are public records and may be examined by any one. It is from these public records, and not from the original documents, that our abstracts are prepared. The abstracter collects and condenses the information found in the records and arranges it in chronological order for the convenience of the attorney who is to pass upon the title. Where land values are relatively important, or where titles have become complicated, abstracts are used; but it would seem that their use, in jurisdictions where instruments are required to be recorded, is regulated rather by convenience and courtesy of the parties than by and distinct recognition of the English custom as a part of our law of conveyancing.

§ 5. General requisites of an abstract.—Generally speaking, an abstract, as a summary or epitome of title to real estate,

[11] Lee on Abstracts, p. *3.

should contain the material or operative parts of all conveyances, transfers, and all other facts relied on as evidence of title, together with all such facts appearing of record as may impair the title. It should contain a full summary of all grants, conveyances, wills, and all records and judicial proceedings whereby the title is in any way affected, and all encumbrances and liens of record, and show whether they have been released or not.[12] It should include a concise statement of what appears on the public records affecting the title to the property in question, whether it shows an equitable title, a legal title, or no title at all.[13] It should contain whatever concerns the source of title and its condition. Not only should the descent and line of the title be clearly traced out, and all encumbrances, all chances of eviction, or adverse claims, be shown, but material parts of all patents, deeds, wills, judicial proceedings, and other records or documents which in any way affect the title to the property in question.[14] Just how full or minute a description of any of the instruments noted should be given is, perhaps, to a certain extent, a matter for the abstracter to decide,[15] although in so far as he undertakes to describe them he must see that the description is accurate.[16] It has been said that an abstract of title should be "so full that no reasonable inquiry shall remain unanswered, so brief that the mind of the reader shall not be distracted by irrelevant details, so methodical that counsel may form an opinion on each conveyance as he proceeds in his reading, and so clear that no new arrangement or dissection of the evidence may be required."[17] But unless there is a contract expressly requiring it, the abstract need not generally show matters not of record, or all the facts and circumstances connected with the conveyances which might affect the title, such as possession, or, who were the legal heirs of the deceased owner where administration was not had within the jurisdiction. Nor is it necessary to state that descriptions of the premises in the various instruments are inconsistent;[18] nor is it

[12] Heinsen v. Lamb, 117 Ill. 549, 7 N. E. 75; Attebery v. Blair, 244 Ill. 363, 91 N. E. 475, 135 Am. St. 342.

[13] Smith v. Taylor, 82 Cal. 533, 23 Pac. 217; Union Safe Deposit Co. v. Chisholm, 33 Ill. App. 647.

[14] Taylor v. Williams, 2 Colo. App. 559, 31 Pac. 504.

[15] Wacek v. Frink, 51 Minn. 282, 53 N. W. 633, 38 Am. St. 502.

[16] Equitable Bldg. &c. Assn. v. Bank of Commerce &c. Co., 118 Tenn. 678, 102 S. W. 901, 12 L. R. A. (N. S.) 449n, 12 Ann. Cas. 407.

[17] Curwen Abstr. Tit., § 36.

[18] American Trust Invest. Co. v. Nashville Abstract Co. (Tenn. Ch.), 39 S. W. 877.

required that the abstract contain an opinion as to the legal effect of any of the instruments noted.[19] While it is not generally a part of the duty of an abstracter to go outside the record to search for facts affecting the title to real estate, still he must furnish to an intended purchaser, by means of the abstract, everything pertaining to the names and to the property in question, so far as appears from the record, that reasonably might affect such title, and thus put the purchaser on inquiry, in order that such purchaser may himself make the proper investigation as to the outside facts.[20] When the abstract is prepared to cover a limited period only, it need not include anything of record outside such period.[21] Likewise, if it is prepared to cover certain records, it need not include anything outside such records.[22]

§ 6. **Sufficiency of abstract between vendor and vendee.**—When a contract for the sale and purchase of land provides that the vendor shall furnish the vendee with an abstract of the title, the only fair interpretation of such contract is that a full abstract of the title is to be furnished, which must show on its face a good title in the vendor.[23] Where the contract provides that the abstract shall show a marketable title, the vendor will not be permitted to show by evidence outside the abstract that the title is good,[24] nor will the purchaser be required to go outside the abstract in examining the title.[25] The vendor can not resort to parol evidence to remove doubts from the title, if, by the terms of the contract, he is to furnish a "good title of record,"[26] or if he contract in express terms that the title shall be free from encumbrances.[27]

Under a contract providing that an abstract showing a good title shall be furnished, a vendee is entitled to demand that the

[19] Wacek v. Frink, 51 Minn. 282, 53 N. W. 633, 38 Am. St. 502.

[20] Stephenson v. Cone, 24 S. Dak. 460, 124 N. W. 439, 26 L. R. A. (N. S.) 1207n.

[21] Wakefield v. Chowan, 26 Minn. 379, 4 N. W. 618.

[22] Thomas v. Carson, 46 Nebr. 765, 65 N. W. 899.

[23] Smith v. Taylor, 82 Cal. 533, 23 Pac. 217; Taylor v. Williams, 2 Colo. App. 559, 31 Pac. 504; Constantine v. East, 8 Ind. App. 291, 35 N. E. 844; Stevenson v. Polk, 71 Iowa 278, 32 N. W. 340; Kane v. Rippey, 22 Ore. 296, 23 Pac. 180.

[24] Parker v. Porter, 11 Ill. App. 602.

[25] Horn v. Butler, 39 Minn. 515, 40 N. W. 833.

[26] Benson v. Shotwell, 87 Cal. 49, 25 Pac. 249; Sheehy v. Miles, 93 Cal. 288, 28 Pac. 1046; Page v. Greeley, 75 Ill. 400; Coray v. Matthewson, 7 Lans. (N. Y.) 80, 44 How. 80.

[27] Evans v. Taylor, 177 Pa. St. 286, 35 Atl. 635, 69 L. R. A. 790.

abstract disclose a marketable title free from encumbrances and defects, and as to which there is no reasonable doubt.[28] In such a case an abstract which fails to show whether there were judgments against or convenances by the vendor, is insufficient,[29] but an abstract furnished by a vendor is not insufficient because it fails to show that an acknowledgment taken in another state bore a notarial seal, when the law of such state provides that an official seal shall not be necessary to the validity of a certificate of acknowledgment. But even though a seal is required, the letters "L. S." in an abstract of title, following the name of a notary in a certificate of acknowledgment, sufficiently indicates that an official seal was attached to such certificate.[30] Where the agreement was to purchase certain real estate "on delivery of a warranty deed, conveying clear title, with abstract," it was held that the purchaser could insist upon the delivery of an abstract showing clear title as a condition precedent, and that upon default in furnishing such an abstract he could maintain an action for purchase-money paid.[31] The fact that the vendor can show title by adverse possession does not change the above rule.[32]

Where the contract of sale required the vendor to furnish a satisfactory abstract of title and give a quitclaim or special warranty deed, it was held that no undertaking as to the character of the title to be conveyed was implied, but, on the contrary, it shows that the vendor assumes no responsibility as to the title any further than it may have been affected by his own acts.[33]

§ 7. **Abstract showing good title.**—Where the vendor agrees to convey to the vendee "by warranty deed with abstract showing good title," this has reference to the record title, which may be epitomized in the abstract, and is a condition precedent to the vendor's right to demand the deferred payments.[34] Where the contract calls for an abstract showing a good title, nothing less than this will satisfy the condition, no matter what the ven-

[28] Vought v. Williams, 120 N. Y. 253, 24 N. E. 195, 8 L. R. A. 591, 17 Am. St. 634; Moot v. Business Men's Assn., 157 N. Y. 201, 52 N. E. 1, 45 L. R. A. 666; Gates v. Parmley, 93 Wis. 294, 66 N. W. 253, 67 N. W. 739.

[29] Union Safe Deposit Co. v. Chisholm, 33 Ill. App. 647.

[30] Bucklen v. Hasterlik, 155 Ill. 423, 40 N. E. 561.

[31] Smith v. Taylor, 82 Cal. 533, 23 Pac. 217; Taylor v. Williams, 2 Colo. App. 559, 31 Pac. 504.

[32] Constantine v. East, 8 Ind. App. 291, 35 N. E. 844.

[33] Fitch v. Willard, 73 Ill. 92.

[34] Lessenich v. Sellers, 119 Iowa 314, 93 N. W. 348; Fagan v. Hook, 134 Iowa 381, 105 N. W. 155.

dor's real title may be, and in an action for specific performance brought by him he has the burden of proving that he, in fact, complied with the condition.[35] Where a contract of sale provided: "Ten days given to examine title; and if, upon examination of the records, it shall appear that any material act or thing is necessary to be done or performed in order to perfect the title to said premises, which the seller is unable to do or perform within a reasonable time, not exceeding sixty days from date hereof, then the sale to be void at the option of either party," it was held that the purchaser was not required to accept the title where it depended solely on adverse possession.[36] A purchaser will not be compelled to accept a title that is not clear, or to assume the risk of subsequent litigation.[37]

An agreement to convey a perfect title contemplates that such a title shall be fairly deducible of record. No reasonable doubt should exist respecting the validity of the title, and it should be free from litigation, palpable defects and grave doubts, and it should consist of both legal and equitable titles.[38]

§ 8. Period for which title should be shown.—According to the Old English rule an abstract was required to show title for sixty years or more prior to the date of making, but the period has been greatly lessened as a result of the shortening of the time necessary to bar an action for real property. By the Vendor and Purchaser Act of 1874, an abstract that shows title for forty years in sufficient. [39] But by the same act, recitals in deeds over twenty years old are prima facie evidence of facts recited, and when the title begins from a deed over twenty years old, reciting seisin in fee, the vendee can not demand that the abstract run back further, except so far as he may prove the recitals inaccurate.[40]

There is no rule in this country requiring that the abstract shall cover a certain period, but the universal custom is to carry the title back, where possible, to the original patent from the government. In the older states this is impossible because of the condi-

[35] Sheehy v. Miles, 93 Cal. 288, 28 Pac. 1046; Brown v. Widen (Iowa), 103 N. W. 158.

[36] Noyes v. Johnson, 139 Mass. 436, 31 N. E. 767.

[37] Cunningham v. Blake, 121 Mass. 333; Butts v. Andrews, 136 Mass. 221.

[38] Turner v. McDonald, 76 Cal. 177, 18 Pac. 262, 9 am. St. 189; Sheehy v. Miles, 93 Cal. 288, 28 Pac. 1046.

[39] In re Johnson, 30 Ch. Div. 42.

[40] Bolton v. London School Board, 7 Ch. Div. 766.

tion of the early records. In such cases it would seem that the title should be shown for a period of forty years. In any event his examination should be carried back until he arrives at what is commonly called the "root of title." By this phrase is meant a title existing in some one through whom the vendor claims for such length of time as would bar any adverse claim existing at the beginning of that period, including all savings in favor of persons under legal disabilities.[41]

When an abstracter is employed to make an abstract of title to certain lands from and after a specified date, he is not bound to inquire as to the existence of judgments entered or conveyances recorded prior to that date. He need not inquire or certify as to any lien arising under any such prior judgment, though the same attached to and became operative upon the land after that time; nor is he required to inquire or state whether the title vested in any grantee during the period covered by the contract was affected by any prior conveyance or any estoppel growing out of any covenants therein.[42] It has been held that deeds recorded before the grantor has any record title, may be safely disregarded in an examination of title under a system of registration and notice which provides that such deeds are not constructive notice to an innocent purchaser, and the abstracter is not bound to look for deeds of any person through whom the title passes, before the date of his record title.[43] However, the safer plan would be to extend the search back at least to the date of the execution of the recorded deed. A grantee purchasing subsequent to the deed conveying the legal title to his grantor is not charged with notice of a mortgage by his grantor, made and recorded before the latter obtained title.[44] A search for mortgages against the holder of the title to the property in question should begin from the time of the conveyance to him, and a mortgage on the property given by him and recorded before the date of the deed to him will not be constructive notice.[45] When the abstracter finds a deed or other instrument filed for record on a certain day, he should ex-

[41] Paine v. Meller, 6 Ves. 347; Cooper v. Emery, 1 Phil. 388.

[42] Wakefield v. Chowan, 26 Minn. 379, 4 N. W. 618.

[43] State v. Bradish, 14 Mass. 296; Dodd v. Williams, 3 Mo. App. 278.

[44] Morse v. Curtis, 140 Mass. 112, 2 N. E. 929, 54 Am. St. 456; Turk v. Funk, 68 Mo. 18, 30 Am. Rep. 771; Farmers Loan &c. Co. v. Maltby, 8 Paige Ch. 361.

[45] State v. Bradish, 14 Mass. 296; Calder v. Chapman, 52 Pa. St. 359, 91 Am. Dec. 163; McCusker v. McEvey, 10 R. I. 606.

amine the records for the whole of that day. While it may be said that the law takes notice of fractions of days as to the time of filing instruments for record, the general rule that the law takes no notice of fractions of days applies to the execution of deeds and mortgages, where the hour of their execution does not appear. The rule requires the abstracter to go back in his search to the time of the execution of the deed, and where the deed does not show the hour of its execution, he should commence his search at the beginning of the day.[46]

§ 9. **Qualifications of abstracters.**—A person who holds himself out as an abstracter of titles to real estate, impliedly undertakes that he possesses the requisite knowledge and skill for such employment, and, if he contracts to render such service he is bound to exercise ordinary skill and care in making such abstract.[47] An abstract company engaged in the business of making and selling abstracts of title, thereby represents to the purchaser of such abstracts that its employés are competent and qualified to make examinations of the records and to furnish such abstracts, and that the purchaser may safely rely upon the statements and representations contained in the abstract and certificate thereto.[48] It has been said that in preparing an abstract, no professional opinion as to the legal effect of the instruments abstracted is required; that the abstracter has only to furnish the facts from the records, and the purchaser, mortgagee or his counsel, determines for himself their sufficiency.[49] And yet, by their profession, abstracters are required to have a sufficient knowledge of the law to know what constitutes and what does not constitute a lien upon real estate, and to use sufficient diligence to find any such encumbrances when properly made a matter of record, so as to affect all parties interested with notice.[50]

The preparation of a perfect abstract of title to a tract of land, including all the instruments of conveyance and transfer, together with all the encumbrances which affect it, involves the exercise of much legal knowledge and careful research. The per-

[46] Higgins v. Dennis, 104 Iowa 605, 74 N. W. 9.

[47] Brown v. Sims, 22 Ind. 317, 53 N. E. 779, 72 Am. St. 308.

[48] Hillock v. Idaho Title &c. Co., 22 Idaho 440, 126 Pac. 612, 42 L. R. A. (N. S.) 178.

[49] West Jersey Title &c. Co. v. Barber, 49 N. J. Eq. 474, 24 Atl. 381; Dickle v. Abstract Co., 89 Tenn. 431, 14 S. W. 896, 24 Am. St. 616.

[50] Dodd v. Williams, 3 Mo. App. 278.

son who undertakes its preparation must understand fully all the laws on the subject of conveyancing, descent and inheritances, uses and trusts, devises, and, in fact, every branch of the law that can affect real estate in its various mutations from owner to owner, sometimes by operation of law, and sometimes by act of the parties.[51] Just what constitutes a lien upon real estate may be a difficult question in some cases to decide; but the abstracter is bound to know the state of the law on the subject, at least sufficiently to put him on his guard; and where there may be a reasonable doubt as to whether such or such a recorded instrument is a lien, if he choose to resolve the doubt he does so at his own peril. If, for instance, it be possible that a deed given and recorded before the grantor has any record title can be good against a subsequent purchaser without actual notice, of the same property from the same grantor, the abstracter will be bound to look for all conveyances of every grantor in the chain of title, up to the time the title passes out of such grantor or alienor. While an abstracter may become very proficient in his work without a thorough knowledge of the law pertaining to the subject mentioned, yet he will find it much to his advantage to possess at least a knowledge of the fundamental principles pertaining thereto. But any mistakes he may make concerning matters of difficulty where the law is unsettled does not render him liable. The abstracter must also be perfectly familiar with the system of surveying and describing land which prevails in the United States, and must be able to construct a diagram or plat of the property which is described according to courses and distances.

In case the abstracter does not choose to assume the liability which the law imposes upon him he may avoid it by noting in his certificate every question which arises upon the title as to which there can be the slightest doubt in the legal mind, or by giving a list of deeds and encumbrances, and abstaining from expressing any opinion as to their legal effect.[52]

§ 10. **Scope of abstracter's undertaking.**—The nature and scope of an abstracter's duties may be prescribed and limited by contract;[53] but in the absence of an express contract defining the scope of an abstracter's duties, he impliedly agrees to exercise

[51] Banker v. Caldwell, 3 Minn. 94.

[52] Dodd v. Williams, 3 Mo. App. 278.

[53] Wakefield v. Chowen, 26 Minn. 379, 4 N. W. 618; Thomas v. Carson, 46 Nebr. 765, 65 N. W. 899.

due and ordinary care in the performance of his task.[54] He is bound to disclose to the person employing him all pertinent information acquired by him in the course of his examination, and to set forth whatever concerns the sources of title and its conditions, whether these tend to confirm the title or to impair it.[55] He must present a summary of the records of all grants, patents, conveyances, wills, documents and all judicial proceedings which may affect the title in any way; also all mortgages, judgments, taxes, assessments, mechanic's liens, lis pendens notices, or other liens which may encumber the title in any degree. He must note all unsatisfied liens, although he doubts their validity.[56] He must set out every part of an instrument which may have any bearing on the condition of the title, and his employer is entitled to assume that any part not so set out has no bearing on the title.[57] But it is not implied that he should show matters not of record, or all the facts and circumstances connected with the conveyances which might affect the title, such as possession, names of legal heirs, and matters of a similar character. It would seem that he is only bound to exercise reasonable care, diligence and skill in preparing the abstract, and that the element of guaranty does not enter into the employment.[58] His examination must be of the actual records,[59] and he is not justified in relying upon marginal notes and references.[60] "One who undertakes the examination of titles, for compensation, is liable for want of ordinary care and skill in the performance of that task. To furnish abstracts of title is a business—a sort of profession. The party undertaking it assumes the responsibility of discharging his duty in a skilful and careful manner. That is just what he is paid for doing. Patience in the investigation of records is the main capacity required. There are no professional opinions required of the abstracter. It is his duty to furnish facts from the records, without concern for their legal effect. Upon the facts furnished the

[54] Lattin v. Gillette, 95 Cal. 317, 30 Pac. 545, 29 Am. St. 115; Chase v. Heaney, 70 Ill. 268.

[55] Smith v. Taylor, 82 Cal. 533, 23 Pac. 217; Taylor v. Williams, 2 Colo. App. 559, 31 Pac. 504; Heinsen v. Lamb, 117 Ill. 549, 7 N. E. 75; Banker v. Caldwell, 3 Minn. 94; Kane v. Rippey, 22 Ore. 296, 23 Pac. 180.

[56] Gilman v. Hovey, 26 Mo. 280.

[57] Burnaby v. Equitable Reversionary Interest Soc., 54 L. J. Ch. 466, 52 L. T. (N. S.) 350.

[58] Thomas v. Schee, 80 Iowa 237, 45 N. W. 539.

[59] Wacek v. Frink, 51 Minn. 282, 53 N. W. 633, 38 Am. St. 502.

[60] Wacek v. Frink, 51 Minn. 282, 53 N. W. 633, 38 Am. St. 502.

purchaser must make his own examination, and determine for himself on their sufficiency."[61]

The scope of an abstracter's duties may be defined by an agreement between the parties. Thus, where the agreement was to make and furnish a correct record abstract of title to certain lands from and after a specific date, there is no obligation to note upon the abstract an unsatisfied judgment against one of the grantees of the title, and which judgment only appears of record prior to that date, though the same becomes a lien upon the premises after that time.[62] It has been held, however, that an abstracter in searching the records for a chain of title, should not stop at the day and hour at which the evidence of a title in a certain grantee is filed for record, but should go back to the date of that title as shown by the record; for the grantee may have made conveyances affecting the title between the dates of his receiving title and recording his deed.[63]

§ 11. Relation of trust and confidence.—Persons engaged in the business of preparing abstracts of title occupy a relation of trust and confidence toward those employing them, which is second only in the sacredness of its nature to the relation which an attorney sustains to his client. Such persons consult the evidence of ownership and become familiar with the chains and histories of title. They handle private title papers, and become aware of whatever weaknesses or defects may exist in the legal proceedings through which the ownership of real property is secured. They should be held to a strict responsibility in the exercise of the trust and confidence which are necessarily reposed in them.[64]

Where the abstracter, in addition to making the abstract, undertakes to advise his employer as to whether his examination discloses a good and marketable title, he assumes the same responsibilities and owes such employer the same duty as if he were an attorney. This involves upon his part the exercise of due care and skill in investigating the title, and the utmost frankness toward his employer in disclosing the result of his investigation, and in advising the proper course to pursue in view of the facts

[61] Stephenson v. Cone, 24 S. Dak. 460, 124 N. W. 439, 26 L. R. A. (N. S.) 1207n.

[62] Wakefield v. Chowen, 26 Minn. 379, 4 N. W. 618; Dodd v. Williams, 3 Mo. App. 278.

[63] Higgins v. Dennis, 104 Iowa 605, 74 N. W. 9.

[64] Vallette v. Tedens, 122 Ill. 607, 14 N. E. 52, 3 Am. St. 502.

which have been discovered respecting the title.[65] Abstracters and attorneys who undertake to assemble all the evidence of title, or to advise their clients with reference thereto, but who make mistakes either intentionally or unintentionally, will be estopped from taking advantage of their own wrong by buying up outstanding titles that destroy the rights of those who trusted in them.[66] But an abstracter is not precluded from purchasing an interest in land adverse to the title for which he has furnished a correct abstract to his client.[67] An attorney at law, holding himself out as a competent person to make and certify abstracts of title, and who induces parties to buy of him a tract of land by presenting them with an abstract of title thereto on which he certified in writing that "he had carefully examined the title to said lands, and that the same was a full, true and complete abstract of said title," is liable for damages resulting to the purchasers on account of his fraudulent entries as to the character of his title.[68]

§ 12. **Who may make abstracts.**—The business of examining titles and making abstracts was formerly confined mainly to public officers having the custody and care of the records of instruments relating to the title to real estate,[69] but in recent years the bulk of the business has been done by private individuals, partnerships and corporations.[70] By statute in some states it is made the duty of local officers having charge of certain records relating to or affecting land titles to make and furnish searches of title when called upon for that purpose.[71] The officer's duties under such statutes are not so extensive as those of private abstracters.[72]

[65] Glyn v. Title Guarantee &c. Co., 132 App. Div. 859, 117 N. Y. S. 424.

[66] Marston v. Catterlin, 239 Mo. 390, 144 S. W. 475.

[67] Moore v. Empire Land Co., 181 Ala. 344, 61 So. 940.

[68] Thomas v. Schee, 80 Iowa 237, 45 N. W. 539.

[69] Glawatz v. People's Guaranty Search Co., 49 App. Div. 465, 63 N. Y. S. 691.

[70] Allen v. Hopkins, 62 Kans. 175, 61 Pac. 750; Glawatz v. People's Guaranty &c. Co., 49 App. Div. 465, 63 N. Y. S. 691.

[71] Such statutes will be found in Arizona, California, Colorado, Idaho, Illinois, Minnesota, Montana, New York, Oregon, Pennsylvania, South Carolina, Utah and Wyoming. See also Lusk v. Carlin, 4 Scam. (Ill.) 395; Kimball v. Connolly, 3 Keyes (N. Y.) 57, 2 Abb. Dec. 504, 33 How. Prac. 247; Van Schaick v. Sigel, 58 How. Pr. (N. Y.) 211; Ziegler v. Commonwealth, 12 Pa. St. 227; Philadelphia v. Anderson, 142 Pa. St. 357, 21 Atl. 976, 12 L. R. A. 751; Dirks v. Collin, 37 Wash. 620, 79 Pac. 1112.

[72] Dirks v. Collin, 37 Wash. 620, 79 Pac. 1112.

§ 13. Compensation of abstracters.—Statutes requiring public officers to make searches and furnish data for abstracts of title usually provide certain fees as compensation for their services.[73] But where the provisions of a statute secure to the public the right to examine the records free of charge, the clerk is entitled to a fee only when he is required to make the search himself;[74] and where the search is made by a private individual, without any service or assistance from the officer or his deputies, such officer is not entitled to any fees or compensation.[75] The compensation of a private individual or a corporation engaged in the abstract business is regulated by the nature and terms of the employment,[76] and where such abstracter fails to comply with the terms of the employment the right to compensation will be denied.[77] In the absence of an express agreement fixing the amount of compensation, the abstracter will be entitled to whatever his services are reasonably worth.[78] Where the abstracter's compensation was based on an agreed price for each transfer, and there was a custom among abstracters to treat each successive step leading to a conveyance as a transfer, and not all the transactions taken together, it was held that the abstracter was authorized to make up his account on such theory.[79]

§ 14. Bond of abstracters.—The statutes of some states require abstracters to give bonds with sureties as security against injury to the public records or against damages to their employers from a lack of skill or care in the performance of their duties,[80] but such statutory requirements do not create the business

[73] Morse v. Lambe, 23 Ont. 608; Ziegler v. Commonwealth, 12 Pa. St. 227.

[74] In re Chambers, 44 Fed. 786.

[75] State v. McMillan, 49 Fla. 243, 38 So. 666; Burton v. Tuite, 78 Mich. 363, 44 N. W. 282, 7 L. R. A. 73.

[76] McVeigh v. Chicago Mill &c. Co., 96 Ark. 480, 132 S. W. 638; Griffin v. Arlt, 96 N. Y. S. 1033.

[77] Griffin v. Arlt, 96 N. Y. S. 1033.

[78] Kenyon v. Charlevoix Imp. Co., 135 Mich. 103, 97 N. W. 407.

[79] McVeigh v. Chicago Mill &c. Co., 96 Ark. 480, 132 S. W. 638.

[80] Allen v. Hopkins, 62 Kans. 175, 61 Pac. 750; Thomas v. Carson, 46 Nebr. 765, 65 N. W. 899; Walker v. Bowman, 27 Okla. 172, 111 Pac. 319, 30 L. R. A. (N. S.) 642, Ann. Cas. 1912B, 839n. In Idaho a bond in the penal sum of $10,000 signed by three sureties, residents of the county, must be given; in Kansas a bond for $5,000, with three or more sureties; in Nebraska the bond must be for $10,000 with not less than three sureties; in North Dakota the bond must be for $10,000 with not less than three sureties; in Oklahoma, $5,000 bond with three sureties; in South Dakota, $10,000 with three sureties; in Utah, bond for not less than $10,000 with sureties to be approved by county commissioners.

of abstracting into a public office, nor constitute the abstracter a public officer.[81] Under some statutes the abstracter and his sureties are liable not only to the person employing the abstracter, but to all persons who purchase the land in reliance on the abstract.[82] Sureties liable on the bond of an abstracter, to a purchaser of land for the omission from the abstract of an outstanding mortgage on the land, are not discharged by an extension of time granted by the vendee to the vendor to make good his covenants of waranty against encumbrances contained in his deed.[83] The sureties on the bond of an abstracter of titles can not be held liable for an error or omission of their principal occurring prior to the execution of the bond.[84]

§ 15. Nature of abstracter's liability.—That there exists a liability on the part of persons who engage in the business of searching records, examining titles and preparing abstracts for compensation, is well settled, but as to the nature of the liability thus assumed, the authorities have not been altogether in harmony. It appears to be settled, however, that the contract is not one of indemnity, but merely an undertaking that the abstracter will faithfully and skilfully perform his work.[85] "The examiner of titles does not warrant. He is not liable except for negligence or want of necessary skill and knowledge. The contract made by him when he receives a fee and examines a title is not one of indemnity, but a contract that he will faithfully and skilfully do his work; and this contract is broken, and an action lies for the breach of it, so soon as he, through negligence or ignorance of his business, delivers a false certificate of title. Where indemnity alone is expressed it has always been held that damage must be sustained before a recovery can be had; but, where there is a positive agreement to do the act which is to prevent damage to plaintiff, there the action lies if defendant neglects or refuses to do the act."[86] An action against an abstracter to recover dam-

[81] Allen v. Hopkins, 62 Kans. 175, 61 Pac. 750.

[82] E. T. Arnold & Co. v. Barner, 91 Kans. 768, 139 Pac. 404, Ann. Cas. 1915D, 446n.

[83] Allen v. Hopkins, 62 Kans. 175, 61 Pac. 750.

[84] Goldberg v. Sisseton Loan &c. Co., 24 S. Dak. 49, 123 N. W. 266, 140 Am. St. 775.

[85] Dundee Mortgage Co. v. Hughes, 20 Fed. 39; Thomas v. Schee, 80 Iowa 237, 45 N. W. 539; Wacek v. Frink, 51 Minn. 282, 53 N. W. 633, 38 Am. St. 502.

[86] Rankin v. Schaeffer, 4 Mo. App. 108. See also In re Negus, 7 Wend. (N. Y.) 499; Rowsey v. Lynch, 61 Mo. 560.

ages for negligence in making or certifying an abstract of title does not sound in tort, but must be founded on contract;[87] and the foundation of the action for damages is his implied promise to perform with care, diligence and sufficient skill the duty undertaken for the compensation agreed upon.[88] Thus where an abstracter knew that the abstract was being made for the exclusive benefit and use of a certain person, and he knew that such person would rely thereon, and the abstract was delivered to such person, the abstracter was held liable.[89] But the remedy may be in tort where the injury or loss resulted from a conspiracy between the abstracter and others to defraud the plaintiff by leaving off instruments not covered by the certificate.[90]

§ 16. Liability for negligence or mistake.—If an abstracter fails to make necessary searches, or searches without due care, or fails to note in the abstract any material fact discovered in his search, he is liable to his employer for any damage the latter may sustain by reason of such failure or neglect.[91] But before damages can be recovered it must appear that they are the direct result of the abstracter's negligence.[92] He impliedly agrees to exercise reasonable care and skill in the performance of his undertaking, and if he fails to exercise this reasonable care and skill, he is liable for the injury that is the direct result of his neglect or want of skill.[93] "It is elementary that one who undertakes, for

[87] Lattin v. Gillette, 95 Cal. 317, 30 Pac. 545, 29 Am. St. 115; Russell v. Polk County Abs. Co., 87 Iowa 233, 54 N. W. 212, 43 Am. St. 381; Thomas v. Title &c. Co., 81 Ohio St. 432, 91 N. E. 183, 26 L. R. A. (N. S.) 1210; Bremerton Development Co. v. Title Trust Co., 67 Wash. 268, 121 Pac. 69.

[88] Chase v. Heaney, 70 Ill. 268; Smith v. Holmes, 54 Mich. 104, 19 N. W. 767; Gilman v. Hovey, 26 Mo. 280; Stephenson v. Cone, 24 S. Dak. 460, 124 N. W. 439, 26 L. R. A. (N. S.) 1207n; Dickle v. Abstract Co., 89 Tenn. 431, 14 S. W. 896, 24 Am. St. 616.

[89] Denton v. Nashville Title Co., 112 Tenn. 320, 79 S. W. 799.

[90] Thomas v. Carson, 46 Nebr. 765, 65 N. W. 899.

[91] Chase v. Heaney, 70 Ill. 268; Thomas v. Scheé, 80 Iowa 237, 45 N. W. 539; Smith v. Holmes, 54 Mich. 104, 19 N. W. 767; Wacek v. Frink, 51 Minn. 282, 53 N. W. 633, 38 Am. St. 502; Gilman v. Hovey, 26 Mo. 280.

[92] Kimball v. Connolly, 42 N. Y. 57, 33 How. Prac. 247, 2 Abb. Dec. 504.

[93] National Sav. Bank v. Ward, 100 U. S. 195, 25 L. ed. 621; Lattin v. Gillette, 95 Cal. 317, 30 Pac. 545, 29 Am. St. 115; Hillock v. Idaho Title & Trust Co., 24 Idaho 242, 133 Pac. 119; Brown v. Sims, 22 Ind. App. 317, 53 N. E. 779, 72 Am. St. 308; Young v. Lohr, 118 Iowa 624, 92 N. W. 684; Renkert v. Title Guaranty Trust Co., 102 Mo. App. 267, 76 S. W. 641; Western Loan &c. Co. v. Silver Bow Abstract Co., 31 Mont. 448, 78 Pac. 774, 107 Am. St. 435; Security Abstract &c. Co. v. Longacre, 56 Nebr. 469, 76 N. W. 1073; Crook v. Chilvers, 99 Nebr. 684, 157

a consideration, the examination of titles is liable for a failure to exercise ordinary care in so doing. It is the general rule that the liability of an abstracter is based upon contract."[94] The abstracter must examine the records themselves, and if he relies upon the indexes thereto or marginal references thereon, and damages result therefrom, he is liable for the loss.[95] Where a person informs the abstracter that he shall rely entirely upon the abstract, and the abstracter assures him that he may place such reliance on the abstract, such abstracter, if he fails, through negligence, to set out in the abstract an existing lis pendens, will be liable for such damages as may result from his negligence.[96] But where an abstracter, without any fraudulent intent, makes a mistake in the abstract, the person employing him can not hold such abstracter liable for a loss occasioned thereby unless he uses ordinary diligence in informing the abstracter of such mistake, where the loss could be averted, if the abstracter were so informed.[97] Nor can a party recover against an abstracter for a false certificate of title, where he does not examine the abstract or have some one to examine it for him.[98] Damages for negligence are recoverable against a person engaged in searching the records and certifying to titles who undertakes to furnish a party a full abstract of title to land which the latter desires to purchase, if, in consequence of the careless omission therefrom of an incumbrance, the purchaser is put to additional expense to perfect the title.[99] Where an abstracter furnished an erroneous abstract to a husband who delivered it to a loan company to obtain a loan, and the loan company's attorney reported the title good, relying on the abstract for his opinion, and the company granted the loan, the abstracter having had no knowledge of the purpose for which the

N. W. 617; Hershiser v. Ward, 29 Nev. 228, 87 Pac. 171; Economy Bldg. &c. Assn. v. West Jersey Title Co., 64 N. J. L. 27, 44 Atl. 854; Byrnes v. Palmer, 18 App. Div. 1, 45 N. Y. S. 479, 26 Civ. Proc. 382; Washington County Abstract Co. v. Harris, 48 Okla. 577, 149 Pac. 1075; Watson v. Muirhead, 57 Pa. St. 161, 98 Am. Dec. 213; Stephenson v. Cone, 24 S. Dak. 460, 124 N. W. 439, 26 L. R. A. (N. S.) 1207n; American Trust Inv. Co. v. Nashville Abstract Co. (Tenn.), 39 S. W. 877; Puckett v. Waco Abstract &c. Co., 16 Tex. Civ. App. 329, 40 S. W. 812.

[94] Young v. Lohr, 118 Iowa 624, 92 N. W. 684.

[95] Wacek v. Frink, 51 Minn. 282, 53 N. W. 633, 38 Am. St. 502.

[96] Brown v. Sims, 22 Ind. App. 317, 53 N. E. 779, 72 Am. St. 308.

[97] Roberts v. Leon Loan &c. Co., 63 Iowa 76, 18 N. W. 702.

[98] Trimble v. Stewart, 35 Mo. App. 537.

[99] Smith v. Holmes, 54 Mich. 104, 19 N. W. 767.

husband wanted the abstract, it was held that the abstracter was not liable to the loan company for damages due to his mistake.[1]

§ 17. **Liability for failure to show liens or incumbrances.** —An abstracter has been held liable for damages sustained through his failure to disclose in the abstract the following liens or encumbrances against the estate: Prior deeds of conveyances duly recorded;[2] mortgages;[3] sale of land for taxes;[4] judgments;[5] attachment suits;[6] and special assesments.[7] If an abstract refers to a will and purports to set out its contents as devising the land in fee, while in fact only a life estate was devised, the abstracter has not exercised a proper degree of care and skill, and if his employer is injured through his reliance on the abstract, he may recover damages to compensate him for his loss.[8] But no recovery can be had against an abstracter for failure to report a judgment lien against the property where his employer had purchased the property before he made the examination, and advanced no money on the faith of the statement in the abstract.[9] Nor is an abstracter liable to his employer beyond nominal damages for failure to note on an abstract a lien junior to his employer's claim of title, unless it appears that he has necessarily suffered special damages on account of such omission.[10]

§ 18. **Measure of damages against abstracter.**—The measure of damages for an abstracter's failure to set out in the abstract the true condition of the title is his employer's actual loss, which is usually the amount which he had to pay to get the title, or to get the encumbrance removed.[11] Where an abstracter failed

[1] Equitable Bldg. &c. Assn. v. Bank of Commerce, 118 Tenn. 678, 102 S. W. 901, 12 L. R. A. (N. S.) 449n, 12 Ann. Cas. 407.

[2] National Sav. Bank v. Ward, 100 U. S. 195, 25 L. ed. 621; Washington County Abstract Co. v. Harris, 48 Okla. 577, 149 Pac. 1075; Dickle v. Nashville Abstract Co., 89 Tenn. 431, 14 S. W. 896, 24 Am. St. 616.

[3] Smith v. Holmes, 54 Mich. 104, 19 N. W. 767; Thomas v. Carson, 46 Nebr. 765, 65 N. W. 899.

[4] Hillock v. Idaho Title &c. Co., 24 Idaho 242, 133 Pac. 119; Chase v. Heaney, 70 Ill. 268.

[5] Western Loan &c Co. v. Silver Bow Abstract Co., 31 Mont. 448, 78 Pac. 774, 107 Am. St. 435; Renkert v. Title Guaranty Trust Co., 102 Mo. App. 267, 76 S. W. 641.

[6] Security Abstract &c. Co. v. Longacre, 56 Nebr. 469, 76 N. W. 1073.

[7] Morange v. Mix, 44 N. Y. 315.

[8] Equitable Bldg. &c. Assn. v. Bank of Commerce, 118 Tenn. 678, 102 S. W. 901, 12 L. R. A. (N. S.) 449n, 12 Ann. Cas. 407.

[9] United States Wind Engine &c. Co. v. Linville, 43 Kans. 455, 23 Pac. 597; Roberts v. Sterling, 4 Mo. App 593.

[10] Williams v. Hanley, 16 Ind. App. 464, 45 N. E. 622.

[11] Chase v. Heaney, 70 Ill. 268;

to show a deed in the abstract, it was held that a purchaser relying on such abstract could recover damages from such abstracter to the extent of the price paid for the land, reasonable attorney's fees, costs, and other necessary expenses incurred in an attempt to defeat the outstanding title, provided there was a reasonable probability of defeating same.[12] But an abstracter is liable only for the damage which is the direct consequence of his error or mistake. He is not liable for any loss resulting to his employer on account of defects in the abstract to the extent such loss could have been averted or lessened by prompt action on the part of such employer.[13] Thus where he has omitted a mortgage from an abstract prepared for an intending purchaser of lands, he can not be held liable for any payments made after the purchaser has notice of the mortgage.[14] But one who has suffered an injury by reason of an error in an abstract is not called upon to do an act which will not affect his own damages, though it would be of service to the abstracter.[15] Where a purchaser of land relied on an abstract furnished him by an abstracter, which failed to set out an attachment on the land, and the land was afterward sold and a deed executed under the attachment before the purchaser had notice of the omission, the measure of such purchaser's damages was held to be the value of the land and not the amount of the judgment in attachment.[16] Where, by reason of an abstracter's negligence, the abstract does not show a prior lien on the property, and his employer, in reliance on the abstract, makes a loan on the property, the employer is entitled to bring suit against such abstracter without waiting for any default in the mortgage and may recover the difference in value between the security he contracted for and that which he actually received.[17] An abstracter is liable to a mortgagee for the entire amount loaned on a mortgage, on the faith of the abstract showing no prior lien, when in fact the property was mortgaged for more than its value, and was exhausted to satisfy the first mortgage.[18]

Dodd v. Williams, 3 Mo. App. 278; Morange v. Mix, 44 N. Y. 315; Allen v. Clark, 7 L. T. N. S. 781.

[12] Washington County Abstract Co. v. Harris, 48 Okla. 577, 149 Pac. 1075.

[13] Roberts v. Leon Loan &c. Co., 63 Iowa 76, 18 N. W. 702; Kimball v. Connolly, 42 N. Y. 57, 33 How. Pr. 247, 2 Abb. Dec. 504.

[14] Brega v. Dickey, 16 Grant's Ch. (U. C.) 494.

[15] Van Schaick v. Sigel, 60 How. Pr. (N. Y.) 122, 9 Daly 383.

[16] Security Abstract &c Co. v. Longacre, 56 Nebr. 469, 76 N. W. 1073.

[17] Lilly v. Boyd, 72 Ga. 83; La Wall v. Groman, 180 Pa. St. 532, 37 Atl. 98, 57 Am. St. 662.

[18] Fox v. Thibault, 33 La. Ann. 32.

§ 19. **Actual damages sustained.**—In an action against an abstracter to recover damages for loss sustained by a defective abstract, the plaintiff must show that he relied upon the abstract.[19] If he relied upon the abstract and has sustained a loss thereby, he can recover damages against the abstracter, if the error was one that a person of ordinary care and skill in the business of making abstracts would not have made.[20] The plaintiff must show that he had a right to rely on the abstract, and that actual injury has resulted to him. It is not enough to show that the abstract was defective, but it must be shown in addition thereto that actual loss resulted from it.[21] Unless something is bought and something is parted with, there can, of course, be no damages.[22] "The damages in this class of cases should be confined to injuries which the court can see resulted in loss of title or impairment of some kind to the ownership or enjoyment of the property which was purchased on the faith of the abstract, and that such injury was the direct result of the defect complained of therein."[23]

§ 20. **Limiting liability of an abstracter.**—An abstracter may limit his liability as to the correctness of the abstract and fullness of search to certain records, either by a specific contract to that effect or by specifying in his certificate the records examined.[24] But he can not limit his liability by an obscure statement in his certificate without specifically calling his employer's attention thereto. If he finds it impossible to furnish a complete and reliable abstract, it is his duty to give his employer notice of the fact, that he may employ some one else; otherwise such employer will have a right to rely on his competency and fidelity in this respect.[25] A statement in the certificate to the effect that the ab-

[19] Young v. Lohr, 118 Iowa 624, 92 N. W. 684; United States Wind Engine &c. Co. v. Linville, 43 Kans. 455, 23 Pac. 597; Hershiser v. Ward, 29 Nev. 228, 87 Pac. 171; Equitable Bldg. &c. Assn. v. Bank of Commerce, 118 Tenn. 678, 102 S. W. 901, 12 L. R. A. (N. S.) 449n, 12 Ann. Cas. 407.

[20] Equitable Bldg. &c. Assn. v. Bank of Commerce, 118 Tenn. 678, 102 S. W. 901, 12 L. R. A. (N. S.) 449n, 12 Ann. Cas. 407.

[21] Batty v. Fout, 54 Ind. 482; Williams v. Hanley, 16 Ind. App. 464, 45 N. E. 622; United States Wind Engine &c. Co. v. Linville, 43 Kans. 455, 23 Pac. 597; Kimball v. Connolly, 3 Keyes (N. Y.) 57, 2 Abb. Dec. 504, 33 How. Pr. 247; Byrnes v. Palmer, 18 App. Div. 1, 45 N. Y. S. 479, 26 Civ. Proc. 382; Puckett v. Waco Abstract &c. Co., 16 Tex. Civ. App. 329, 40 S. W. 812.

[22] Kimball v. Connolly, 3 Keyes (N. Y.) 57, 2 Abb. Dec. 504, 33 How. Pr. 247.

[23] Denton v. Nashville Title Co., 112 Tenn. 320, 79 S. W. 799.

[24] Thomas v. Carson, 46 Nebr. 765, 65 N. W. 899.

[25] Chas v. Heaney, 70 Ill. 268.

stracter finds no conveyance or encumbrance affecting the title, is equivalent to a statement that there are none.[26] The liability of an abstracter is measured by his employment, and when he is engaged to search the records for liens only, or for deeds only, his liability will not, by implication, be so extended as to embrace liens or conveyances not disclosed by a search of the designated office or offices. In other words, in order to maintain an action upon the statutory undertaking of an abstracter, it is necessary to show that the act of omission or commission alleged as the cause thereof is a breach of the conditions, express or implied, of the particular engagement to which it relates.[27] So if the engagement is to make a correct abstract of title from a specified sale, the abstracter is not liable for a failure to note upon the abstract an unsatisfied judgment against a grantee in the chain of title, which only appears of record prior to that date, notwithstanding that the judgment becomes a lien upon the property after that time.[28]

§ 21. Liability of public officers examining titles.—By statute in some states abstracters are not permitted to search the public records; and in others they are required to pay a fee for the privilege of making a search. In such states, it is the practice of the abstracter, after having ascertained the chain of title, to direct written requisitions to the proper official having custody of the records for searches for encumbrances or liens of record that may affect the property. Whenever, by law or custom, it is made a part of the duty of such official to make such searches, he is held liable for mistakes and omissions and false certificates of search, to the same extent as an abstracter.[29] A duty sufficient to create such liability on the part of a public official need not be expressly created by statute, but may be created by custom, or may be implied from the fact that he may charge a fee for his services.[30] When such liability exists the officer is liable for the

[26] Ziegler v. Commonwealth, 12 Pa. St. 227; Philadelphia v. Anderson, 142 Pa. St. 357, 21 Atl. 976, 12 L. R. A. 751; Tripp v. Hopkins, 13 R. I. 99.

[27] Thomas v. Carson, 46 Nebr. 765, 65 N. W. 899.

[28] Wakefield v. Chowan, 26 Minn. 379, 4 N. W. 618.

[29] Lusk v. Carlin, 4 Scam. (Ill.) 395; Fox v. Thibault, 33 La. Ann. 32; Smith v. Holmes, 54 Mich. 104, 19 N. W. 767; Kimball v. Connolly, 42 N. Y. 57, 33 How. Pr. 247, 2 Abb. Dec. 504; McCaraher v. Commonwealth, 5 Watts & S. (Pa.) 21, 39 Am. Dec. 506; Ziegler v. Commonwealth, 12 Pa. St. 227; Houseman v. Girard Bldg. &c. Assn., 81 Pa. St. 256; Siewers v. Commonwealth, 87 Pa. St. 15; Tripp v. Hopkins, 13 R. I. 99.

[30] Lusk v. Carlin, 4 Scam. (Ill.) 395; Ziegler v. Commonwealth, 12

mistakes and omissions of his deputies, clerks, and persons in his employ.[31] His liability, like that of an abstracter's, is only to those who employ him, or others in privity of contract with him.[32] The officer may limit his liability by his certificate, or it may be limited by the requisition for the search.[33] But in the absence of a statute requiring a public officer to make searches, and especially where the statute specifies no compensation therefor, he is not liable unless he has a contract with the person for whom the search is made, or unless the certificate is falsely made with an intent to defraud.[34]

§ 22. To whom an abstracter may be liable.—As a general rule, in the absence of fraud, collusion, or malicious or tortious act, the maker of an abstract is liable for his errors only to the party that employed him, or is in some way in privity of contract with him.[35] And where this rule obtains, the fact that the abstracter has knowledge that the abstract is to be used in a sale or loan to advise a prospective purchaser or mortgagee of the land does not affect the rule as to his liability.[36] But, inasmuch as the vendee or mortgagee, the only parties likely to be damaged by any mistake or inaccuracy in an abstract, seldom procures the

Pa. St. 227; McCaraher v. Commonwealth, 5 Watts & S. (Pa.) 21, 39 Am. Dec. 506.

[31] Kimball v. Connolly, 42 N. Y. 57, 33 How. Pr. 247, 2 Abb. Dec. 504; Peabody Bldg. &c. Assn. v. Houseman, 89 Pa. St. 261, 33 Am. Rep. 757.

[32] Mallory v. Ferguson, 50 Kans. 685, 32 Pac. 410, 22 L. R. A. 99; Commonwealth v. Harmer, 6 Phila. (Pa.) 90; Houseman v. Girard Bldg. &c. Assn., 81 Pa. St. 256.

[33] Tripp v. Hopkins, 13 R. I. 99.

[34] Mechanics Bldg. Assn. v. Whitacre, 92 Ind. 547; Mallory v. Ferguson, 50 Kans. 685, 32 Pac. 410, 22 L. R. A. 99; Wood v. Ruland, 10 Mo. 143.

[35] Savings Bank v. Ward, 100 U. S. 195, 25 L. ed. 621; Dundee Mtg. Co. v. Hughes, 20 Fed. 39; Talpey v. Wright, 61 Ark. 275, 32 S. W. 1072, 54 Am. St. 206; Buckley v. Gray, 110 Cal. 339, 42 Pac. 900, 31 L. R. A. 862, 52 Am. St. 88; Mechanic's Bldg. Assn. v. Whitacre, 92 Ind. 547; Brown v. Sims, 22 Ind. App. 317, 53 N. E. 779, 72 Am. St. 308; Mallory v. Ferguson, 50 Kans. 685, 32 Pac. 410, 22 L. R. A. 99; Morano v. Shaw, 23 La. Ann. 379; Schade v. Gehner, 133 Mo. 252, 34 S. W. 576; Zweigardt v. Birdseye, 57 Mo. App. 462; Thomas v. Carson, 46 Nebr. 765, 65 N. W. 899; Gate City Abstract Co. v. Post, 55 Nebr. 742, 76 N. W. 471; Day v. Reynolds, 23 Hun (N. Y.) 131; Lockwood v. Title Ins. Co., 73 Misc. 296, 130 N. Y. S. 824; Thomas v. Title &c. Co., 81 Ohio St. 432, 91 N. E. 183, 26 L. R. A. (N. S.) 1210; Sackett v. Rose (Okla.), 154 Pac. 1177; Houseman v. Girard Bldg. &c. Assn., 81 Pa. St. 256; Siewers v. Commonwealth, 87 Pa. St. 15; Commonwealth v. Harmer, 6 Phila. 90; Equitable Bldg. &c. Assn. v. Bank of Commerce, 118 Tenn. 678, 102 S. W. 901, 12 L. R. A. (N. S.) 449n, 12 Ann. Cas. 407; Bremerton Development Co. v. Title Trust Co., 67 Wash. 268, 121 Pac. 69.

[36] Zweigardt v. Birdseye, 57 Mo. App. 462; Anderson v. Spriestersbach, 69 Wash. 393, 125 Pac. 166, 42 L. R. A. (N. S.) 176n.

abstract to be made, there is a tendency to extend the liability to parties other than the employer of the abstracter. Thus where one employed by a landowner to make an abstract knew that it was to be used to induce a third party to make a loan on the land and that he would rely on it, subsequently delivered the abstract to such proposed mortgagee with the assurance that his work could be relied upon and that the title was correctly shown in the abstract, he was held liable to such mortgagee for loss sustained by him on account of defects in the title not shown by the abstract.[37] In another case it was held that the maker of an abstract, who guaranteed its correctness, was answerable in damages to the purchaser who relied upon the abstract, and refused to purchase without it, where recorded conveyances were omitted from such abstract to the injury of such purchaser, though the abstract was made at the request and expense of and delivered to the owner of the property, who thereupon delivered it to the intending purchaser for examination.[38] Where, upon inquiry, an abstracter affirms the correctness of his abstract to the grantee or mortgagee of his employer, he will be held liable for loss resulting to such grantee or mortgagee relying upon his abstract, on account of defects therein.[39] The abstracter's liability is not affected by the fact that a person other than his employer paid him for making it.[40] Nor will the fact that the borrower knew of the existence of omitted liens, and acted as the agent of the lender in ordering the abstract, relieve the abstracter from liability to a party loaning money and relying on his certificate.[41] Where a landowner, being an abstracter, prepares an abstract of title to his land, which abstract is to be used to induce others to purchase the land, he is liable to a purchaser thereof for mistakes in the abstract just as much as if the abstract was prepared upon the purchaser's order.[42] There is a contract between the owner of land and an abstracter, for making an abstract, rendering the abstracter liable for failure to exercise ordinary care in the examination, though the contract was by the owner's agent, who did

[37] Brown v. Sims, 22 Ind. App. 317, 53 N. E. 779, 72 Am. St. 308.

[38] Dickle v. Abstract Co., 89 Tenn. 431, 14 S. W. 896, 24 Am. St. 616.

[39] Siewers v. Commonwealth, 87 Pa. St. 15.

[40] Page v. Trutch, Fed. Cas. No. 10668; Houseman v. Girard Bldg. &c. Assn., 81 Pa. St. 256; La Wall v. Groman, 180 Pa. St. 532, 37 Atl. 98, 57 Am. St. 662.

[41] Houseman v. Girard Bldg. &c. Assn., 81 Pa. St. 256.

[42] Thomas v. Schee, 80 Iowa 237, 45 N. W. 539.

not disclose his agency.[43] Under statutes requiring abstracters to give bond for the payment of any damages to a party through any error, they are liable to a purchaser who relies on the abstract, without regard to who paid for the abstract or ordered it made.[44]

§ 23. **When right of action accrues.**—The right of action against an abstracter for damages resulting from a defective abstract accrues at the time the examination is made and reported, and not when the error is discovered, and the damages resulting therefrom have been paid;[45] and the statute of limitations runs from that time, and not from the time the damages accrued.[46] Whether the negligence out of which the cause of action arises is the breach of an implied contract, or the affirmative disregard of some positive duty, is immaterial. In either case the liability arises immediately upon such breach of contract or disregard of duty, and an action to recover the damages which are the measure of such liability may be immediately maintained. The right to maintain the action is distinguished from the measure of damages, and, although the entire damage resulting from such a negligence may not have been sustained, or the fact that the negligence occurred may not have been known until the right to a recovery is barred, yet the time within which an action may be brought is not thereby prolonged.[47] But where the complaint in an action against an abstracter not only alleged the contract and purchase of the abstract and certificate, but also alleged that through and by the mistake of the defendant the certificate to the abstract was false and untrue, and that, relying on the truth and correctness of the certificate, plaintiff made the purchase of the land, and subsequently sustained the injury and damages com-

[43] Young v. Lohr, 118 Iowa 624, 92 N. W. 684.

[44] Scott v. Jordan (Okla.), 155 Pac. 498; Goldberg v. Sisseton Loan &c. Co., 24 S. Dak. 49, 123 N. W. 266, 140 Am. St. 775.

[45] Lattin v. Gillette, 95 Cal. 317, 30 Pac. 545, 29 Am. St. 115; Russell v. Polk County Abstract Co., 87 Iowa 233, 54 N. W. 212, 43 Am. St. 381; Provident Loan Trust Co. v. Wolcott, 5 Kans. App. 473, 47 Pac. 8; Schade v. Gehner, 133 Mo. 252, 34 S. W. 576; Rankin v. Schaeffer, 4 Mo. App. 108; Walker v. Bowman, 27 Okla. 172, 111 Pac. 319, 30 L. R. A. (N. S.) 642, Ann. Cas. 1912B, 839n; Owen v. Western Sav. Fund, 97 Pa. 47, 39 Am. Rep. 794; Bodine v. Wayne Title &c. Co., 33 Pa. Super. Ct. 68.

[46] Lattin v. Gillette, 95 Cal. 317, 30 Pac. 545, 29 Am. St. 115; Russell v. Polk County Abstract Co., 87 Iowa 233, 54 N. W. 212, 43 Am. St. 381; Schade v. Gehner, 133 Mo. 252, 34 S. W. 576.

[47] Lattin v. Gillette, 95 Cal. 317, 30 Pac. 545, 29 Am. St. 115.

plained of, it was held that the cause of action did not accrue until the discovery, by the plaintiff, of the facts constituting the fraud or mistake.[48]

§ 24. Pleadings in action against abstracter.—In an action against an abstracter for damages resulting from an incorrect or defective abstract, the complaint should allege or show the nature of the agreement or character of the abstract to be furnished,[49] that the abstract was defective,[50] that the plaintiff relied and acted upon the abstract,[51] and that he has been damaged thereby.[52] Where the damage resulted from a false certificate the complaint must show that the plaintiff has been damaged on account of it.[53] The complaint must allege facts and not conclusions.[54] But it is not defective because it alleges that the plaintiff was ousted from the premises "by due course of law."[55] Where the action is brought by a vendee, to recover damages on account of an error in an abstract, he must allege in his complaint that he purchased the realty.[56] But allegations as to defendant's lack of care and skill may be general,[57] and, as the cause of action accrues when the abstract is furnished, the complaint, if it shows a breach of duty on the part of the defendant, and a liability incurred by plaintiff as a result thereof, need not allege that the plaintiff at the time the action was begun had been actually subjected to pecuniary loss.[58]

§ 25. Agreement to furnish abstract.—Ordinarily parties entering into an executory agreement for the purchase and sale of real estate make provisions therein specifying the time allowed for examination of the title, for furnishing abstract, making report of defects and objections, specifying the time within which the vendor may thereafter make his title good, and the character of the conveyance to be executed by him.[59] Where the vendor

[48] Hillock v. Idaho Title &c. Co., 22 Idaho 440, 126 Pac. 612, 42 L. R. A. (N. S.) 178.

[49] Hershiser v. Ward, 29 Nev. 228, 87 Pac. 171.

[50] Hershiser v. Ward, 29 Nev. 228, 87 Pac. 171.

[51] Batty v. Fout, 54 Ind. 482.

[52] United States Wind Engine &c. Co. v. Linville, 43 Kans. 455, 23 Pac. 597.

[53] United States Wind Engine &c. Co. v. Linville, 43 Kans. 455, 23 Pac. 597.

[54] Puckett v. Waco Abstract &c. Co., 16 Tex. Civ. App. 329, 40 S. W. 812.

[55] Hershiser v. Ward, 29 Nev. 228, 87 Pac. 171.

[56] Batty v. Fout, 54 Ind. 482.

[57] Gilman v. Hovey, 26 Mo. 280.

[58] Walker v. Bowman, 27 Okla. 172, 111 Pac. 319, 30 L. R. A. (N. S.) 642, Ann. Cas. 1912 B, 839n.

[59] Easton v. Montgomery, 90 Cal. 307, 27 Pac. 280, 25 Am. St. 123.

agrees to furnish an abstract of title within a specified time, but fails to do so, the vendee can not be required to extend the time, but may rescind the contract and recover the purchase-money which he has paid to the vendor.[60] Likewise, if the vendor agrees to furnish an abstract, and furnishes one showing a defective title, he may recover the purchase-money paid, even though the vendor had a good title as a matter of fact.[61] Where the vendor agrees in the contract of sale to furnish the vendee an abstract of title and the condition of the sale is that the title shall be good or there shall be no sale, the fair interpretation of the contract is that a full and complete abstract of title is to be furnished. If the abstract does not disclose a good record title, the purchaser is not required to make an investigation dehors the record, nor is he required to assume the risk of any litigation shown by the abstract to be either pending or probable. In an action by the vendee to recover purchase-money paid by him, evidence of the invalidity of the claims of persons whom the abstract shows to be asserting title adverse to the vendor is inadmissible.[62] It is a sufficient compliance with an agreement to furnish an abstract if the vendee is notified where it may be found, if it is accessible to him, and if he raises no objection at the time.[63] The agreement to furnish an abstract means an abstract of the records in the recorder's office and all the records showing the title of the vendor to the real estate.[64] It is a statement of the substance of the matters appearing in the public records affecting the title to the real estate involved.[65] By some authorities it means not only a statement in substance of what appears on the public records affecting the title, but also a statement in substance of those facts which do not appear on the public records necessary to perfect the title.[66] Where an abstract of title furnished by a vendor to a vendee under a contract of sale does not connect the vendor with the title, but shows it to be in a third person, the vendee may properly

[60] Howe v. Hutchinson, 105 Ill. 501; Des Moines &c. Real Estate Co. v. Beale, 78 Ill. App. 40.

[61] Boas v. Farrington, 85 Cal. 535, 24 Pac. 787.

[62] Smith v. Taylor, 82 Cal. 533, 23 Pac. 217.

[63] Papin v. Goodrich, 103 Ill. 86.

[64] Stevenson v. Polk, 71 Iowa 278, 32 N. W. 340.

[65] Union Safe Deposit Co. v. Chisholm, 33 Ill. App. 647.

[66] Tasker v. Garrett County, 82 Md. 150, 33 Atl. 407; Loring v. Oxford, 18 Tex. Civ. App. 415, 45 S. W. 395; Hollifield v. Landrum, 31 Tex. Civ. App. 187, 71 S. W. 979; Dickinson v. Chesapeake R. Co., 7 W. Va. 390.

refuse to comply with the contract of sale, though a sufficient deed to the vendor is afterward exhibited to the vendee, since the absence of the vendor's name from the abstract does not show whether any conveyances have been made by the vendor, or any judgments recovered against him, or any other facts which would affect the title as to him.[67] There is no agreement to furnish an abstract where the contract of sale and purchase simply provides that "title to be satisfactory and a warranty deed given,"[68] or to "make good title and give a warranty deed."[69]

§ 26. Duty to furnish abstract irrespective of agreement. —In England it would seem that the vendor must furnish the vendee with an abstract of title irrespective of any agreement upon the subject.[70] The reason assigned for this is, that the vendee, in the absence of any record of the vendor's muniments of title, must be given an opportunity to inspect them or their equivalents, unless he has agreed to take the title without such inspection. But it is the usual practice in that country to insert in the contract of sale a provision that the vendor shall, within a stated time, prepare at his own expense and deliver to the purchaser an abstract of the title.[71] Although the vendor should think fit to deliver his title deeds to a purchaser in lieu of an abstract, the purchaser would yet have a right to require an abstract of title at the vendor's expense.[72] In this country the universal custom now prevailing in the transfer of real estate is for the vendor to furnish to the vendee satisfactory evidence of his title, and this is usually done by furnishing him an abstract. "An abstract has become the usual concomitant of every instrument evidencing an interest or ownership in land."[73] But, in the absence of an express agreement to furnish an abstract, the vendor is not bound to furnish one, and it is incumbent upon the purchaser to provide an abstract and to satisfy himself as to the condition of the title.[74]

[67] Union Safe Deposit Co. v. Chisholm, 33 Ill. App. 647; Drury v. Mickelberry, 144 Mo. App. 212, 129 S. W. 237.

[68] Taylor v. Williams, 45 Mo. 80.

[69] Tapp v. Nock, 89 Ky. 414, 12 S. W. 713, 11 Ky. L. 611.

[70] Williams Real Prof. (6th ed.), 450; 2 Sudg Vend (8th ed) 29 (428); Dart Vend. (5th ed.) 125.

[71] Dart Vend. & Purch. (5th ed.) 125.

[72] Preston on Abstracts, p. 34.

[73] Gate City Abstract Co. v. Post, 55 Nebr. 742, 76 N. W. 471.

[74] Bolton v. Branch, 22 Ark. 435; Easton v. Montgomery 90 Cal. 307; 27 Pac. 280, 25 Am. St. 123; Symns, v. Cutter, 9 Kans. App. 210, 59 Pac. 671; Carr v. Roach, 2 Duer (N. Y.) 20; Espy v. Anderson, 14 Pa. St. 308.

"In the absence of any special agreement, the purchaser must look for himself to the records for the validity of the title to lands he would purchase."[75] Since the title is of record, the application of the doctrine of caveat emptor, in the absence of special agreement, requires the purchaser to satisfy himself as to the sufficiency of the title, and for that purpose to procure an abstract of the title, if he desires it, and to make the necessary investigation.[76] The Supreme Court of Alabama, following the English rule, has held that it is the duty of the vendor, when required, to furnish to the purchaser an abstract of the title.[77] It would seem that as between mortgagor and mortgagee, the former must furnish the latter an abstract of title and pay for same. The reason assigned for this rule is, that the mortgagee is entitled to the full amount of his loan and interest, and without discount for expenses incurred in preparing the security and ascertaining its value.[78] Where there is no agreement obligating the vendor to furnish the vendee with an abstract of the title, the latter is not at liberty to pronounce the title defective without any examination, or upon a partial examination. Having assumed to examine the title for the purpose of determining whether it was good, it is incumbent upon him to make a complete examination thereof. He could call upon the vendor for any information with reference thereto, and it then would be the duty of the vendor to furnish such information as he possesses.[79] If, upon such examination, it appears to him that the title is defective, it then becomes his duty to report to the vendor the particulars wherein such defects are claimed to exist, and in the absence of any time fixed by the contract of sale within which the vendor must remove the defects, or satisfy the vendee's objections, a reasonable time will be allowed therefor.[80] If the vendor fails within such time to remedy the defects thus pointed out, the vendee in an action to recover the purchase-money or deposit paid by him on the ground that the title is defective, is limited to such defects as were then pointed out.[81]

[75] Symns v. Cutter, 9 Kans. App. 210, 59 Pac. 671.

[76] Easton v. Montgomery, 90 Cal. 307, 27 Pac. 280; 25 Am. St. 123; Espy v. Anderson, 14 Pa. St. 308.

[77] Chapman v. Lee, 55 Ala. 616; Wade v. Killough, 5 Stew. & P. (Ala.) 450.

[78] Mart. on Abst. 9.

[79] Benson v. Shotwell, 87 Cal. 49, 25 Pac. 249.

[80] More v. Smedburgh, 8 Paige (N. Y.) 600.

[81] Easton v. Montgomery, 90 Cal. 307, 27 Pac. 280, 25 Am. St. 123.

§ 27. **Contract by broker to furnish abstract.**—It has been held that authority conferred on a real estate broker to make a binding contract for the sale of land includes power to bind the grantor to furnish an abstract of title.[82] But it would seem that if the grantor is not required to furnish an abstract, a real estate broker employed to find a purchaser for his property at a price stipulated in the contract of employment, has no power, in making a contract of sale, to bind the grantor to furnish an abstract.[83] A real estate broker who has no express authority from his principal to agree to furnish a satisfactory abstract of title has no implied authority to so agree, and a contract made by him, containing such agreement, is in excess of his authority.[84] It is well settled that, if the broker relies for his commission on having made a sale under the authority conferred on him by the owner, he must prove a sale made on the terms and conditions specified by the owner.[85] A real estate broker's authority is limited to the precise terms given him by his principal, and the principal is not bound by a departure therefrom.[86]

§ 28. **Requiring abstracts of parties to real actions.**—The statutes of many states provide that either party to a real action may require the other to furnish an abstract of the title or titles to the real estate involved. The time for furnishing the abstract is usually regulated by the statute requiring it to be furnished. Under a statute providing that the court may, in all proper cases, upon motion, order abstracts of title to be furnished, it was held that the plaintiff in an action upon a fire insurance policy could not be required to furnish an abstract of title to the property which was destroyed by fire.[87] Where the action was for the possession of the land described in the complaint and to quiet title thereto, and the plaintiff had filed an abstract of title showing upon what deeds of conveyance she relied to prove such title, it

[82] Jasper v. Wilson, 14 N. Mex., 482, 94 Pac. 951, 23 L. R. A. (N. S.) 982n.

[83] Easton v. Montgomery, 90 Cal. 307, 27 Pac. 280, 25 Am. St. 123; Gilbert v. Baxter, 71 Iowa 327, 32 N. W. 364; Balkema v. Searle, 116 Iowa 374, 89 N. W. 1087; Hunt v. Tuttle, 133 Iowa 647, 110 N. W. 1026; Espy v. Anderson, 14 Pa. St. 308.

[84] Mitchell v. Hagge (Iowa), 160 N. W. 287.

[85] Blodgett v. Sioux City & St. P. R. Co., 63 Iowa 606, 19 N. W. 799; Smith v. Allen, 101 Iowa 608, 70 N. W. 694; Balkema v. Searle, 116 Iowa 374, 89 N. W. 1087.

[86] Balkema v. Searle, 116 Iowa 374, 89 N. W. 1087; Ballou v. Bergvendsen, 9 N. Dak. 285, 83 N. W. 10.

[87] Phœnix Ins. Co. v. Rowe, 117 Ind. 202, 20 N. E. 122.

was held that she was not required to furnish a more complete abstract.[88] When an abstract is furnished pursuant to the statute, either voluntarily or by order of court, it constitutes no part of the complaint.[89] Where a statute provides that an abstract may be demanded in an action in ejectment, it is not to be construed as requiring the production of an abstract in the technical sense. It is sufficient if it be specific enough to advise the opposite party of the title upon which reliance will be placed.[90] Where a statute provided in substance that either party may demand of the other an abstract in writing of the claim of title upon which he relies, which must be filed within a specified time, and in default thereof no evidence of the title of such opposite party shall be given on the trial, it was held that where the abstract filed stated that a deed in the chain of title was recorded in volume 5 of the records of deeds, while in fact it was recorded in book lettered V, it was not a sufficient compliance with the statute.[91]

§ 29. **Abstract where records destroyed.**—Where the public records and title papers have been lost or destroyed, an abstract of title, or letter press copy thereof, made in the ordinary course of business prior to such loss or destruction, and delivered to the parties interested in the land, is generally regarded as competent evidence of the facts therein recited.[92] Such abstract or copy thereof is rendered competent evidence either by comity, or, in some states, by statutory enactment. But before it can be relied on as evidence under a statute, the requirements of the statute must be complied with. Thus an affidavit which states that the original documents referred to in a certified abstract are not in the possession of the complainant and "that they have been either lost or destroyed, and it is not in the power of the complainant to produce them," was held insufficient to lay the foundation for the introduction of the abstract in evidence, under the statute, because the affidavit failed to show that the original instrument was not intentionally destroyed or disposed of for the purpose of introducing a copy.[93]

[88] Roberts v. Vornholt, 126 Ind. 511, 26 N. E. 207.

[89] Roberts v. Vornholt, 126 Ind. 511, 26 N. E. 207; Hoover v. Weesner, 147 Ind. 510, 45 N. E. 650, 46 N. E. 905; O'Mara v. McCarthy, 45 Ind. App. 147; 90 N. E. 330.

[90] Jackson v. Tribble, 156 Ala. 480, 47 So. 310.

[91] Coler v. Alexander 60 Tex. Civ. App. 573, 128 S. W. 664.

[92] Russell v. Mandell, 73 Ill. 136.

[93] Bauer v. Glos, 244 Ill. 627, 91 N. E. 701.

§ 30. Property in the abstract.—In England the purchaser has a temporary right of property in the abstract during the negotiations for sale of the land, and an absolute ownership therein if the sale be consummated.[94] There seems to be no reason why this rule should not apply in this country.[95] Our courts have held that the absolute right of property in the abstract remains in the vendor until the sale is consummated. Pending the sale the vendee is entitled to the custody of the abstract and has a special property therein, which he can enforce against the vendor or other persons. But immediately upon the rescission of the contract of sale all his rights in and to the abstract cease.[96] If the contract of sale is, for any reason, rescinded, the purchaser can not hold the abstract as a security for the return of any purchase-money he may have paid.[97] As between mortgagor and mortgagee, the rule is that an abstract furnished by the mortgagor to assist the mortgagee in examining the title becomes a part of the security for the loan, and may be retained by the mortgagee until the mortgage is discharged.[98]

§ 31. Delivery of abstract.—An executory contract for the sale and purchase of real estate requiring the furnishing of an abstract implies that it shall be furnished sufficiently long before the date of the consummation of the sale and payment of the purchase-money for the purchaser to have opportunity to examine it.[99] If such contract provides for the exhibition of an abstract showing title in the vendor by a day named, this is a condition precedent to be performed before either party can call upon the other to perform the agreement, and if the abstract is not satisfactory, or fails to show the title agreed to be made, the other may elect to consider the contract at an end.[1] If the vendor does not produce the abstract at the appointed time, the purchaser may rescind the contract and recover his deposit.[2] When the contract calls for an abstract showing good title by a day certain, the vendor can not demand time to furnish an additional abstract if the first is defective.[3] But a purchaser who has granted the ven-

[94] Roberts v. Wyatt, 2 Taunt, 268; Langslow v. Cox, 1 Chit. 98.
[95] Chapman *v.* Lee, 55 Ala. 616.
[96] Jackson v. Conlin, 50 Ill. App. 538; Espy v. Anderson, 14 Pa. St. 308.
[97] Jackson v. Conlin, 50 Ill. App. 538.
[98] Holm v. Wust, 11 Abb. Pr. (N. S.) (N. Y.) 113.
[99] Compton v. Bagley, 1 Ch. 313.
[1] Howe v. Hutchinson, 105 Ill. 501.
[2] Williams v. Daly, 33 Ill. App. 454.
[3] Howe v. Hutchinson, 105 Ill. 501; Williams v. Daly, 33 Ill. App. 454.

dor time to remedy defects in an abstract will not be allowed to rescind for failure to furnish an additional abstract within a reasonable time without notifying the vendor that he will wait no longer, where he receives the abstract furnished as if he meant to have it examined.[4] Where the vendor agrees to furnish an abstract of title within a certain specified number of days from the date of the contract, which he fails to do, and the vendee raises no objection on that ground, and continues to make payments under the contract and otherwise treats it as still in force, he will be deemed to have waived the performance of that condition, and can not maintain rescission or recover the money advanced on account of such default.[5] If no time is fixed in the contract for the delivery of the abstract to the purchaser, it may be delivered within a reasonable time.[6] Where the contract required the vendor to furnish an abstract within a reasonable time, it was held that what was a reasonable time depended on the circumstances of the case, and the fact that a payment was to be made within thirty-five days from the date of the contract did not necessarily mean that the abstract should be delivered within that time.[7] If the contract provides that an abstract shall be furnished "without delay," the vendee must allege and prove a demand, and a refusal to deliver the abstract within a reasonable time thereafter, to entitle him to a rescission of the contract.[8]

§ 32. Tender of abstract after expiration of agreed time. —Should the vendee wish to insist on a breach of the contract of sale due to the vendor's failure to furnish an abstract within the time specified, he must decline to accept it, if tendered to him after the period limited by the terms of the contract. If he accepts the abstract after a breach of the condition respecting the time of delivery, he waives his right to claim rescission on account of such breach. In a case where the contract provided that the vendor should deliver an abstract within ten days from the signing of the contract, but he did not do so until after the expiration of the prescribed ten days, and the abstract was accepted, the Supreme Court of the United States said: "The effect of the

[4] Jackson v. Conlin, 50 Ill. App. 538.
[5] McAlpine v. Reicheneker, 56 Kans. 100, 42 Pac. 339.
[6] Martin v. Roberts, 127 Iowa 218, 102 N. W. 1126.
[7] Jackson v. Conlin, 50 Ill. App. 538.
[8] Cummings v. Wilson, 99 Minn. 502, 110 N. W. 4.

fact that the abstract was not delivered within ten days after sale has been waived by the acceptance of it, when delivered, without objection, and its retention for months without specifically referring to any other defects in the title than those amendable by the steps taken in the county court suggested by the buyer's counsel as necessary to perfect the title."[9] The vendee can not waive the condition to furnish an abstract within a specified time, and subsequently obtain rescission, or recover the money advanced, by reason of such default.[10] Thus where the vendor agreed to furnish the vendee an abstract within thirty days from the date of sale, which was not done, and the vendee thereafter treated the default as immaterial, and continued to make payments under the contract, and otherwise treated the contract as still in force, he was denied rescission, or a recovery of the money advanced, on account of such default.[11]

§ 33. **Merger in deed of contract to deliver abstract.**— Whether a contract for the future delivery of an abstract showing a good title is merged in a warranty deed, and a mortgage executed by the purchaser to secure payment of purchase-money, all of which instruments were executed simultaneously, must be determined from an examination of such instruments, taking into consideration the situation, conduct and intention of the parties. The provision in the contract will be merged in the deed if the latter instrument is accepted as a performance of the condition, but the deed will not supersede the provision if it is agreed and intended by the parties that the provision relative to furnishing the abstract is to continue in full force and effect.[12] It can not be said as a matter of law that a contract of sale is merged in a subsequent deed, especially where there is no inconsistency between the provisions of the contract and the deed.[13] But a written contract for the sale of real estate is superseded and extinguished by a subsequent deed of conveyance between the same parties, which covers in its provisions all of the stipulations contained in the contract.[14]

[9] Kentucky Distilleries &c. Co. v. Blanton, 149 Fed. 31, 80 C. C. A. 343.

[10] McAlpine v. Reicheneker, 56 Kans. 100, 42 Pac. 339.

[11] McAlpine v. Reicheneker, 56 Kans. 100, 42 Pac. 339.

[12] Read v. Loftus, 82 Kans. 485, 108 Pac. 850, 31 L. R. A. (N. S.) 457n.

[13] Nothe v. Nomer, 54 Conn. 326, 8 Atl. 134; Witbeck v. Waine, 16 N. Y. 532; Close v. Zell, 141 Pa. 390, 21 Alt. 770, 23 Am. St. 296.

[14] Hampe v. Higgins, 74 Kans. 296, 85 Pac. 1019.

§ 34. **Waiver of objections to title by taking possession.**—Whether or not a purchaser waives objections to the title by taking possession of the premises is clearly one of fact. If he takes possession with knowledge of defects, the general rule is that he thereby waives his right to rescind the contract or to recover damages against the vendor.[15] But the rule is otherwise where the purchaser was not aware of the objections to the title when he took possession;[16] or where the contract of sale authorizes him to take possesion before title is made;[17] or where under the contract he is entitled to call for a good title and takes possession with the concurrence of the vendor;[18] or where the vendor has agreed to remove the objection to the title.[19] Where the contract of sale provides that the vendor shall furnish an abstract showing a good title, the fact that the vendee has taken possession of the land and made improvements thereon, is not conclusive evidence that he has waived the stipulation as to title.[20] If the vendor delivers an abstract to the purchaser's attorney in compliance with the contract of sale, and the attorney in good faith makes objections to the title, and the vendor, for the purpose of removing one of these objections, promises to prosecute an action to quiet title, the fact that the vendee continues in possession for a reasonable time in reliance upon such promise, will not be denied rescission, where the vendor refuses to take any steps to remove the objections. But an unreasonable delay on the part of the purchaser in instituting a suit for rescission, while it does not constitute, as a legal proposition, a waiver of the stipulation in the contract to give good title, is, nevertheless, a proper circumstance for consideration in determining whether or not rescission should be decreed.[21] Where a contract for the sale of mineral lands provided that the vendor furnish the vendee a sufficient abstract of title showing clear title in the vendor, and where abstracts were delivered to the vendee who took possession of the

[15] Barnett v. Gaines, 8 Ala. 373; Tompkins v. Hyatt, 28 N. Y. 347; Caswell v. Black River Mfg Co., 14 Johns. (N. Y.) 453; Mitchell v. Pinckney, 13 S. Car. 203; Christian v. Cabell, 22 Gratt. (Va.) 99.

[16] Gans v. Renshaw, 2 Pa. St. 34, 44 Am. Dec. 152.

[17] Thompson v. Dulles, 5 Rich. Eq. (S. Car.) 370; Hendricks v. Gillespie, 25 Grat. (Va.) 181.

[18] Magaw v. Lathrop, 4 Watts & S. (Pa.) 316.

[19] Barnett v. Wheeler, 7 M. & W. 363.

[20] Read v. Loftus, 82 Kans. 485, 108 Pac. 850, 31 L. R. A. (N. S.) 457n.

[21] Read v. Loftus, 82 Kans. 485, 108 Pac. 850, 31 L. R. A. (N. S.) 457n.

property, and nearly three years after executing the contract of sale exchanged the property acquired for other property, it was held that there was an acceptance on the part of the original vendee of the title to the property as a sufficient compliance with the terms of the contract.[22]

§ 35. Time in which to examine abstract.—Sufficient time in which to examine and verify the abstract should be given the purchaser by the terms of the contract of sale, and where no time is specified therein, he will be allowed a reasonable time for that purpose.[23] Unless he has expressly agreed to do so, he can not be required to pay the purchase-money before he has examined the abstract.[24] Where a vendor contracts to sell land, agreeing to furnish an abstract of title, and the vendee is to have a specified number of days from the date of the contract in which to examine the title and pay the purchase-money, a tender of the purchase-money after the expiration of the time given for such examination and payment is too late, and specific performance will be denied, though the vendor did not furnish the abstract within the time limited for such examination and payment.[25] When the record shows an apparent encumbrance, the most that the vendor can insist upon is that the vendee shall satisfy himself within a reasonable time whether such apparent encumbrance is valid or not.[26] After the purchaser has examined the abstract in the time allowed for that purpose, it is his duty to point out his objections to the title, if any, so as to give the vendor an opportunity to remove them.[27] If he retains the abstract an unreasonable length of time, without making any objections thereto, he will be deemed to have waived any defects there may be in the title.[28] But in the absence of any waiver of defects, it would seem that the vendee is not bound at his peril to point out his objections specifically in order to insist on a breach of the contract.[29] Where the vendee is given a specified time in which to examine the ab-

[22] Thornburg v. Doolittle, 148 Iowa 530, 125 N. W. 1003.

[23] Hoyt v. Tuxbury, 70 Ill. 331.

[24] Pennsylvania Min. Co. v. Thomas, 204 Pa. 325, 54 Alt. 101.

[25] Kelsey v. Crowther, 7 Utah 519, 27 Pac. 695.

[26] Allen v. Atkinson, 21 Mich. 351.

[27] Easton v. Montgomery, 90 Cal. 307, 27 Pac. 280, 25 Am. St. 123; Goodell v. Sanford, 31 Mont. 163, 77 Pac. 522.

[28] Stevenson v. Polk, 71 Iowa 278, 32 N. W. 340.

[29] Smith v. Taylor, 82 Cal. 533, 23 Pac. 217; Howe v. Hutchinson, 105 Ill. 501; Lessenich v. Sellers, 119 Iowa 314, 93 N. W. 348; Kane v. Rippey, 22 Ore. 296, 23 Pac. 180.

stract, he may abandon the contract at the expiration of the time, if he finds that the vendor has not such a title as the contract calls for.[30] Even if he makes no objection to the title at the expiration of the time allotted for the examination, the vendor can not compel specific performance of the contract if his title is defective.[31] But the purchaser can not recover back his deposit where he has not, at the expiration of the specified time, notified the vendor that the title is unsatisfactory, and that he intends to rescind the contract.[32] Where the vendor, in pursuance of his agreement with the purchaser, furnishes an abstract showing the title to the land, and the purchaser accepts same without objection, and keeps it until the time allowed the vendor to furnish the abstract has passed, the purchaser can not then insist upon its insufficiency as a breach of the contract.[33]

§ 36. **Taxation of abstract books.**—There is a lack of uniformity of opinion relative to the question of the liability of abstract books to taxation. Some courts class them with private manuscripts as being of no intrinsic value, and for this reason say they are not liable to taxation. These authorities contend that such books are only valuable for the information they contain, and that information is conveyed by consultation or extracts; that their value is only kept up by their completeness and continued correction; that the sale of a complete copy would practically destroy their value in the hands of their owner; and that a similar compilation by any one else would have a like result. They hold that the value of such books, except as they are used, is nothing; that they resemble in nature, if not precisely, the books which are consulted by any person who makes an income from his acquired knowledge, whether scientific or otherwise.[34] Although such books may be made subject to levy and sale on execution by statute, it is held that such a statute will not operate as modifying the rule by which they are considered not to be subject to taxation.[35] In some jurisdictions, however, such

[30] Mead v. Fox, 6 Cush. (Mass.) 199.

[31] Packard v. Usher, 7 Gray (Mass.) 529.

[32] Anderson v. Strassburger, 92 Cal. 38, 27 Pac. 1095.

[33] Moot v. Business Men's Assn., 157 N. Y. 201, 52 N. E. 1, 45 L. R. A. 666.

[34] Stevens v. Gladding, 17 How. (U. S.) 447, 15 L. ed. 155; Dart v. Woodhouse, 40 Mich. 399, 29 Am. Rep. 544; Perry v. Big Rapids, 67 Mich. 146, 34 N. W. 530, 11 Am. St. 570; Banker v. Caldwell, 3 Minn. 94.

[35] Loomis v. Jackson, 130 Mich. 594, 90 N. W. 328.

books, being used as a means of profit, are considered property having a market value, and may be properly assessed for taxation.[36] It is argued that the chief value of such books consists in their contents being kept from the public. "They are the means, in a sense the instruments, for carrying on a business; as much so as are the tools or machinery by which the artisan plies his calling."[37] It is held that the fact that the books are largely in abbreviations and in cipher code which only a limited number of persons understand does not render them exempt from taxation.[38]

[36] Leon Loan &c. Co. v. Equalization Board, 86 Iowa 127, 53 N. W. 94, 17 L. R. A. 199, 41 Am. St. 486; Booth v. Phelps, 8 Wash. 549, 23 L. R. A. 864, 36 Pac. 489, 40 Am. St. 921.

[37] Leon Loan &c. Co. v. Equalization Board, 86 Iowa 127, 53 N. W. 94, 17 L. R. A. 199, 41 Am. St. 486.

[38] Booth v. Phelps, 8 Wash. 549, 36 Pac. 489, 23 L. R. A. 864, 40 Am. St. 921.

CHAPTER II

ESTATES, INTERESTS AND RIGHTS IN REAL PROPERTY

SEC.
40. Estates defined and distinguished.
41. General classification of estates.
42. Estates in fee simple.
43. Modified fees.
44. Conditional fees at common law.
45. Creation of fee simple estate by deed.
46. Creation of fee simple estate by will.
47. Limitations and restrictions in transfers of fee simple estates.
48. Estates in fee tail.
49. Life estates.
50. Estates for years.
51. Estates at will.
52. Estates at sufferance.
53. Estates from year to year.
54. Estates upon condition.
55. Estates upon limitation.
56. Estates upon conditional limitation.
57. Legal and equitable estates.
58. Uses.
59. Trusts.
60. Powers.
61. Easements.
62. Licenses.
63. Profits à prendre.
64. Curtesy.
65. Dower.
66. Homestead.
67. Widow's quarantine.

§ 40. **Estates defined and distinguished.**—The term "estate" is used in various senses. It is often used to designate the property composing the assets of a descendant, or the property, real and personal, belonging to an existing individual,[1] and in its broadest sense is held to include choses in action.[2] "The word 'estate,' unqualified or restricted, is always construed to embrace every description of property, real, personal, and mixed."[3] But when applied to real property, it signifies not only the title or interest which the owner has therein, but the state, condition or circumstances in which he stands in regard to it, and has relation to the quantity or interest he has therein, and the time at which that quantity or interest is to be enjoyed.[4] Subjectively speaking, an estate in lands is the quantity of interest which the owner thereof has, from a fee simple down to naked possession.[5] It expresses the owner's position with regard to the degree, quantity, nature or extent of interest he has in land,[6] and, particularly, with ref-

[1] Sellers v. Sellers, 35 Ala. 235.
[2] State v. Fidelity &c. Co., 35 Tex. Civ. App. 214, 80 S. W. 544.
[3] Pulliam v. Pulliam, 10 Fed. 25.
[4] In re Rash's Estate (Pa.), 2 Pars. Eq. Cas. 160.
[5] Moody v. Farr, 33 Miss. 195; Jackson v. Parker, 9 Cow. (N. Y.) 72.
[6] Robertson v. Vancleave, 129 Ind. 217, 26 N. E. 899, 29 N. E. 781, 15 L. R. A. 68; Bates v. Sparrell, 10 Mass. 323; Clift v. White, 12 N. Y. 519; Messmore v. Williamson, 189 Pa. St. 73, 41 Atl. 1110, 69 Am. St. 791.

erence to quantity, whether a fee simple, a fee tail, for life, for a term of years or any other interest.[7] It does not import a fee or even a freehold, but any legal interest in land.[8] The words "estate" and "interest" are synonymous terms, and are not infrequently used as convertible terms.[9] But it has been held that "estate" and "equity" are not synonymous words either in meaning or substance.[10] Objectively speaking, an estate is the thing itself of which one is owner,[11] but the technical use of the term "estate" is to be carefully distinguished from the corporeal property itself.[12]

§ 41. **General classification of estates.** — The primary classification of estates is: (1) With reference to their quantity or duration; (2) with reference to their conditional or qualified nature; (3) with reference to their legal or equitable character; (4) with reference to the time of their enjoyment; and (5) with reference to the number of their owners.

In respect to the quantity or duration of estates, they are either (1) freehold estates or (2) estates less than freehold.

Freehold estates are divided into (1) Estates of inheritance, and (2) estates not of inheritance. Estates of inheritance are such as pass to the owner's heirs, and include: (1) Fee simple estates, (2) modified fees, or base, qualified and determinable fees, (3) estates in fee conditional, and (4) estates in fee tail. Estates not of inheritance are either estates for the life of the owner, termed "life estates," or for the life of another, termed "estates pur autre vie." Life estates created by voluntary act are known as "conventional" life estates, and those created by act of law are termed "legal" life estates. Legal life estates are either a "tenancy in tail after possibility of issue extinct," curtesy, dower and homestead.

Estates less than freehold are: (1) Estates for years, (2) estates at will, (3) estates from year to year, and (4) estates by sufferance.

Estates with reference to their conditional or qualified nature

[7] Co. Lit. 345a.
[8] Sudbury v. Stow, 13 Mass. 462.
[9] New York v. Stone, 20 Wend. (N. Y.) 139; Hurst v. Hurst, 7 W. Va. 289.
[10] Tewksbury Tp. v. Readington Tp., 8 N. J. L. 319.
[11] Sellers v. Sellers, 35 Ala. 235.
[12] Deering v. Tucker. 55 Maine 284.

may be divided into: (1) Estates upon condition, (2) estates upon limitation, and (3) estates upon conditional limitation.

Estates as regards their quality are either: (1) Legal or (2) equitable. The former applies to such estates as are cognizable by courts of law; the latter are such as are recognized and protected in courts of equity, and embrace uses, trusts and equity of redemption.

Estates with reference to their time of enjoyment are divided into: (1) Estate in possession, and (2) estates in expectancy. The first of these are the kinds most frequently owned and most commonly desired. The second class includes all future estates, or all interests where the right of possession and enjoyment is postponed to some future time.

Estates with reference to the number of their owners are divided into: (1) Estates in severalty, and (2) joint estates. To the former class belong those estates in which the right of possession is in one person at a time. To the latter class belong those estates in which the right of possession and enjoyment may be held by two or more persons in an undivided ownership, and include joint tenancies, tenancies in common, estates in coparcenary, estates in the entirety, and estates in partnership. Legal estates are those cognizable by courts of law.

§ 42. **Estates in fee simple.**—A fee simple is the greatest interest and the most absolute in the rights conferred that a person can have in real property,[13] and carries with it an unlimited power of alienation.[14] It is the highest estate which the law recognizes,[15] and when this term is used, and no words of qualification or limitation are added, it necessarily implies an estate owned in severalty, and an estate in possession.[16] It includes all qualifications or restrictions as to the persons who may inherit as heirs; thus distinguishing it from a fee tail, as well as from an estate which, though inheritable, is subject to conditions or collateral determination.[17] The word "fee" means inheritance, and, as Lord Coke says, " 'simple' is added, for that it is descendible to the heirs of the body, or the like."[18] In other words, the owner

[13] Bush v. Bush, 5 Del. Ch. 144; Brackett v. Ridlon, 54 Maine 426; Jecko v. Taussig, 45 Mo. 167.

[14] Haynes v. Bourn, 42 Vt. 686.

[15] McMillen v. Anderson, 95 U. S. 37, 24 L. ed. 335.

[16] Brackett v. Ridlon, 54 Maine 426.

[17] Warden v. Lyons, 118 Pa. St. 396, 12 Alt. 408.

[18] Haynes v. Bourn, 42 Vt. 686; Co. Lit. 1b; 2 Bl. Comm. 105.

of the fee holds the land for himself and for his heirs, absolutely and simply.[19] The word "absolute" added does not impart anything to the legal effect of the term "fee" or "fee simple."[20] The terms "fee," "fee simple" and "fee simple absolute," when used in modern conveyancing, are practically synonymous.[21] An estate in fee simple is a freehold estate in perpetuity.[22] Ownership in fee simple implies something more than being the holder of the naked legal title to land. It implies an indefeasible legal title—the entire title and estate in land.[23]

§ 43. **Modified fees.**—Under the head of "modified fees" may be included what are termed base, qualified or determinable fees. This classification results from the fact that they are modifications of estates in fee. The terms "base fees," "qualified fees" and determinable fees," have been used promiscuously as descriptive of an estate which has a qualification subjoined thereto, and which may be determined whenever the qualification annexed to it is at an end.[24] Some question of doubt has arisen as to whether there is now any such estates as base, qualified or determinable fees, but such estates are recognized in this country by courts and text-writers generally.[25]

A qualified fee is one where, instead of limiting the estate to a man and his heirs, it is limited to him and the heirs of an ancestor whose heir he is.

A determinable fee is an estate limited to a man and his heirs, with a qualification annexed to it by which it is provided that it must determine whenever that qualification is at an end.[26]

An estate which is to continue till the happening of a certain event is not upon a condition subsequent, because upon the happening of that event the estate ceases by its own limitation with-

[19] Stephen's Comm. (15th ed.), Vol. 1, 145.

[20] Clark v. Baker, 14 Cal. 612, 76 Am. Dec. 449.

[21] Bowen v. John, 201 Ill. 292, 66 N. E, 357; Jecko v. Taussig, 45 Mo. 167; Lott v. Wykoff, 2 N. Y. 355.

[22] Friedman v. Steiner, 107 Ill. 125; Jecko v. Taussig, 45 Mo. 167.

[23] United States v. Hyde, 132 Fed. 545.

[24] Wiggins Ferry Co. v. Ohio &c. R. Co., 94 Ill. 83; Wills v. Wills, 85 Ky. 486, 9 Ky. L. 76, 3 S. W. 900; First Universalist Soc. v. Boland, 155 Mass. 171, 29 N. E. 524, 15 L. R. A. 231; Hall v. Turner, 110 N. Car. 292, 14 S. E. 791; Lyford v. Laconia, 75 N. H. 220, 72 Atl. 1085, 22 L. R. A. (N. S.) 1062n, 139 Am. St. 680; 2 Bl. Comm. 109.

[25] First Universalist Society v. Boland, 155 Mass. 171, 29 N. E. 524, 15 L. R. A. 231.

[26] Weed v. Woods, 71 N. H. 581, 53 Atl. 1024; Lyford v. Laconia, 75 N. H. 220, 72 Atl. 1085, 22 L. R. A. (N. S.) 1062n, 139 Am. St. 680.

out a re-entry by the grantor. Such an estate is a fee, because it lasts forever; it is determinable, because it may end by the happening of the event named. Illustrations of determinable fees are, "as long as the church of St. Paul shall stand," or "a tree shall stand," or "so long as A shall have heirs of his body," or "till the marriage of a certain person."[27] A grant to a religious society to hold so long as the society shall support certain specified doctrines, the deed reciting that when the land is devoted to other purposes "then the title of said society or its assigns shall forever cease," creates a determinable fee. The grant in such case is not upon a condition subsequent, and no re-entry is necessary; but by the terms of the grant the estate is to continue so long as the real estate shall be devoted to the specified uses, and when it shall no longer be so devoted, then the estate will cease and determine by its own limitation.[28]

A base, qualified or determinable fee is created by a devise in fee coupled with a provision that upon the happening of a certain condition or contingency the estate so devised may be determined.[29] If the condition or contingency be void,[30] or becomes impossible of performance without fault of the devisee, the estate becomes a fee simple absolute.[31] The event or contingency which may be provided for to defeat the qualified or defeasible fee may be the marriage of the first devisee,[32] or his death before marriage,[33] or death before distribution,[34] or death before attaining a certain age.[35]

[27] 2 Bl. Comm. 109; 4 Kent Comm. 9, 129.

[28] Owen v. Field, 102 Mass. 90; First Universalist Society v. Boland, 155 Mass. 171, 29 N. E. 524, 15 L. R. A. 231.

[29] McFarland v. McFarland, 177 Ill. 208, 52 N. E. 281; Greer v. Wilson, 108 Ind. 322, 9 N. E. 284; Commonwealth v. Pollitt, 25 Ky. L. 790, 76 S. W. 412.

[30] Carter v. Carter, 39 Ala. 579; In re Walkerly's Estate, 108 Cal. 627, 41 Pac. 772, 49 Am. St. 97.

[31] Huckabee v. Swoope, 20 Ala. 491; New Haven Co. v. Trinity Church Parish, 82 Conn. 378, 73 Atl. 789, 17 Ann. Cas. 432; Shockley v. Parvis, 4 Houst. (Del.) 568; Green v. Gordon, 38 App. D. C. 443; Harrison v. Harrison, 105 Ga. 517, 31 S. E. 455, 70 Am. St. 60.

[32] Frey v. Thompson, 66 Ala. 287; Cummings v. Lohr, 246 Ill. 577, 92 N. E. 970; Chenault v. Scott, 23 Ky. L. 1974, 66 S. W. 759; Rohrbach v. Sanders, 212 Pa. 636, 62 Atl. 27; Haring v. Shelton, 103 Tex. 10, 122 S. W. 13.

[33] Wheeler v. Long, 128 Iowa 643, 105 N. W. 161.

[34] Giles v. Anslow, 128 Ill. 187, 21 N. E. 225; Corey v. Springer, 138 Ind. 506, 37 N. E. 322; Schneider v. Holtzhauer, 134 Ky. 33, 119 S. W. 177; Robert v. Corning, 89 N. Y. 225, 23 Hun 299.

[35] Matlock v. Lock, 38 Ind. App. 281, 73 N. E. 171; Wheeler v. Long, 128 Iowa 643, 105 N. W. 161; Hersey v. Purington, 96 Maine 166, 51 Atl. 865; Woodman v. Madigan, 58 N. H. 6; Foster v. Wick, 17 Ohio 250; Glasscock v. Tate, 107 Tenn. 486, 64 S. W. 715.

A devise of lands by a testator to his wife, "her heirs and assigns forever," with a stipulation that "it is my will that my said wife and her heirs shall hold said land in fee simple forever, or so long as she shall remain a widow," gives the wife a fee simple title, determinable on her remarriage; and a purchaser from her takes with notice of the nature of her estate.[36] The event or contingency expressed must be of such a character that it may, by possibility, never happen.[37] Where an estate is conveyed in fee for a specified purpose and no other, the fee is a base fee, determinable upon the cessation of the use of the property for that purpose.[38] The right or possibility of reverter after the termination of such an estate is similar to, though not quite identical with, the possibility of reverter which remains in the grantor of lands upon a condition subsequent. This right represents whatever is not conveyed by the deed, and it is the possibility that the land may revert to the grantor or his heirs when the granted estate terminates.[39]

§ 44. **Conditional fees at common law.**—Conditional fees, at common law, were fees limited to some particular heir exclusive of others, as to the heirs of A's body, by which only his lineal descendants are admitted, in exclusion of the collateral heirs.[40] This was construed to be a fee simple upon condition that the grantee had the heirs prescribed. If the grantee die leaving no such heirs, the land reverted to the grantor. A fee conditional at common law became a fee tail by the statute de donis condition alibus. This statute ordained that "the will of a donor according to the form of the deed or gift manifestly expressed, be henceforth observed; so that they to whom a tenement was given under such condition shall have no power to alien the tenement so given, but that it shall remain unto the issue of them to whom it was given after their death, or shall revert to the donor or his heirs, if issue fail, or there is no issue at all."[41] The effect of the statute was not to create a new estate, but to prevent the dis-

[36] Haring v. Shelton, 103 Tex. 10, 122 S. W. 13.

[37] Van Horn v. Campbell, 100 N. Y. 287, 3 N. E. 316, 53 Am. Rep. 166.

[38] Siegel v. Lauer, 148 Pa. St. 236, 23 Atl. 996, 15 L. R. A. 547.

[39] First Universalist Society v. Boland, 155 Mass. 171, 29 N. E. 524, 15 L. R. A. 231.

[40] Simmons v. Augustin, 3 Port. (Ala.) 69; Baltimore & O. R. Co. v. Patterson, 68 Md. 606, 13 Atl. 369; Paterson v. Ellis, 11 Wend. (N. Y.) 259, 277

[41] 13 Edw. I. 1285.

charge of the condition by the donee's having issue of the prescribed class. The fee was preserved to such issue while there existed any to take it, and when there was a failure of such issue the reversion was secured to the donor.

§ 45. Creation of fee simple estate by deed.—A fee simple estate in land may be created by deed or by will. In the creation of an estate in fee simple by deed at common law the limitation must be to one "and his heirs"; otherwise, the grantee will take only a life estate.[42] And it would seem that other words of the same meaning will not suffice, even though the intention to pass a fee is clear. Thus it has been held that a fee simple will not pass by such words as "his lawful issue and their lawful issue forever,"[43] "successors and assigns forever,"[44] "executors, administrators and assigns,"[45] or "in fee simple."[46]

It would seem that no words of limitation are required to pass a fee simple to a corporation aggregate,[47] but the use of some such words is necessary to pass such an estate to a corporation sole.[48]

Since a quitclaim deed passes whatever interest the grantor has, no words of inheritance are necessary to pass a fee simple estate to the grantee, if the grantor was seized in fee simple.[49] But conveyances between tenants in common must contain words of inheritance in order to pass a fee, as one tenant in common can not convey to another in any other way, or by a conveyance whose operation is different from those used by grantors' between whom such relationship exists.[50] When technical words of inheritance are not used in the conveyance, but are supplied by reference to another instrument which contains them, a fee simple estate will vest in the grantee.[51] Whenever, however, it can be shown

[42] Edwardsville R. Co. v. Sawyer, 92 Ill. 377; Adams v. Ross, 30 N. J. L. 505, 82 Am. Dec. 237; Stell v. Barkam, 87 N. Car. 62; Jordan v. McClure, 85 Pa. St. 495; Arms v. Burt, 1 Vt. 303, 18 Am. Dec. 680; contra: Cole v. Lake Co., 54 N. H. 242.

[43] Williams v. Gause, 83 S. Car. 265, 65 S. E. 241.

[44] Sedgwick v. Laflin, 10 Allen (Mass.) 430.

[45] Clearwater v. Rose, 1 Blackf. (Ind.) 137.

[46] Taylor v. Cleary, 29 Grat. (Va.) 448.

[47] Wilcox v. Wheeler, 47 N. H. 488; Congregational Soc. v. Stark, 34 Vt. 243.

[48] Overseers of Poor v. Sears, 22 Pick. (Mass.) 126; Olcott v. Gabert, 86 Tex. 121, 23 S. W. 985.

[49] Rector v. Waugh, 17 Mo. 13, 57 Am. Dec. 251.

[50] Rector v. Waugh, 17 Mo. 13, 57 Am. Dec. 251.

[51] Reaume v. Chambers, 22 Mo. 36; Mercier v. Missouri &c. R. Co., 54 Mo. 506; Lemon v. Graham, 131 Pa. St. 447, 19 Atl. 48, 6 L. R. A. 663.

But see Lytle v. Lytle, 10 Watts (Pa.) 259.

to a court of equity that it was the manifest intention of the grantor to convey a fee simple, the deed will be reformed so as to include words of inheritance in conformity to such intention.[52] The use of the word "heirs" is regarded as merely indicating that the grantee takes an estate which will pass to his heirs, or to the heirs of any one to whom he may alien it; that is, it is a word of limitation, and not a word of purchase.[53]

The office of the habendum is to define the grantee's estate. However, the nature and duration of the estate are sometimes defined in the "premises," by which term are designated all those parts of a deed which go before the habendum. In naming the grantee in the granting clause, if the words "and his heirs" are added, the grantee takes an estate in fee simple, though the habendum clause be wholly omitted.[54] Although the words of limitation usually appear in the habendum as an independent clause of the deed, it is not necessary that they should, if they appear in some other part, as in the premises.[55] The habendum may explain, enlarge or qualify, but can not contradict or defeat the estate granted by the premises.[56] If no words of inheritance are used in the premises, the grantee by the premises takes by implication only a life estate at most. The habendum may then, by express limitation, define the estate granted as an estate in fee, and the estate so expressly defined necessarily excludes the uncertain implication from the premises.[57]

While the word "heirs" is indispensable at common law in the limitation of an estate of inheritance, yet the statutes of most of the states have dispensed with the necessity of its use to create an estate in fee simple, and in some states a fee simple estate is presumed to have been intended, unless a contrary intention clearly appears.[58] Notwithstanding a statutory provision

[52] Ewing v. Shannahan, 113 Mo. 188, 20 S. W. 1065; Vickers v. Leigh, 104 N. Car. 248, 10 S. E. 308.

[53] Cole v. Lake Co., 54 N. H. 242.

[54] Goodtitle v. Gibbs, 5 B. & C. 709, 8 D. & Ry. 502.

[55] Montgomery v. Sturdivant, 41 Cal. 290; Major v. Bukley, 51 Mo. 227; Karchner v. Hoy, 151 Pa. St. 383, 25 Atl. 20.

[56] Breed v. Osborne, 113 Mass, 318; Rines v. Mansfield, 96 Mo. 394, 9 S. W. 798; Tyler v. Moore, 42 Pa. St. 374; Warn v. Brown, 102 Pa. St. 347; Thompson v. Carl, 51 Vt. 408.

[57] Montgomery v. Sturdivant, 41 Cal. 290; Riggin v. Love, 72 Ill. 553; Bodine v. Arthur, 91 Ky. 53, 12 Ky. L. 650, 14 S. W. 904; 34 Am. St. 162; Berry v. Billings, 44 Maine 416, 69 Am. Dec. 107; Bean v. Kenmuir, 86 Mo. 666.

[58] Stim. Am. St. Law, § 1474.

The common law rule requiring the use of words of inheritance to pass a fee simple estate prevails in Delaware, Florida, New Jersey, Ohio, Pennsylvania, South Carolina and Wyoming.

that the words "convey and warrant" shall convey a fee simple to the grantee, the grantor may use these words and yet actually convey in the deed, after description of the land, his intention to pass a less estate than one of inheritance to the first taker, which will be given effect.[59]

§ 46. Creation of fee simple estate by will.—A devise of real estate to one and his "heirs and assigns" is the surest method of creating a fee in the devisee,[60] but even in the absence of the word "heirs," other words in the will showing an intention to devise a fee simple are sufficient to pass such an estate.[61] But the intention must, in the absence of a statute changing the rule, appear in some way on the face of the will,[62] and it is sometimes said that there must be words from which an intention to pass a fee may necessarily be implied.[63]

But by statute in most states it is provided that a devise of land shall pass or be construed to pass a fee simple, or all the testator's interest in the land, unless a contrary intention appear from the words of the will;[64] the presumption which formerly obtained that only a life estate was intended to pass, unless the contrary appeared, being thus reversed.[65] Where the statute has dispensed with the use of the word "heirs" in devising real

[59] Adams v. Merrill, 45 Ind. App. 315, 85 N. E. 114, 87 N. E. 36.

[60] Galloway v. Darby, 105 Ark. 558, 151 S. W. 1014, 44 L. R. A. (N. S.) 782n, Ann. Cas. 1914 D, 712n; Reddick v. Lord, 131 Ind. 336, 30 N. E. 1085; Kendall v. Clapp, 163 Mass. 69, 39 N. E. 773; Jackson v. Littell, 213 Mo. 589, 112 S. W. 53, 127 Am. St. 620. And see post chap. 30, § 793.

[61] Wright v. Denn, 10 Wheat. (U. S.) 204, 6 L. ed. 303; Schneer v. Greenbaum, 27 Del. 97, 86 Atl. 107; Robinson v. Randolph, 21 Fla. 629, 58 Am. Rep. 692; Ashby v. McKinlock, 271 Ill. 254, 111 N. E. 101; 2 Bl. Comm. 108; Co. Lit. 9b.

[62] Jackson v. Wells, 9 Johns. (N. Y.) 222.

[63] Wheaton v. Andress, 23 Wend. (N. Y.) 452.

[64] For cases illustrating the application of these statutes see Smith v. Phillips, 131 Ala. 629, 30 So. 872; Ford v. Gill, 109 Ga. 691, 35 S. E. 156; McFarland v. McFarland, 177 Ill. 208, 52 N. E. 281, 4 Prob. Rep. Ann. 279; In re Barrett's Will, 111 Iowa 570, 82 N. W. 998, 5 Prob. Reb. Ann. 639; Boston Safe Deposit &c. Co. v. Stich, 61 Kans. 474, 56 Pac. 1082; Clay v. Chenault, 108 Ky. 77, 21 Ky. L. 1485; 55 S. W. 729; Fuller v. Fuller, 84 Maine 475, 24 Atl. 946; Simonds v. Simonds, 168 Mass. 144, 46 N. E. 421; Johnson v. Delome L. &c. Co., 77 Miss. 15, 26 So. 360; Yocum v. Siler, 160 Mo. 281, 61 S. W. 208; Feit v. Richard, 64 N. J. Eq. 16, 53 Atl. 824; Crain v. Wright, 114 N. Y. 307, 21 N. E. 401; Whitfield v. Garriss, 131 N. Car. 148, 42 S. E. 568; In re Jeremy's Estate, 178 Pa. St. 477, 35 Atl. 847; Waterman v. Greene, 12 R. I. 483; McAllister v. Tate, 11 Rich. L. (S. Car.) 509, 73 Am. Dec. 119; Dulin v. Moore (Tex. Civ. App.), 69 S. W. 94; Reeves v. School Dist. 59, 24 Wash. 282, 64 Pac. 752; Morrison v. Clarksburg C. &c. Co., 52 W. Va. 331, 43 S. E. 102.

[65] McConnel v. Smith, 23 Ill. 611; Baldwin v. Bean, 59 Maine 481; Shirey v. Postlethwaite, 72 Pa. St. 39.

estate, the fact that a testator used the word has been held not to cast any doubt upon the intention of the testator to devise a fee simple.[66]

It has been held that, unless a contrary intention appear, a devise of one's "estate" located at a certain place,[67] or of "all" his "estate,"[68] or "all" his "real estate,"[69] or his "property," with reference to particular land or to the testator's possessions generally,[70] though without the use of the word "heirs" or other words of limitation, will vest a fee simple in the devisee; such expressions being regarded as descriptive of the quantity of interest intended to be conveyed. The same effect is given to a devise to a person "in fee simple," or "forever,"[71] and to such a devise with merely a charge or duty imposed on the devisee personally in regard to the payment of money, to enable him to discharge which an estate for life might not be sufficient, though not if the charge is imposed on the land alone.[72]

§ 47. Limitations and restrictions in transfers of fee simple estates.—The owner of a fee simple estate can not, in its transfer, create an estate unknown to the law, or one which is prohibited by law,[73] nor is he permitted to convey to another, and at the same time forbid such other the right of alienation, for only very limited restraints on alienation are allowed.[74] Thus he will not be permitted to transfer the estate, and by the terms

[66] Gannon v. Allbright, 183 Mo. 238, 81 S. W. 1162, 67 L. R. A. 97, 105 Am. St. 471.

[67] Lambert v. Paine, 3 Cranch (U. S.) 97, 2 L. ed. 377; Robinson v. Randolph, 21 Fla. 629, 58 Am. Rep. 692; Leland v. Adams, 9 Gray (Mass.) 171.

[68] Saeger v. Bode, 181 Ill. 514, 55 N. E. 129; Godrey v. Humphrey, 18 Pick. (Mass.) 537, 29 Am. Dec. 621; Forsaith v. Clark, 21 N. H. 409; Steward v. Knight, 62 N. J. Eq. 232, 49 Atl. 535; Jackson v. Merrill, 6 Johns. (N. Y.) 185, 5 Am. Dec. 213.

[69] Boston Safe Deposit &c. Co. v. Stich, 61 Kans. 474, 59 Pac. 1082; Bacon v. Woodward, 12 Gray (Mass.) 376; Forsaith v. Clark 21 N. H. 409; Sharp v. Humphreys, 16 N. J. L. 25.

[70] Lincoln v. Lincoln 107 Mass. 590; Fogg v. Clark, 1 N. H. 163; Foster v. Stewart, 18 Pa. St. 23; Arnold v. Lincoln, 8 R. I. 384.

[71] 2 Bl. Comm. 108; Co. Lit. 9b.

[72] Wright v. Den, 10 Wheat. (U. S.) 204, 6 L. ed. 303; Funk v. Eggleston, 92 Ill. 515, 34 Am. Rep. 136; Snyder v. Nesbitt, 77 Md. 576, 26 Atl. 1006; Parker v. Parker, 5 Metc. (Mass.) 134; Jackson v. Bull, 10 Johns. (N. Y.) 148, 6 Am. Dec. 321; King v. Cole, 6 R. I. 584; 2 Jarman Wills, 1131.

[73] Loosing v. Loosing, 85 Nebr. 66, 122 N. W. 707, 25 L. R. A. (N. S.) 920; In re Doebler's Appeal, 64 Pa. St. 9.

[74] Hill v. Gray, 160 Ala. 273, 49 So. 676; Langdon v. Ingram, 28 Ind. 360; Conger v. Lowe, 124 Ind. 368, 24 N. E. 889, 9 L. R. A. 165; Blackstone Bank v. Davis, 21 Pick. (Mass.) 42, 32 Am. Dec. 241.

of the transfer provide that the estate shall terminate if the grantee attempts to transfer it to another.[75]

While the general policy of the law is against unlimited restrictions upon the right of alienation, an owner of land may agree, for a valuable consideration, that he will not sell his property during his lifetime, or that during his lifetime a certain person shall have the right to say whether or not he will take the property at his death at a stipulated or an agreed price.[76] Some authorities hold that a condition in an instrument of conveyance that the tenant of the fee shall not transfer it to a particular person or persons is invalid;[77] while others seem to think that such a condition is valid.[78] But, by the weight of authority, a condition that he can transfer it only to a certain class of persons, is invalid.[79] The restriction against selling to particular persons, or to any but certain specified parties, does not, if valid, suspend for a moment the power of sale, but a sale may be made at any time to parties not coming within the restriction.[80]

The fact that a restriction suspending the power of alienation for a limited time only, does not, by the weight of authority, render the restriction valid, if the estate in fee simple is vested.[81] But it has been held that such a restriction is valid if the estate is to be terminated upon the making of the alienation.[82]

§ 48. Estates in fee tail.—An estate in fee tail is a freehold estate of inheritance limited, not to the grantee's heirs in

[75] Potter v. Couch, 141 U. S. 296, 11 Sup. Ct. 1005, 35 L. ed. 721; Winsor v. Mills, 157 Mass. 362, 32 N. E. 352; Mutual Benefit Life Ins. Co. v. Grace Church, 53 N. J. Eq. 413, 32 Atl. 691; Hardy v. Galloway, 111 N. Car. 519, 32 Am. St. 828; Turley v. Massengil, 7 Lea (Tenn.) 353.

[76] Elliott v. Delaney, 217 Mo. 14, 116 S. W. 494.

[77] Barnard v. Bailey, 2 Har. (Del.) 56; Williams v. Jones, 2 Swan (Tenn.) 620; 4 Kent. Comm. 131.

[78] Cowell v. Colorado Springs, Co., 100 U. S. 55, 25 L. ed. 547; Winsor v. Mills, 157 Mass. 362, 32 N. E. 352; Co. Lit. 223.

[79] Chappell v. Chappel (Ky.), 119 S. W. 218; Schermerhorn v. Negus, 1 Denio (N. Y.) 448; Anderson v. Cary, 36 Ohio St. 506, 38 Am. Rep. 602; Attwater v. Attwater, 18 Beav. 330; In re Rosher, 26 Ch. Div. 801. See also Morse v. Blood, 68 Minn. 442, 71 N. W. 682.

[80] Maudlebaum v. McDonell, 29 Mich. 78, 18 Am. Rep. 61.

[81] Potter v. Couch, 141 U. S. 296, 11 Sup. Ct. 1005, 35 L. ed. 721; Conger v. Lowe, 124 Ind. 368, 24 N. E. 889, 9 L. R. A. 165; Todd v. Sawyer, 147 Mass. 570, 17 N. E. 527; Maudlebaum v. McDonell, 29 Mich. 78, 18 Am. Rep. 61; Van Horne v. Campbell, 100 N. Y. 287, 3 N. E. 316; Anderson v. Cary, 36 Ohio St. 506, 38 Am. Rep. 602; In re Rosher, 26 Ch. Div. 801. But see Harkness v. Lisle, 132 Ky. 767, 117 S. W. 264.

[82] Fowlkes v. Wagoner (Tenn. Ch.) 46 S. W. 586.

general, but to the heirs of his body.[83] When the grantee in tail is alone mentioned as a person from whose body the heirs are to be derived the estate is in tail general, and any of the issue of the donees' body can inherit.[84] When both the parents from whose bodies the heirs must be derived are specified, as where the grant is to one and the heirs of his body by a woman named, the estate is in tail special.[85] The estate may be confined to heirs male or female, and then the descent must be traced through heirs male in the one case, or heirs female in the other, and the estate is in tail male or female.[86]

To create an estate in fee tail it is essential to use not merely the word "heirs," but some words indicating the body from which the heirs are to come, or some word of procreation from a particular person.[87] While the words of limitation generally used are "heirs of his body," other equivalent words, which clearly make the limitation to the heirs of the body of the grantee, are sufficient. Thus it has been held that the words "heirs of his flesh" will create an estate in fee tail.[88] Any words which show that the word "heirs" is to be restricted to the heirs of the body, will be sufficient to create such an estate.[89] It has been held, however, that the word "issue" or "seed" can not be substituted for the word "heirs" in creating an estate in fee tail.[90]

In this country the statute de donis was generally recognized in the colonies and original estates as being in force.[91] Recoveries for barring entails were adopted in several of the colonies, and generally continued in use until more effectual remedies were secured by statute.[92] But now, however, great changes have been made. By the statutes of some states, estates tail have been abol-

[83] McArthur v. Allen, Fed. Cas. No. 8659; Riggs v. Sally, 15 Maine 408; Corbin v. Healy, 20 Pick. (Mass.) 514; Fanning v. Doan, 128 Mo. 323, 30 S. W. 1032; Prindle v. Beveridge, 7 Lans. (N. Y.) 225; Goodright v. Morningstar, 1 Yeates (Pa.) 313.

[84] Duffy v. Jarvis, 84 Fed. 731; Lehndorf v. Cope, 122 Ill. 317, 13 N. E. 505.

[85] Allen v. Craft, 109 Ind. 476, 9 N. E. 919, 58 Am. Rep. 425.

[86] Co. Lit. 377a; 2 Bl. Comm. 114.

[87] Adams v. Ross, 30 N. J. L. 505, 82 Am. Dec. 237.

[88] Co. Lit. 20b.

[89] Brown v. Addison Gilbert Hospital, 155 Mass. 323, 29 N. E. 625; Corbin v. Healy, 20 Pick. (Mass.) 514; Holcomb v. Lake, 24 N. J. L. 686; Pollock v. Speidel, 17 Ohio St. 439; Hall v. Vandegrift, 3 Bin. (Pa.) 374.

[90] Wheeler v. Duke, 1 Cr. & M. 210.

[91] Corbin v. Healy, 20 Pick. (Mass.) 514; Pollock v. Speidel, 17 Ohio St. 439; Giddings v. Smith, 15 Vt. 344.

[92] Hawley v. Northampton, 8 Mass. 3, 5 Am. Dec. 66; Baker v. Mattocks, Quincy (Mass.) 69; Den v. Smith, 10 N. J. L. 46; Jackson v. Van Zandt, 12 Johns. (N. Y.) 169.

ished, and an attempt to create such an estate will result simply in vesting a fee simple in the donee.[93] In such states, the words of procreation used in deeds, which, without the statute, would have created estates tail, are to be wholly disregarded, leaving the limitation simply to the heirs of the grantee and creating in him a fee simple.[94] In several states the first donee in tail takes the life estate and the heirs of the body of such donee take as purchasers, the remainder in fee simple.[95] The statutes of several states enable the tenant in tail to bar the entail by a conveyance in fee simple.[96] In some states, however, no statutory provisions as to estates tail exist, and in such states, fees tail are as at common law,[97] unless, the court deems such estates inapplicable to our institutions.[98]

While estates in fee tail in their original form have now practically fallen into disuse, their consideration is deemed important from the fact that they are still recognized in a form modified by statutory enactments. We find, for example, that it is provided in some states that language which formerly created an estate tail shall be held to create a fee simple, while in others that by such language a life estate only will be created. Whatever form such statutes abolishing or modifying estates tail as they formerly existed may take, in order that they may be properly applied, a knowledge of the character of the estate and the mode of its creation is absolutely necessary.

§ 49. **Life estates.**—A life estate is a freehold estate in land, but not of inheritance.[99] This estate can not extend beyond

[93] Duffy v. Jarvis, 84 Fed 731; Barnett v. Barnett, 104 Cal. 298, 37 Pac. 1049; Durant v. Muller, 88 Ga. 251, 14 S. E. 612; McIlhinny v. McIlhinny, 137 Ind. 411, 37 N. E. 147, 24 L. R. A. 489, 45 Am. St. 186; Lanham v. Wilson, 15 Ky. L. 109, 22 S. W. 438; Pruitt v. Holland, 92 Ky. 641, 13 Ky. L. 867, 18 S. W. 852; Prichard v. James, 93 Ky. 306, 14 Ky. L. 243, 20 S. W. 216; Rhodes v. Bouldrey, 138 Mich. 144, 101 N. W. 206; Nellis v. Nellis, 99 N. Y. 505, 3 N. E. 59; Nicholson v. Bettle, 59 Pa. St. 384; Ray v. Alexander, 146 Pa. St. 242, 23 Atl. 383; In re Robinson's Estate, 149 Pa. St. 418, 24 Atl. 297.

[94] Andrews v. Spurlin, 35 Ind. 262; Singletary v. Hill, 43 Tex. 588.

[95] Preston v. Smith, 26 Fed. 884; Peterson v. Jackson, 196 Ill. 40, 63 N. E. 643; Clarkson v. Clarkson, 125 Mo. 381, 28 S. W. 446; Brown v. Rodgers, 125 Mo. 392, 28 S. W. 630; Fanning v. Doan, 128 Mo. 323, 30 S. W. 1032; Weart v. Cruser, 49 N. J. L. 475, 13 Atl. 36; Doty v. Teller, 54 N. J. L. 163, 23 Atl. 944, 33 Am. St. 670.

[96] Collamore v. Collamore, 158 Mass. 74, 32 N. E. 1034.

[97] Ewing v. Nesbitt, 88 Kans. 708, 129 Pac. 1131.

[98] Jordon v. Roach, 32 Miss. 481.

[99] Cummings v. Cummings, 76 N. J. Eq. 568, 75 Atl. 210; 2 Bl. Comm. 120.

the life or lives of some particular person or persons, but it may possibly continue for the period of such life or lives.[1]

To constitute a life estate, it is not necessary that it continue during the life or lives named, but it is sufficient that it may so continue, though liable to terminate sooner by the happening of a contingency. Thus, an estate granted to a woman for her life or during her widowhood, or to a man so long as he shall occupy certain premises, is a life estate.[2] Where the estate is limited for the life of the tenant himself it is sometimes termed a "conventional" life estate, and where it is limited to the life of another person or persons it is termed an estate "pur autre vie."[3]

With reference to their creation life estates are either "conventional" or "legal." The former has reference to such as are created by the act of the parties, and the latter to such as are created by construction and operation of law.[4] Either of these forms of a life estate may be created by deed or will. Where the owner of the fee grants the land to another for so long as he lives, the grantee takes a conventional life estate.[5] This form of life estate may be created either by express words or by implication,[6] but never by parol.[7] On the other hand, legal life estates result from the construction and operation of law. Thus marriage will often give both spouses life interests in the lands of each other, though no express contract in relation to such property be made.[8] In the absence of a statute providing that a fee simple is presumed to be conveyed unless otherwise restricted, no special words are necessary to create a life estate.[9] Consequently, conveyances, for example, to one "and his generation, to endure as long as the waters of the Delaware should run;"[10] to one "his

[1] Gilmore v. Hamilton, 83 Ind. 196; Hurd v. Cushing, 7 Pick. (Mass.) 169; Warner v. Tanner, 38 Ohio St. 118; 2 Bl. Comm. 121; 4 Kent Comm. 26.

[2] McArthur v. Scott, 113 U. S. 340, 5 Sup. Ct. 652, 28 L. ed. 1015; Hayward v. Kinney, 84 Mich. 591, 48 N. W. 170; Roseboom v. Van Vechten, 5 Denio (N. Y.) 414; Mattocks v. Stearns, 9 Vt. 326.

[3] Co. Lit. § 56; 2 Bl. Comm. 120; 4 Kent Comm. 25.

[4] 2 Bl. Comm. 120.

[5] 2 Bl. Comm. 120.

[6] 2 Bl. Comm. 121; 4 Kent Comm. 25

[7] Smith v. May, 3 Pennew. (Del.) 233, 50 Atl. 59; Stewart v. Clark 13 Metc. (Mass.) 79; Garrett v. Clark 5 Ore. 464.

[8] Rose v. Rose, 104 Ky. 48, 20 Ky. L. 417, 46 S. W. 524, 41 L. R. A. 353, 84 Am. St. 430; Foster v. Marshall, 22 N. H. 491.

[9] Bozeman v. Bishop, 94 Ga. 459, 20 S. E. 11; Kearney v. Kearney, 17 N. J. Eq. 59; Trusdell v. Lehman, 47 N. J. Eq. 218, 20 Atl. 391; Jackson v. Embler, 14 Johns. (N. Y.) 198.

[10] Foster v. Joice, Fed. Cas. No. 4974, 3 Wash. (U. S.) 498.

executors, administrators and assigns;"[11] to several "and their representatives;"[12] to them and "assigns forever;"[13] have been held to convey life estates only to their respective grantees.[14]

§ 50. Estates for years.—An estate for years is an estate or interest in land less than a freehold, and having for its duration a definite and ascertained period, as a term for a fixed number of weeks, months or years.[15] According to the common law, this estate was of less dignity than a life estate, and was not an interest in real estate, but was a mere chattel interest, known as a chattel real to distinguish it from chattels personal. The prime requisite of this kind of an estate is definiteness of duration, while there is no requirement that it must last for at least a year.[16] Its duration may be limited to nine months, or any time certain less than a year.[17]

Where the term and duration of a tenancy is fixed and certain, it is an estate for years and not a tenancy from year to year. The term may be fixed to continue "during the minority of" a person named, or to endure for a certain time from the happening of a certain contingency, as in the case of a lease for twenty years after payment of a certain sum by the lessee to the lessor.[18] Estates for years are almost invariably created by contract, and never by operation of law.[19] The contract is called a "lease" or "demise;" the words "grant," "demise" and "let" being commonly used, though any words expressing an intention to transfer the possession for a fixed time is sufficient.[20] Such contracts are

[11] Hofsass v. Mann, 74 Md. 400, 22 Atl. 65.

[12] Mattocks v. Brown, 103 Pa. St. 16.

[13] McMichael v. McMichael, 51 S. Car. 555, 29 S. E. 403.

[14] For other words held to pass a life estate, see Jossey v. White, 28 Ga. 265; Schaefer v. Schaefer, 141 Ill. 337, 31 N. E. 136; Lowrie v. Ryland, 65 Iowa 584, 22 N. W. 686; Corby v. Corby, 85 Mo. 371; Sheafe v. Cushing, 17 N. H. 508; Jones v. Stites, 19 N. J. Eq. 324; Leeper v. Neagle, 94 N. Car. 338; Robinson v. Robinson, 89 Va. 916, 14 S. E. 916; Dew v. Kuehn, 64 Wis. 293, 25 N. W. 212.

[15] Brown v. Bragg, 22 Ind. 122.

[16] Casey v. King, 98 Mass. 503.

[17] Shaffer v. Sutton, 5 Binn. (Pa.) 228.

[18] Reed v. Lewis, 74 Ind. 433, 39 Am. Rep. 88; Murray v. Cherrington, 99 Mass. 229; Batchelder v. Dean, 16 N. H. 265; Western Transp. Co. v. Lansing, 49 N. Y. 499.

[19] Poppers v. Meagher, 148 Ill. 192, 35 N. E. 805; Sawyer v. Hanson, 24 Maine 542; Cass County v. Cowgill, 97 Mich. 448, 56 N. W. 849; Loring v. Taylor, 50 Mo. App. 80. But see Skinner v. Skinner, 38 Nebr. 756, 57 N. W. 534.

[20] Branch v. Doane, 17 Conn. 402; Dunckiee v. Webber, 151 Mass. 408, 24 N. E. 1082; Horner v. Leeds, 25 N. J. L. 112; Watson v. O'Hern, 6 Watts (Pa.) 362.

a charge upon the fee and must be set out in the abstract wherever they are found on the public records, as will be seen in a subsequent part of this work.

§ 51. **Estates at will.**—An estate at will, in the primary and technical sense of that expression, is created by grant and contract, whereby one man lets land to another to hold at the will of the lessor.[21] In a tenancy of this kind both the entry and occupation are lawful, but for no definite term or purpose, subject to be determined at common law by either party instanter and without notice, or at most by mere demand of possession by the landlord.[22] This kind of holding is distinguished on the one hand from a tenancy at sufferance by adverse possession by the fact that it is under an agreement from the landowner. In every case a tenancy at will rests on the actual or presumed consent of the owner of the premises.[23]

On the other hand, an estate of this kind differs from a term for years or for life in that it may be brought to an end at any time at the whim of the parties, instead of continuing until the happening of a certain event or the lapse of a certain period of time. Moreover, it was determined at an early date that if an estate was at the will of one of the parties it was equally at the will of the other.[24] Where a tenant occupies the premises without rent and without any time agreed upon to limit the occupation and without in any way binding himself to become a tenant for any definite time or at any agreed price, his occupation is that of a tenant at will.[25] It has been held that a mere tenancy at will was created where a life tenant verbally leased the premises for the full term of his life in consideration of an agreement for his support.[26] Also where the owner of land allowed some of his relatives to use and improve it without payment of rent, it was held that they became mere tenants at will.[27] In a case where no claim was made for a more permanent tenure, the occupant was held to be by implication a tenant at will, even without the

[21] Den v. Drake, 14 N. J. L. 523; 4 Kent Comm. (1st ed.) 100.

[22] Brown v. Kayser, 60 Wis. 1, 18 N. W. 523; Webb v. Seekins, 62 Wis. 26, 21 N. Y. 814.

[23] Gault v. Stormont, 51 Mich. 636, 17 N. W. 214; Ridgely v. Stillwell, 25 Mo. 570.

[24] Knight v. Indiana Coal &c. Co., 47 Ind. 105, 17 Am. Rep. 692; Cowan v. Radford Iron Co., 83 Va. 547, 3 S. E. 120.

[25] Maher v. James Hanley &c. Co., 23 R. I. 323, 50 Atl. 330.

[26] Barrett v. Cox, 112 Mich. 220, 70 N. W. 446.

[27] Ellsworth v. Hale, 33 Ark. 633.

reservation of any rent.[28] A parol gift of land creates merely an estate at will in the donee, which he has no power to alienate by deed or lease, and any attempt to do so on his part termniates the will.[29] A tenant who enters and continues in possession of the demised premises under a written lease until the expiration of the term, does not thereafter become a tenant at will by refusing to surrender that possession and by holding over without the consent of the lessor.[30]

Entry and occupation under a void parol lease creates a tenancy, which is either strictly at will or from year to year or from month to month, according to the circumstances of the case.[31] The rule that occupation under a void lease creates a tenancy at will applies only in the case of leases granted by the owner of the premises which can not be enforced because of a failure to comply with some statutory requirement as to execution.[32]

An estate at will is uncertain and defeasible, and is destroyed by the alienation of the premises by either party.[33] The estate of a tenant at will is not an interest capable of bargain and sale. It can not be assigned without the landlord's consent. An unauthorized transfer gives the transferee no right that he can hold against the will of the landlord.[34]

§ 52. Estates at sufferance.—An estate at sufferance is where one who comes lawfully into possession of land holds over after his interest has determined,[35] and while he is not liable

[28] Larned v. Hudson, 60 N. Y. 102.

[29] Jackson v. Rogers, 1 Johns. Cas. (N. Y.) 33; Contra, Kaufman v. Cook, 114 Ill. 11, 28 N. E. 378.

[30] Perine v. Teague, 66 Cal. 446, 6 Pac. 84; Canning v. Fibush, 77 Cal. 196, 19 Pac. 376; Kuhn v. Smith, 125 Cal. 615, 58 Pac. 204, 73 Am. St. 79.

[31] Phelan v. Anderson, 118 Cal. 504, 50 Pac. 685; Lockwood v. Lockwood, 22 Conn. 425; Huyser v. Chase, 13 Mich. 98; Whitney v. Swett, 22 N. H. 10; Dumn v. Rothermel, 112 Pa. St. 272, 3 Atl. 800; Duke v. Harper, 6 Yerg. (Tenn.) 280, 27 Am. Dec. 462; Sartwell v. Sowles, 72 Vt. 270, 48 Atl. 11; Dolan v. Scott, 25 Wash. 214, 65 Pac. 190.

[32] Toan v. Pline, 60 Mich. 385, 27 N. W. 557; Sanford v. Johnson, 24 Minn. 172; Yellow Jacket &c. Co. v. Stevenson, 5 Nev. 224.

[33] Joy v. McKay, 70 Cal. 445, 11 Pac. 763; Jackson v. Aldrich, 13 Johns, (N. Y.) 106; Co. Lit. 55b, 57a.

[34] Cook v. Cook, 28 Ala. 660; Mc Leran v. Benton, 73 Cal. 329, 14 Pac. 879; Atlanta &c. R. Co. v. McHan, 110 Ga. 543, 35 S. E. 634; Cunningham v. Holton, 55 Maine 33; Cooper v. Adams, 6 Cush. (Mass.) 87; Whittemore v. Gibbs, 24 N. H. 484; McCann v. Rathbone, 8 R. I. 403.

[35] Hauxhurst v. Lobree, 38 Cal. 563; Coomler v. Hefner, 86 Ind. 108; Hanson v. Johnson, 62 Md. 25, 50 Am. Rep. 199; Warren v. Lyons, 152 Mass. 310, 25 N. E. 721; Abeel v. Hubbell, 52 Mich. 37, 17 N. W. 231; Poole v. Engelke, 61 N. J. L. 124, 38 Atl. 823; Smith v. Littlefield, 51 N. Y. 539.

strictly for rent as such, he is liable for such sum as may be reasonable in an action for use and occupation. It has never been required that there should be privity either of contract or estate between the parties to a tenancy at sufferance.[36]

The distinguishing feature of a holding by sufferance is the absence of consent. It is to a certain extent a wrongful holding. If there is any agreement it can not be a tenancy at sufferance.[37] A tenancy by sufferance is not by the consent but by the laches of the owner, and it follows that where the owner has been guilty of no laches there can be no tenancy at sufferance.[38] A tenancy at sufferance arises under the statutes of some states from a bare holding over,[39] especially where the lease stipulates for payment of rent beyond the term.[40] An employe occupying premises owned by his master becomes, on holding over after the termination of his employment, a tenant at sufferance.[41] Also a purchaser of land who is put in possession before a transfer of title, and who makes default in the payment of an instalment of the purchase-money, becomes a tenant by sufferance.[42] The rule that one who comes into possession of land lawfully, and holds over after the expiration of his right, becomes a tenant at sufferance, does not apply to one whose original right of occupancy became vested in him by operation of law.[43]

§ 53. Estates from year to year.—An estate from year to year is a qualified tenancy at will introduced to obviate the inconveniences of the latter kind of estate; and the qualification requires the determination of the will to be prospective, to take effect at the end of a current year of the tenancy.[44] Estates at will, and estates from year to year differ chiefly in that the former may be terminated by either of the parties at his pleasure, while the latter can be terminated against the tenant only at the

[36] Bennett v. Robinson, 27 Mich. 26; Smith v. Littlefield, 51 N. Y. 539.

[37] Columbian Ins. Co. v. Ashby, 4 Pet. (U. S.) 139, 7 L. ed. 809; Johnson v. Carter, 16 Mass. 443.

[38] Moore v. Morrow, 28 Cal. 551; Spalding v. Hall, 6 D. C. 123.

[39] Brown v. Markham, 56 Fla. 202, 48 So. 39; Swift v. Boyd, 202 Mass. 26, 88 N. E. 439.

[40] Benton v. Williams, 202 Mass. 189, 88 N. E. 843.

[41] Eichengreen v. Appel, 44 Ill. App. 19; School District No. 11 v. Batsche, 106 Mich. 330, 64 N. W. 196, 29 L. R. A. 576.

[42] Sanders v. Richardson, 14 Pick. (Mass.) 522.

[43] Brown v. Smith, 83 Ill. 291; Hanson v. Johnson, 62 Md. 25, 50 Am. Rep. 199; Pattison v. Dryer, 98 Mich. 564, 57 N. W. 814; Livingston v. Tanner, 14 N. Y. 64.

[44] Crawford v. Morris, 5 Grat. (Va.) 90.

expiration of the year, month, etc., as the case may be, by a notice to quit.[45] Some courts have, in the absence of any excepting clause in the statute favoring short term parol leases, refused to recognize tenancies from year to year,[46] but it would seem without sound reason; because the doctrine of notice to quit for the purpose of increasing the stability of the tenant's tenure is a very ancient one. It existed before the passage of the English statute of frauds.

In certain respects an estate from year to year resembles a holding under a lease for a definite term of one year. The tenant from year to year is bound for the full year's rent even though he abandons the premises. If the landlord choose to hold him, a tenant from year to year is in no better position in regard to escaping liability for rent than is a lessee who is bound by express covenants.[47]

An estate at will is converted into an estate from year to year by the payment of rent; the conversion being wrought, not by the length of time of the holding, but by the fact that the tenant entered under an agreement to pay an annual rent and pays it accordingly.[48] A general occupancy by one other than the owner of land will be treated as a tenancy from year to year whenever the reservation of rent or other circumstances plainly indicate an agreement for an annual holding.[49]

The leading circumstance which turns parol leases for uncertain terms into tenancies from year to year is the reservation of an annual rent.[50] Where a tenant enters and occupies under an invalid parol lease, the agreement governs the terms of the holding as to the amount and time for payment of rent and as to other matters, but not as to the duration of the term.[51]

One of the most common ways in which a tenancy from year to year originates is for a landlord to allow his tenant for years

[45] Currier v. Perley, 24 N. H. 219.

[46] Hammon v. Douglas, 50 Mo. 434.

[47] Lockwood v. Lockwood, 22 Conn. 425; Tanton v. Van Alstine, 24 Ill. App. 405; Currier v. Perley, 24 N. H. 219.

[48] Silsby v. Allen, 43 Vt. 172.

[49] Judd v. Fairs, 53 Mich. 518, 19 N. W. 266; Farley v. McKeegan, 48 Nebr. 237, 67 N. W. 161.

[50] Packard v. Cleveland &c. R. Co., 46 Ill. App. 244; Williams v. Derair, 31 Mo. 13; Johnson v. Johnson, 13 R. I. 467.

[51] Larkin v. Avery, 23 Conn. 304; Railsback v. Walke, 81 Ind. 409; Laughran v. Smith, 75 N. Y. 205; Peoples v. Evens, 8 N. Dak. 121, 77 N. W. 93; Baltimore & O. R. Co. v. West, 57 Ohio St. 161, 49 N. E. 344; Thurber v. Dwyer, 10 R. I. 355; Barlow v. Wainwright, 22 Vt. 88, 52 Am. Dec. 79.

to hold over after the expiration of the term.[52] The terms of a year to year holding are the same as those of a lease which preceded it in the absence of any agreement changing them.[53]

§ 54. Estates upon condition.—Estates upon condition are such as have a qualification annexed to them by which they may upon the happening of a particular event be created, enlarged or destroyed.[54] They are divided into: (1), Estates upon conditions implied in law; and (2), estates upon conditions express or in deed. An example of an implied condition at common law was that a tenant for life should not convey, by feoffment or by fine or recovery, a greater estate than that which he had; for such conveyances, by which seisin was divested, worked a forfeiture.[55] Where an estate is granted in fee simple or otherwise, with an express qualification annexed whereby the estate shall commence, be enlarged or defeated upon performance or breach of such qualification or condition, it is an estate upon condition expressed.[56]

Conditions are either precedent or subsequent. Precedent conditions must happen or be performed before the estate vests.[57]

[52] Crommelin v. Thiess, 31 Ala. 412, 70 Am. Dec. 499; Belding v. Texas Produce Co., 61 Ark. 377, 33 S. W. 421; Burkhard v. Mitchell, 16 Colo. 376, 26 Pac. 657; Roberson v. Simons, 109 Ga. 360, 34 S. E. 604; Hately v. Myers, 96 Ill. App. 217; Kleespies v. McKenzie, 12 Ind. App. 404, 40 N. E. 648; Adams Express Co. v. McDonald, 21 Kans. 680; Hobbs v. Batory, 86 Md. 68, 37 Atl. 713; Gardner v. Dakota, 21 Minn. 33; Finney v. St. Louis, 39 Mo. 177; Bradley v. Slater, 50 Nebr. 682, 70 N. W. 258; Yetter v. King &c. Co., 66 N. J. L. 491, 49 Atl. 678; Harty v. Harris, 120 N. Car. 408, 27 S. E. 90; Parker v. Page, 41 Ore. 579, 69 Pac. 822; Harvey v. Gunzberg, 148 Pa. St. 294, 23 Atl. 1005; State v. Fort, 24 S. Car. 510; Banbury v. Sherin, 4 S. Dak. 88, 55 N. W. 723; Shipman v. Mitchell, 64 Tex. 174; Peirce v. Grice, 92 Va. 763, 24 S. E. 392; Amsden v. Atwood, 67 Vt. 289, 31 Atl. 448; Allen v. Bartlett, 20 W. Va. 46; Ganter v. Atkinson, 35 Wis. 48.

[53] Keegan v. Kinnare, 123 Ill. 280, 14 N. E. 14; Tolle v. Orth, 75 Ind. 298, 39 Am. Rep, 147; Bradley v. Slater, 50 Nebr. 682, 70 N. W. 258; Hemphill v. Flynn, 2 Pa. St. 144; Providence County Sav. &c. Bank v. Hall, 16 R. I. 154, 13 Atl. 122; Voss v. King, 38 W. Va. 607, 18 S. E. 762.

[54] Warner v. Bennett, 31 Conn. 468; Co. Lit. 201a; 2 Bl. Comm. 152.

[55] Co. Lit. §§ 415, 416; 2 Bl. Comm. 274. This doctrine did not apply to conveyances under the Statute of Uses, since these conveyed only what the grantor had; nor does it apply at this time in this country. Quimby v. Dill, 40 Maine 528; McCorry v. King, 3 Humph. (Tenn.) 267, 39 Am. Dec. 165.

[56] Warner v. Bennett, 31 Conn. 468; Co. Lit. 201; 2 Bl. Comm. 154; 4 Kent Comm. 125.

[57] Stockton v. Weber, 98 Cal. 433, 33 Pac. 332; Hurd v. Shelton, 64 Conn. 496, 30 Atl. 766; Richards v. Richards, 90 Iowa 606, 58 N. W. 926; Upington v. Corrigan, 69 Hun 320, 23 N. Y. S. 451, 53 N. Y. St. 310; Tilley v. King, 109 N. Car. 461, 13 S. E. 936; Moore v. Perry, 42 S. Car. 369, 20 S. E. 200.

If the condition never happens or is not performed, the grant or devise containing the condition never becomes operative.[58] In other words, the happening or performance of the condition precedent is necessary to the vesting of the estate.[59] Thus where a deed, made in consideration of the performance of certain conditions by the grantee, provides that "when these conditions are fully complied with, then this deed is to be in full force and virtue in law, and otherwise null and void," the grantee does not take any title until the conditions are performed.[60]

Subsequent conditions are such which, by reason of nonperformance, defeat the estate already created. The condition diminishes or destroys the estate to which it is attached.[61] The characteristic of a condition subsequent is that it prescribes terms upon which the land granted shall revert to the grantor. If such a condition be impossible or unlawful, the estate already vested can not be defeated.[62] Conditions subsequent can not affect the estate conveyed until they have been broken.[63] Conditions subsequent are not favored;[64] but they are favored rather than conditions precedent.[65]

It is not always easy to determine whether a particular clause constitutes a condition precedent or a condition subsequent, as there are no technical words by which to distinguish between them.[66] It is a matter of intention of the party imposing the condition to be gathered from the whole instrument and not merely from the terms of a part of it.[67] If it appears that the condition on which the estate depends must be performed before

[58] Mizell v. Burnett, 49 N. Car. 249, 69 Am. Dec. 744; Donohue v. McNichol, 61 Pa. St. 73.

[59] Borst v. Simpson, 90 Ala. 373, 7 So. 814.

[60] Oakman v. Walker, 69 Vt. 344, 38 Atl. 63.

[61] Bank of Suisun v. Stark, 106 Cal. 202, 39 Pac. 531; Ritchie v. Kansas &c. R. Co., 55 Kans. 36, 39 Pac. 718; Rice v. Boston &c. R. Corp. 12 Allen (Mass.) 141; Harrison v. Foote, 9 Tex. Civ. App. 576, 30 S. W. 838; Mills v. Seattle &c. R. Co., 10 Wash. 520, 39 Pac. 246. But see Baker v. Mott, 78 Hun 141, 28 N. Y. S. 968, 60 N. Y. St. 174; Kilpatrick v. Baltimore, 81 Md. 179, 31 Atl. 805, 27 L. R. A. 643, 48 Am. St. 509; Studdard v. Wells, 120 Mo. 25, 25 S. W. 201.

[62] Lynch v. Melton, 150 N. Car. 595, 64 S. E. 497, 27 L. R. A. (N. S.) 684n.

[63] Aumiller v. Dash, 51 Wash. 520, 99 Pac. 583.

[64] Patterson v. Patterson, 135 Ky. 339, 122 S. W. 169; Potomac Power Co. v. Burchell, 109 Va. 676, 64 S. E. 982.

[65] Congregational Church Bldg. Soc. v. Everett, 85 Md. 79, 36 Atl. 654, 35 L. R. A. 693, 60 Am. St. 308.

[66] Nicoll v. New York &c. R. Co., 12 N. Y. 121.

[67] Lynch v. Melton, 150 N. Car. 595, 64 S. E. 497, 27 L. R. A. (N. S.) 684n; Finlay v. King, 3 Pet. (U. S.) 346, 7 L. ed. 701; Frank v. Straford-Handcock, 13 Wyo. 37, 77 Pac. 134, 67 L. R. A. 571, 110 Am. St. 963.

the estate can vest, it is a condition precedent; if, however, the performance of the act does not necessarily precede the vesting of the estate, but may accompany or follow it, there is a condition subsequent.[68]

§ 55. Estates upon limitation.—The word "limitation" in legal sense has two distinct meanings. Primarily, it signifies the marking out of the bounds or limits of the estate created; in the other sense it signifies simply the creating of an estate.[69] When used in the habendum clause of a deed, it is an appropriate word to declare the nature and extent of the estate granted, and the uses for which the grant is made.[70]

An estate upon limitation, therefore, is an estate created by the use of words denoting duration of time; such as "while," "until," "during," "as long as," etc.[71] Such are estates, to A so long as he shall live on the premises; to A and the heirs of his body, while they do not sell intoxicating liquor on the land. Thus we see the estate is one which is determined, rather than defeated, by the happening of a contingency.[72] In a case where land is granted to a woman "during widowhood," the words "during widowhood" define the time during which it is the intention of the grantor that the estate shall endure, and at the end of which time the estate shall end. However, neither the use of such words of limitation, nor their absence, is conclusive.[73]

A limitation determines an estate upon the happening of the event itself, without the necessity of doing any act to regain the estate.[74] "A condition is to be carefully distinguished from a limitation. It is the character and quality of the estate granted, and not the terms used in their creation, that distinguishes them. The latter requires no entry to determine the estate, but terminates it ipso facto by the happening of the event referred to,

[68] Finlay v. King, 3 Pet. (U. S.) 346, 7 L. ed. 701; Burdis v. Burdis, 96 Va. 81, 30 S. E. 462, 70 Am. St. 825; Donnelly v. Eastes, 94 Wis. 390, 69 N. W. 157.

[69] Starnes v. Hill, 112 N. Car. 1, 16 S. E. 1011, 22 L. R. A. 598.

[70] Mills v. Davison, 54 N. J. Eq. 659, 35 Atl. 1072, 35 L. R. A. 113, 55 Am. St. 594.

[71] Vanatta v. Brewer, 32 N. J. Eq. 268; Henderson v. Hunter, 59 Pa. St. 335; In re Machu, 21 Ch. Div. 838; Co. Lit. 234b.

[72] Partington's Cas. 5 Coke 41; 2 Bl. Comm. 155.

[73] Wheeler v. Walker, 2 Conn. 196, 7 Am. Dec. 264; Stearns v. Godfrey, 16 Maine 158; Owen v. Field, 102 Mass. 90; Camp v. Cleary, 76 Va. 140.

[74] Hoselton v. Hoselton, 166 Mo. 182, 65 S. W. 1005.

while the former is determined only by the re-entry of the grantor or his heirs for the condition broken."[75]

§ 56. **Estates upon conditional limitation.**—An estate upon conditional limitation is one which arises from a conveyance to one person, with words of either condition or limitation, and with the further provision that, upon the happening of a specified contingent event, it shall depart from him and go over to another person.[76] Such are estates, to A and his heirs until he marries and then to B and his heirs; to A for twenty years, but if he sell intoxicating liquor on the premises, then to B for the residue of the term. Thus we see, the estate partake both of a condition and a limitation;[77] of a condition because it defeats the estate previously limited; of a limitation, because upon the happening of the contingency, the estate passes to the person in whose favor the limitation is made.[78]

"One material difference, therefore, between an estate in fee on condition and on a conditional limitation is briefly this: that the former leaves in the grantor a vested right, which, by its very nature, is reserved to him as a present existing interest, transmissible to his heirs; while the latter passes the whole interest of the grantor at once, and creates an estate to arise and vest in a third person upon a contingency, at a future and uncertain period of time. A grant of a fee on condition only creates an estate of a base or determinable nature in the grantee, leaving the right or possibility of reverter vested in the grantor. Such an interest or right in the grantor, as it does not arise and take effect upon a future uncertain or remote contingency, is not liable to the objection of violating the rule against perpetuities in the same degree with other conditional and contingent interests in real estate of an executory character. The possibility of reverter, being a vested interest in real property, is capable at all times of being released to the person holding the estate on condition, or his grantee, and if so released vests an absolute and indefeasible title

[75] Bryan v. Spires, 3 Brewst. (Pa.) 580.

[76] Horton v. Sledge, 29 Ala. 478; Outland v. Bowen, 115 Ind. 150, 17 N. E. 281, 7 Am. St. 420; Brattle Square Church v. Grant, 3 Gray (Mass.) 142, 63 Am. Dec. 725; Miller v. Levi, 44 N. Y. 489.

[77] Brattle Square Church v. Grant, 3 Gray (Mass.) 142, 63 Am. Dec. 725.

[78] Brattle Square Church v. Grant, 3 Gray (Mass.) 142, 63 Am. Dec. 725; Fowlkes v. Wagoner (Tenn.) 46 S. W. 586.

thereto. The grant or devise of a fee on condition does not therefore fetter and tie up estates, so as to prevent their alienation, and thus contravene the policy of the law which aims to secure the free and unembarrassed disposition of real property. It is otherwise with gifts or grants of estates in fee with limitations over upon a condition or event of an uncertain or indeterminate nature. The limitation over being executory, and depending on a condition, or an event which may never happen, passes no vested interest or estate. It is impossible to ascertain in whom the ultimate right to the estate may vest, or whether it will ever vest at all, and therefore no conveyance or mode of alienation can pass an absolute title, because it is wholly uncertain in whom the estate will vest on the happening of the event or breach of the condition upon which the ulterior gift is to take effect."[79]

§ 57. **Legal and equitable estates.**—Estates as regards their quality are either legal or equitable. A legal estate is one which arises under, and is recognized by the common or statutory law. The legal estate in land is the whole estate therein, and the holder of the legal title is the sole owner.[80] Prior to the time when courts of equity began to take cognizance of estates in land every estate was "legal" in the proper acceptation of that term, and in contemplation of law there was and could be but one estate, which might properly be denominated the "legal estate."[81] Such legal estates known to the courts of law, and which they protected, are, in the main, the strictly legal estates which are recognized by the courts of law today. They were and are such interests in lands, for which the owners have, by and for themselves, their remedies at law for any wrongful taking thereof or injury thereto.

Equitable estates are interests which a person has in lands, tenements and hereditaments which can be enforced only in a court of equity.[82] Such an estate is not, however, strictly speaking, an interest in the land itself, but a right which can be enforced in equity.[83] Upon the establishment of the system of

[79] Brattle Square Church v. Grant, 3 Gray (Mass.) 142, 63 Am. Dec. 725.

[80] In re Qualification of Electors, 19 R. I. 387, 35 Atl. 213.

[81] Sayre v. Mohney, 30 Ore. 238, 47 Pac. 197.

[82] McIlvaine v. Smith, 42 Mo. 45, 97 Am. Dec. 295; Avery v. Dufrees, 9 Ohio, 145.

[83] In re Qualification of Electors, 19 R. I. 387, 35 Atl. 213.

equity jurisprudence, rights and interests in real property which courts of law did not recognize were protected and enforced by courts of equity. These rights or interests thus recognized by courts of equity are termed "equitable estates," and they may exist in fee simple, fee tail, for life, or for years. Ordinarily, equitable estates in fee are subject to the same incidents which attach to legal estates in fee, and, generally speaking, these include the right to dispose of the estate by alienation as well as by devise.[84] Equitable estates descend in case of intestacy, and are subject to the rights of dower and curtesy. The most important forms of equitable estates are uses and trusts, which will be discussed in succeeding sections.

§ 58. **Uses.**—A use, as it originally existed, was an equitable right to the beneficial enjoyment of an estate, the seisin or possession of which was in another. Such rights were not recognized in the courts of law, but were protected and enforced by courts of equity. By the statute of 27 Henry VIII, c. 10, commonly called the Statute of Uses, it was provided that, in the case of a use, the seisin should be transferred to the person entitled to the use, and thereafter uses ceased to exist as equitable obligations separate from the legal title, except in certain cases which were decided not to be within the operation of the statute, and three of which have survived under the name of trusts. A modern use, therefore is an estate of right which is acquired through the operation of the Statute of Uses; and which, when it may take effect according to the rules of the common law, is called the "legal estate," and, when it may not, is denominated a "use." The statute of Uses is in force in many of the states of this country, either by re-enactment or judicial recognition.[85] In some states, however, the statute is not recognized,[86] and in others all uses and trusts have been abolished by statute, except in certain cases.[87]

[84] Gunn v. Brown (Md.), 23 Atl. 462; Ropes v. Upton, 125 Mass. 258; Lewin, Trusts, 692; Story Eq. Jur. § 974.

[85] Webster v. Cooper, 14 How. (U. S.) 488, 14 L. ed. 510; Morgan v. Rogers, 79 Fed. 577, 25 C. C. A. 97; Tindal v. Drake, 51 Ala. 574; Bryan v. Bradley, 16 Conn. 474; Myers v. Myers, 167 Ill. 52, 47 N. E. 309; Kay v. Scates, 37 Pa. St. 31, 78 Am. Dec. 399; Sullivan v. Chambers, 18 R. I. 799, 31 Atl. 167; Reeves v. Brayton, 36 S. Car. 384, 15 S. E. 658.

[86] McCurdy v. Otto, 140 Cal. 48, 73 Pac. 748; Farmers & Merchants' Ins. Co. v. Jensen, 58 Nebr. 522, 78 N. W. 1054, 44 L. R. A. 861; Helfenstein v. Garrard, 7 Ohio 275; Gorham v. Daniels, 23 Vt. 600.

[87] See statutes of New York, Michigan, Minnesota, South Dakota and Wisconsin.

It must be understood that, where the Statute of Uses is in force, every estate arising thereunder is a legal and not an equitable estate, and that it is solely by reason of the fact that the statute fails to operate in certain cases, that a class of equitable estates exists. The uses which have been decided not to be within the operation of the statute are, active uses, uses in chattel interests, uses to the legal grantee, uses upon a use and estates for the separate use of married women. If the use imposed on the first taker is of an active nature, involving the exercise of some power, agency or control by him, it has been held that the statute will not operate.[88] This holding is on the ground that it would be impossible for such person to perform his duties in regard to the estate unless he is permitted to retain the legal title.[89] Also uses in chattel interests, that is, interests or estates for a term of years, have been held not within the statute, because the language of the statute is "where any person or persons stand or be seised," and a tenant for years is not "seised."[90] Also a use limited to the grantee of a legal estate is held not within the statute, because the provisions of the statute apply to cases where one person is seised to the use of another person.[91] A use limited upon a use is another case which has been held not to be within the terms of the statute, because the effect of the statute is exhausted in the first use.[92] Also lands conveyed or devised for the separate use of a married woman are held not within the statute, because, if the legal title were to vest in her, the purpose of the use would be defeated by entitling the husband to control the estate.[93]

§ 59. **Trusts.**—While it was the object of the statute of Uses to destroy that double property in land which resulted from the invention of conveyances to uses, it is evident that this object

[88] Kirkland v. Cox, 94 Ill. 400.

[89] In re Clark's Appeal, 70 Conn. 195; 39 Atl. 155; Hart v. Seymour, 147 Ill. 598, 35 N. E. 246; Morton v. Barrett, 22 Maine 261, 39 Am. Dec. 575; Hutchins v. Heywood, 50 N. H. 500; In re Barnett's Appeal, 46 Pa. St. 392, 86 Am. Dec. 502; Sprague v. Sprague, 13 R. I. 701; Blount v. Walker, 31 S. Car. 13, 9 S. E. 804.

[90] Kirkland v. Cox, 94 Ill. 400.

[91] Meredith v. Joans, 3 Cro. Cas. 244; Peacock v. Eastland, L. R. 10 Eq. 17.

[92] Durant v. Ritchie, Fed. Cas. No. 4190; Reid v. Gordon, 35 Md. 183; Hutchins v. Heywood, 50 N. H. 491.

[93] Bowen v. Chase, 94 U. S. 812, 24 L. ed. 184; Dean v. Long, 122 Ill. 447, 14 N. E. 34; Ware v. Richardson, 3 Md. 505, 56 Am. Dec. 762; Richardson v. Stodder, 100 Mass. 528; Walton v. Drumtra, 152 Mo. 489, 54 S. W. 233; Pittsfield Sav. Bank v. Berry, 63 N. H. 109; Steacy v. Rice, 27 Pa. St. 75, 67 Am. Dec. 447.

was not entirely accomplished. The strict construction put upon the statute by the courts defeated, in a large measure, the objects for which it was enacted. As was pointed out in the preceding section, there were certain uses upon which the statute had no effect. These uses continue separate and distinct from legal estates, and are recognized and supported by courts of equity as such, under the general name of trusts.[94] A trust, therefore, is a use not executed by the Statute of Uses.[95] The words "use" and "trust" were both mentioned in the statute, and were perfectly synonymous; but as the provisions of the statute were not deemed co-extensive with the various modes of creating uses, such uses as were not provided for by the statute were left to their former jurisdiction. A trust is the general name applied to the relation between two persons, by virtue of which one of them, as trustee, holds the legal title to property for the benefit of the other who holds the equitable title and who is called the cestui que trust. There are certain distinct modes of creating trusts; that is to say, there are certain principal cases in which legal estates, created upon trusts for certain purposes, will not be executed or transferred from the common law grantee to the beneficiary by force of the statute. These cases, as explained in the preceding section were chattel interests, active uses, estates for the separate use of married women, a use upon a use, and uses to grantees of legal estates.

Respecting their manner of creation, trusts are divided into express trusts, and implied trusts. Express trusts, are those which are created in express terms in the deed or will,[96] or by words showing an intention to create a trust.[97] When the instrument creating a trust contains all the terms of the trust, and nothing remains to be done to carry out its terms, it is termed an executed trust.[98] But when the full intention of the donor is not declared, so that something remains to be done in order to complete the trust, it is said to be executory.[99]

[94] Ware v. Richardson, 3 Md. 505, 56 Am. Dec. 762; Farmers' Loan & Trust Co. v. Carroll, 5 Barb. (N. Y.) 613.

[95] Fisher v. Fields, 10 Johns. (N. Y.) 495; Fuller v. Missroon, 35 S. Car. 314, 14 S. E. 714.

[96] Jones v. Byrne, 149 Fed. 457; Caldwell v. Matthewson, 57 Kans. 258, 45 Pac. 614; Kaphan v. Toney (Tenn. Ch. App.) 58 S. W. 909.

[97] Tennant v. Tennant, 43 W. Va. 547, 27 S. E. 334.

[98] In re Fair's Estate, 132 Cal. 523, 60 Pac. 442, 64 Pac. 1000, 84 Am. St. 70; Cornwell v. Orton, 126 Mo. 355, 27 S. W. 536.

[99] Gaylord v. Lafayette, 115 Ind. 423, 17 N. E. 899; Morris v. Linton, 74 Nebr. 411, 104 N. W. 927; In re Smith's Estate, 144 Pa. St. 428, 22 Atl. 916, 27 Am. St. 641.

While no particular or technical words are required to create an express trust, the words used for that purpose must clearly show an intention on the part of the donor to give to one the legal title to the property, and to another the equitable title thereto.[1] There must concur sufficient words or acts to show an unequivocal intention to devote the subject-matter to the object of the trust; the subject-matter must be definite in character and so at the disposal of the settler as to enable him to devote it to the object of the trust; and this object must be one that is lawful, certain and ascertained.[2]

The donor frequently expresses his desire by words of entreaty, expectation, request, recommendation, hope, wish, desire, and the like, rather than by words of command. Such expressions are termed "precatory words," and they have often been held sufficient to create a trust in favor of the person or object sought to be benefited.[3]

While no consideration is required to support an executed trust,[4] equity will not enforce an executory agreement to create a trust in the absence of any consideration.[5]

A trust may often be implied from the nature of the powers granted or duties imposed by the instrument creating it.[6] But in order that a trust may be implied from the context of an in-

[1] In re Heywood's Estate, 148 Cal. 184, 82 Pac. 755; Hughes v. Fitzgerald, 78 Conn. 4, 60 Atl. 694; Quinn v. Shields, 62 Iowa 129, 17 N. W. 437, 49 Am. Rep. 141; Patrick v. Patrick, 135 Ky. 307, 122 S. W. 159; Robinson v. Cogswell, 192 Mass. 79, 78 N. E. 389; Pembroke Academy v. Epsom School Dist., 75 N. H. 408, 75 Atl. 100, 37 L. R. A. (N. S.) 646n; Close v. Farmers' Loan &c. Co., 195 N. Y. 92, 87 N. E. 1005; Haywood v. Wright, 152 N. Car. 421, 67 S. E. 982; In re Nevins' Estate, 192 Pa. St. 258, 43 Atl. 996; Holmes v. Walter, 118 Wis. 409, 95 N. W. 380, 62 L. R. A. 986.

[2] Lines v. Darden, 5 Fla. 51; In re Soulard's Estate, 141 Mo. 642, 43 S. W. 617; In re Smith's Estate, 144 Pa. St. 428, 22 Atl. 916, 27 Am. St. 641.

[3] McRee v. Means, 34 Ala. 349; Warner v. Bates, 98 Mass. 274; Knox v. Knox, 59 Wis. 172, 18 N. W. 155, 48 Am. Rep. 487; Contra, Colton v. Colton, 21 Fed. 594; Hopkins v. Glunt, 111 Pa. St. 287, 2 Atl. 183.

[4] Massey v. Huntington, 118 Ill. 80, 7 N. E. 269; Brunson v. Henry, 140 Ind. 455, 39 N. E. 256; Hall v. Hall, 76 Kans. 806, 93 Pac. 177; Bennett v. Littlefield, 177 Mass. 294, 58 N. E. 1011; Ownes v. Ownes, 23 N. J. Eq. 60. But see Hamilton v. Downer, 152 Ill. 651, 38 N. E. 733; Beeman v. Beeman, 88 Hun 14, 34 N. Y. S. 484, 68 N. Y. St. 491.

[5] Moore v. Ransdel, 156 Ind. 658, 59 N. E. 936; Fisher v. Hampton Trans. Co., 136 Mich. 218, 98 N. W. 1012, 112 Am. St. 358; Brannock v. Magoon, 141 Mo. App. 316, 125 S. W. 535.

[6] Prince v. Barrow, 120 Ga. 810, 48 S. E. 412; Ingraham v. Ingraham, 169 Ill. 432, 48 N. E. 561, 49 N. E. 320; Robinson v. Cogswell, 192 Mass. 79, 78 N. E. 389; Barksdale v. Capital City Realty Co., 88 Miss. 623, 42 So. 668; Woodward v. James, 115 N. Y. 346, 22 N. E. 150; In re Warner's Appeal, 80 Pa. St. 140; Woodruff v. Pleasants, 81 Va. 37; Wolbert v. Beard, 128 Wis. 391, 107 N. W. 663.

strument it must be reasonably certain in its terms as to the property embraced in the trust; the beneficiaries, the nature of the estate they are to have, and the manner in which the trust is to be executed, and, when either of these elements are indefinite or uncertain, the trust must fail.[7] When a trust arises by implication or construction of law in order to carry out the presumed intention of the parties, it is termed a resulting trust. Thus where one standing in a fiduciary relation uses fiduciary funds to purchase property in his own or in another's name, a resulting trust will be created.[8] Also a resulting trust will arise in connection with certain fraudulent dealings with property.[9]

There is a class of implied trusts which arise entirely by construction of equity, independently of any intention of the parties, and often contrary to their intention, for the purpose of preventing fraud, or promoting justice. These are called constructive trusts.[10]

Trusts are also classified as passive and active trusts. A passive trust, or dry trust as it is sometimes called, is one in which the trustee has a mere legal title, and which, in jurisdictions where the Statute of Uses is in force, will be executed so as to vest the entire legal title in the beneficiary.[11] Where the trustee is given a mere legal title, with no control over the subject matter, and no duties to perform, the trust is passive and is executed in the cestui que trust by the Statute of Uses.[12] An active trust is one in which powers or duties are imposed upon the trustee with reference to the property granted ar devised, in which case it becomes necessary that he should continue to hold the legal title in order to perform his duty or execute the trust.[13]

[7] Smullin v. Wharton, 73 Nebr. 667, 103 N. W. 288, 106 N. W. 577, 112 N. W. 622, 113 N. W. 267.

[8] Williams v. Williams, 108 Iowa 91, 78 N. W. 792; Avery v. Stewart, 136 N. Car. 426, 48 S. E. 775, 68 L. R. A. 776.

[9] Trapnall v. Brown, 19 Ark. 39; Walker v. Bruce, 44 Colo. 109, 97 Pac. 250.

[10] Scadden Flat Gold-Min. Co. v. Scadden, 121 Cal. 33, 53 Pac. 440; Williams v. Williams, 108 Iowa 91, 78 N. W. 792; Avery v. Stewart, 136 N. Car. 426, 48 S. E. 775, 68 L. R. A. 776.

[11] Russell v. Bates, 181 Mass. 12, 62 N. E. 950; Jones v. Jones, 223 Mo. 424, 123 S. W. 29, 25 L. R. A. (N. S.) 424n; Hayes v. Tabor, 41 N. H. 521; Denison v. Denison, 185 N. Y. 438, 78 N. E. 162; Mims v. Machlin, 53 S. Car. 6, 30 S. E. 585; Holmes v. Walter, 118 Wis. 409, 95 N. W. 380, 62 L. R. A. 986.

[12] Ringrose v. Gleadall, 17 Cal. App. 664, 121 Pac. 407; Jones v. Jones, 223 Mo. 424, 123 S. W. 29, 25 L. R. A. (N. S.) 424n.

[13] Chicago Terminal T. R. Co. v. Winslow, 216 Ill 166, 74 N. E. 815; Gerard v. Buckley, 137 Mass. 475; Webb v. Hayden, 166 Mo. 39, 65 S. W. 760; Story v. Palmer, 46 N. J. Eq. 1, 18 Atl. 363; In re Spring's Estate, 216 Pa. 529, 66 Atl. 110.

Thus where the trustee is given the duty to care for the land, pay taxes, collect rents or make sale of or mortgage the land, the trust is active.[14]

§ 60. **Powers.**—A power is an authority reserved by or limited to one to do certain acts in relation to the subject-matter of the gift for his own benefit or for the benefit of another, and operating upon an estate vested either in himself or in another. It must be understood, however, that the power is distinct from the estate,[15] although it may be, and frequently is, coupled with an interest in the land, as in case of a gift to a tenant for life, with a general power of disposition; in which case the power does not enlarge the life estate into a fee, although a sale thereunder will pass a fee to the purchaser.[16]

It will be observed that the procedure under powers presents a new mode of conveyance, operating through the medium of springing and shifting uses; and inasmuch as such uses may be created either by deed or by will, lands may be transferred in this manner either by will or deed. In form and general attributes powers are executory interests, but are called powers from the fact that their distinguishing feature is that some designated person has the power to raise the use in another. Before the enactment of the Statute of Uses, powers were merely directions to the trustee of the legal estate as to the manner of transferring the estate. They were future uses to be designated by the person on whom the power was conferred. When such future uses arose, equity compelled the trustee to observe them; and when conveyances under the Statute of Uses became established, it was still usual to reserve or limit such powers as the exigencies of the case required.

A power differs from an estate, in that no title or interest in the land is vested in the donee by reason of the creation of the power. There is also a clear distinction between a power and a trust. Thus a power conferred upon one by will is not imperative, but may be exercised by him at his discretion; while a trust is imperative, and is made with strict reference to its faithful execution. The trustee is not empowered, but is required to act in

[14] Chicago Terminal T. R. Co. v. Winslow, 216 Ill. 166, 74 N. E. 815; Gerard v. Buckley, 137 Mass. 475; Webb v. Hayden, 166 Mo. 39, 65 S. W. 760.

[15] Sewall v. Wilmer, 132 Mass. 131; Eaton v. Straw, 18 N. H. 320.

[16] Durr v. Wilson, 116 Ala. 125, 22 So. 536; Vamplew v. Chambers, 29 Nebr. 83, 45 N. W. 268.

accordance with the will of the testator.[17] However, if the power is made a duty, or if it is coupled with the duties of a trustee for the benefit of the trust, or ministerial or coupled with an interest, it may be enforced by a court of equity.[18]

Powers are either general or special. They are general when they are capable of being exercised by the donee in favor of any person, including himself, and are not restricted as to the estate or interest over which he may exercise the power, while the power is special if its exercise is restricted to particular persons, or a particular class of persons, or if it can be exercised only for certain named purposes or under certain conditions.[19]

Powers are also further classified as appendant or appurtenant, in gross, or collateral. Powers are said to be appendant or appurtenant when they depend on the estate limited to the person to whom they are given.[20] Thus, where an estate for life is limited to a person, with a power to convey or incumber his life estate, the power is appendant.[21] Powers collateral or in gross are powers given to one who has an interest in the estate, to create such estates only as will not attach on the interest limited to him, or take effect out of his own interest. Thus where a tenant for life has a power to create an estate which is not to begin until his own ends. It is a power in gross, because the estate for life has no concern in it.[22] A power simply collateral is a power given to a person not having any interest or estate in land, and to whom no estate is given, to dispose of or charge the estate in favor of another.[23]

Again, powers are (1) exclusive, such as to appoint to certain members of a class,[24] or (2) nonexclusive, as a power to appoint among all the members of a class.[25]

[17] Law Guarantee & Trust Co. v. Jones, 103 Tenn. 245, 58 S. W. 219.

[18] Freeman v. Prendergast, 94 Ga. 369, 21 S. E. 837; Nugent v. Cloon, 117 Mass. 219; Osborne v. Gordon, 86 Wis. 92, 56 N. W. 334.

[19] Thompson v. Garwood, 3 Whart. (Pa.) 287, 31 Am. Dec. 502; Sugden Powers (8th ed.), 394.

[20] Brown v. Renshaw, 57 Md. 67; Clark v. Wilson, 53 Miss. 119.

[21] Garland v. Smith, 164 Mo. 1, 64 S. W. 188.

[22] Young v. Sheldon, 139 Ala. 444, 36 So. 27, 101 Am. St. 44; Garland v. Smith, 164 Mo. 1, 64 S. W. 188.

[23] McGriff v. Porter, 5 Fla. 373; Hammond v. Croxton, 162 Ind. 353, 69 N. E. 250, 70 N. E. 368; Bradt v. Hodgdon, 94 Maine 559, 48 Atl. 179; Reid v. Gordon, 35 Md. 174.

[24] Portsmouth v. Shackford, 46 N. H. 423; Graeff v. De Turk, 44 Pa. St. 527; Huling v. Fenner, 9 R. I. 410.

[25] Hatchett v. Hatchett, 103 Ala. 556, 16 So. 550; Faloon v. Flannery, 74 Minn. 38, 76 N. W. 954; Lippincott v. Ridgway, 10 N. J. Eq. 164; Thrasher v. Ballard, 35 W. Va. 524, 14 S. E. 232.

§ 61. **Easements.**—An easement is a right in the owner of one parcel of land, by virtue of such ownership, to use the land of another for a special purpose not inconsistent with a general property in the latter.[26] In strictness it is a mere use of the land of another without taking anything from it.[27] It is a privilege, service or convenience in the estate of another, but comprises no interest in the land itself.[28] One person may own land in fee simple, and be in actual possession thereof, while another may have an easement therein.[29] But one can not have an easement in his own lands.[30]

Strictly speaking, an easement does not confer title, but it may affect the title and possession of the owner to such an extent as to be more than an incumbrance.[31] Its existence is a breach of a covenant against incumbrances.[32]

The essential qualities of easements are: (1) They are incorporeal; (2) they are imposed upon corporeal property; (3) they confer no right to a participation in the profits arising from such property, and (4) there must be two distinct tenements, the dominant to which the right belongs, and the servient upon which the obligation rests.[33]

There is a well-settled distinction between an easement and license, although it is sometimes difficult to discover a substantial difference between them.[34] An easement is an interest in another's land with a right to enjoy it, while a license carries no such interest,[35] is personal, and does not run with the land.[36] A license may be created by parol,[37] while some instrument in writ-

[26] Wessels v. Colebank, 174 Ill. 618, 51 N. E. 639; Warner v. Rogers, 23 Minn. 34; Stevens v. Dennett, 51 N. H. 324; Clark v. Glidden, 60 Vt. 702, 15 Atl. 358.

[27] Kennedy Stave & Cooperage Co. v. Sloss-Sheffield Steel &c. Co., 137 Ala. 401, 34 So. 372.

[28] Peck v. Smith, 1 Conn. 103, 6 Am. Dec. 216; Rhode Island Hospital Trust Co. v. Hayden, 20 R. I. 544, 40 Atl. 421, 42 L. R. A. 107.

[29] Rhode Island Hospital Trust Co. v. Hayden, 20 R. I. 544, 40 Atl. 421, 42 L. R. A. 107.

[30] Worthen & Aldrich v. White Spring Paper Co., 74 N. J. Eq. 647, 70 Atl. 468.

[31] Coleman v. Thomson, 6 Pa. County Ct. 126.

[32] Mitchell v. Warner, 5 Conn. 497; Leonard v. Adams, 119 Mass. 366; Wilson v. Cochran, 48 Pa. St. 107, 86 Am. Dec. 574; Russ v. Steel, 40 Vt. 310.

[33] Pierce v. Keator, 70 N. Y. 419, 26 Am. Rep. 612; Le Blond v. Peshtigo, 140 Wis. 604, 123 N. W. 157, 25 L. R. A. (N. S.) 511n.

[34] Wolf v. Frost, 4 Sandf. Ch. (N. Y.) 72; Hazelton v. Putnam, 3 Pinney (Wis.) 107, 54 Am. Dec. 158.

[35] Pomeroy v. Mills, 3 Vt. 279, 23 Am. Dec. 207.

[36] Taylor v. Waters, 7 Taunt. 374.

[37] Fitch v. Seymour, 9 Metc. (Mass.) 462; Morrill v. Mackman, 24 Mich. 279, 9 Am. Rep. 124.

ing is usually required to create an easement.[38] The person giving a license may usually revoke same at will,[39] while an easement can not be so revoked.[40]

The strict and technical definition of an easement excludes a right to the proceeds of land, or, as they are generally termed, "profits á prendre." Strictly speaking, these latter are rights exercised by one man in the soil of another, accompanied with participation in the profits thereof, such as rights of pasture, taking wood, digging sand, and the like. But this right of profit á prendre, if enjoyed by reason of holding a certain other estate, is regarded in the light of an easement appurtenant to such estate.[41] Easements that inhere in the land, concern the premises, and are necessary to its enjoyment, are called easements appurtenant. They attach to the land to which they are appurtenant, and pass by deed of the land without express mention.[42] Thus, if a lot to which a right of way appurtenant is attached be subdivided, each subdivision is entitled to all legitimate rights, by way of easement, which appertain to the entirety of the original lot.[43]

A mere personal interest or privilege in the real estate of another, and which is not assignable or inheritable is called an easement in gross. It dies with the person who may have acquired it, and it is so exclusively personal that the owner by right can not take another person in company with him.[44] An easement in gross will never be presumed when it can be fairly construed to be appurtenant to some other estate.[45]

Where the easement is of a continuous nature, or where its enjoyment may be continued without the necessity of any human interference, it is said to be a continuous easement.[46] To this

[38] Johnson v. Lewis, 47 Ark. 66, 2 S. W. 329, 14 S. W. 466; Howes v. Barmon, 11 Idaho 64, 81 Pac. 48, 69 L. R. A. 568, 114 Am. St. 255; Yeager v. Tuning, 79 Ohio St. 121, 86 N. E. 657, 19 L. R. A. (N. S.) 700, 128 Am. St. 679.

[39] Cook v. Chicago &c. R. Co., 40 Iowa 451.

[40] Hills v. Miller, 3 Paige (N. Y.) 254, 24 Am. Dec. 218; Foster v. Browning, 4 R. I. 47, 67 Am. Dec. 505.

[41] Huntington v. Asher, 96 N. Y. 604, 48 Am. Rep. 652.

[42] Kuecken v. Voltz, 110 Ill. 264; Moore v. Crose, 43 Ind. 30; Willets v. Langhaar, 212 Mass. 573, 99 N. E. 466; Boatman v. Lasley, 23 Ohio St. 614.

[43] Trenton v. Toman, 74 N. J. Eq. 702, 70 Atl. 606.

[44] Cadwalader v. Bailey, 17 R. I. 495, 23 Atl. 20, 14 L. R. A. 300.

[45] Lidgerding v. Zignego, 77 Minn. 421, 80 N. W. 360, 77 Am. St. 677.

[46] Lampman v. Milks, 21 N. Y. 505; Dee v. King, 77 Vt. 230, 59 Atl. 839, 68 L. R. A. 860.

class of easements belong right to lateral or subjacent support, right to light and air, right to an open drain, right to a water course, and the like. Noncontinuous easements, on the other hand, are those the enjoyment of which can be had only by the interference of man,[47] such as rights of way,[48] or a right to draw water from a well.[49]

If an easement is necessary for the use of the tenement, and without which the land can not be used at all, it is called an easement of necessity or natural easements, in distinction from conventional easements, or those arising out of agreement.[50]

At common law, easements were said to "lie in grant" and "not in livery." So an easement must be created by deed unless some statute provides otherwise.[51] This includes prescription, which is based upon the common-law doctrine of the presumption of a grant. While ordinarily an easement can be created only by writing under seal, it may be created by adverse user, by estoppel, or part performance of a parol agreement.[52] While it is customary to create an easement by an express reservation in the deed of conveyance, it may be done quite as effectually by a separate instrument which operates to create or convey the easement only.[53] Unlike other estates or interests, easements may be created by implication as well as by express grant.[54] In order that an easement may be created by implication it must be necessary to the enjoyment of the land granted.[55] But the necessity need not be absolute. It is sufficient if it appears that without the easement the grantee could not enjoy his estate in full, except at unusual cost or inconvenience.[56]

§ 62. **Licenses.**—A license is a mere permission given by

[47] Lampman v. Milks, 21 N. Y. 505.

[48] Oliver v. Pitman, 98 Mass. 46; Morgan v. Meuth, 60 Mich. 238, 27 N. W. 509; Stuyvesant v. Woodruff, 21 N. J. L. 133, 57 Am. Dec. 156.

[49] Lampman v. Milks, 21 N. Y. 505.

[50] Hildreth v. Googins, 91 Maine 227, 39 Atl. 550; Laumier v. Francis, 23 Mo. 181.

[51] Fuhr v. Dean, 26 Mo. 116, 69 Am. Dec. 484; Cagle v. Parker, 97 N. Car. 271, 2 S. E. 76; Huff v. McCauley, 53 Pa. St. 206, 91 Am. Dec. 203.

[52] Shaw v. Proffitt, 57 Ore. 192, 109 Pac. 584, 110 Pac. 1092, Ann. Cas. 1913 A, 63.

[53] Ashcroft v. Eastern R. Co., 126 Mass. 196, 30 Am. Rep. 672; Gilbert v. Peteler, 38 Bark. (N. Y.) 489; Richardson v. Clements, 89 Pa. St. 503, 33 Am. Rep. 784.

[54] Bean v. Bean, 163 Mich. 379, 128 N. W. 413; Morgan v. Mason, 20 Ohio 402, 55 Am. Dec. 464.

[55] Cihak v. Klehr, 117 Ill. 643, 7 N. E. 111; Philbrick v. Ewing, 97 Mass. 133; In re Francies' Appeal, 96 Pa. St. 200.

[56] Thompson v. Miner, 30 Iowa 386, 517; Oliver v. Hook, 47 Md. 301; Lanier v. Booth, 50 Miss. 410; Valley Falls Co. v. Dolan, 9 R. I. 489.

one landowner to another to use his land for a given purpose.[57] It may be created either by express agreement, or by implication.[58] A mere license exists wherever the owner grants to another a right to enter, without giving him an interest in the land.[59]

Every landowner impliedly licenses his neighbors and strangers to enter for any proper occasion, as business, social visits, and to make inquiries and the like. The nature and extent of this implied license is controlled and measured by the kind of premises, the purpose of the entry and the general custom of the community.[60] Being a purely personal right,[61] the licensee has no power to assign it.[62] Such a license is personal to the licensee and it is subject to revocation by the licensor at will.[63] But if the license is coupled with an interest it can not be so revoked.[64] For instance, if a londowner sell personal property on his land, giving the buyer a license to go upon the land and remove such property, the license can not be revoked.[65] Also a license to do some act which obstructs or destroys an easement of the licensor can not be revoked after it is executed, so long as the easement is in force.[66] In some states it is held that an executed license, the execution of which involved the expenditure of money or labor, is regarded in equity as an executed agreement for a valuable consideration, and that it is therefore irrevocable, although given merely by parol, and relating to the use and occupation of

[57] Emerson v. Bergin, 76 Cal. 197, 18 Pac. 264; Howes v. Barmon, 11 Idaho 64, 81 Pac. 48, 69 L. R. A. 568, 114 Am. St. 255; Baldwin v. Taylor, 166 Pa. St. 507, 31 Atl. 250.

[58] Cutler v. Smith, 57 Ill. 252; Harmon v. Harmon, 61 Maine 222; Lakin v. Ames, 10 Cush. (Mass.) 198; Adams v. Burton, 43 Vt. 36.

[59] Prince v. Case, 10 Conn. 375, 27 Am. Dec. 675; Baltimore & H. R. Co. v. Algire, 63 Md. 319; Cook v. Stearns, 11 Mass. 533.

[60] Cutler v. Smith, 57 Ill. 252; Gibson v. Leonard, 143 Ill. 182, 32 N. E. 182, 17 L. R. A. 588, 36 Am. St. 376; Sterling v. Warden, 51 N. H. 217, 12 Am. Rep. 80; Kay v. Pennsylvania Co., 65 Pa. St. 273, 3 Am. Rep. 628.

[61] Blaisdell v. Portsmouth &c. R. Co., 51 N. H. 483; East Jersey Iron Co. v. Wright, 32 N. J. Eq. 248.

[62] Ruggles v. Lesure, 24 Pick. (Mass.) 187; Ward v. Rapp, 79 Mich. 469, 44 N. W. 934; Fuhr v. Dean, 26 Mo. 116, 69 Am. Dec. 484; Pearson v. Hartman, 100 Pa. St. 84.

[63] Hibbard, Spencer, Bartlett & Co., v. Chicago, 173 Ill. 91, 50 N. E. 256, 40 L. R. A. 621; Classen v. Chesapeake Guano Co., 81 Md. 258, 31 Atl. 808; Pitzman v. Boyce, 111 Mo. 387, 19 S. W. 1104, 33 Am. St. 536.

[64] Barney v. Lincoln Park, 203 Ill. 397, 67 N. E. 801; Long v. Buchanan, 27 Md. 502, 92 Am. Dec. 653; Sterling v. Warden, 51 N. H. 217, 12 Am. Rep. 80.

[65] Carter v. Wingard, 47 Ill. App. 296; Rogers v. Cox, 96 Ind. 157, 49 Am. Rep. 152. But see Fish v. Capwell, 18 R. I. 667, 29 Atl. 840, 25 L. R. A. 159, 49 Am. St. 807.

[66] Powers v. Harlow, 53 Mich. 507, 19 N. W. 257, 51 Am. Rep. 154.

real estate.[67] Where, however, the authority consists of a mere oral license, the courts generally hold that the license can be revoked, regardless of the expenditures or improvements made, since a contrary holding would, in effect, transfer an interest in land by parol.[68]

A license is also revoked by the death,[69] or insanity[70] of either the licensor or licensee, by the expiration of the time for which it was given,[71] by abandonment or nonuser,[72] by a sale of the land,[73] or by the exercise of the right of eminent domain.[74]

§ 63. **Profits a prendre.**—A profit à prendre is a right in one person to take the soil, gravel, minerals, and the like from the land of another.[75] The thing so taken is supposed to have some value.[76] It is, in its nature, corporeal, and is capable of livery, while easements are not, and may exist independently without connection with or being appendant to other property,[77] that is, it may be held by one independently of his ownership of other land, the rule in this respect differing from that usually regarded as applying to easements, unattended with a right of profit.[78] It may be further distinguished from an easement, in that the latter consists in a right to use or enjoy, but involves no right to take any profit from the land.[79]

Profits à prendre may, however, be appurtenant to other land, the land to which the right appertains being then the "dominant

[67] Ferguson v. Spencer, 127 Ind. 66, 25 N. E. 1035; Rerick v. Kern, 14 Serg. & R. (Pa.) 267, 16 Am. Dec. 497.

[68] West Chicago St. R. Co. v. People, 214 Ill. 9, 73 N. E. 393; Whittemore v. New York &c. R. Co., 174 Mass. 363, 54 N. E. 867; Nowlin Lumber Co. v. Wilson, 119 Mich. 406, 78 N. W. 338; Rodefer v. Pittsburg &c. R. Co., 72 Ohio St. 272, 74 N. E. 183, 70 L. R. A. 844.

[69] Ruggles v. Lesure, 24 Pick. (Mass.) 187; Estelle v. Peacock, 48 Mich. 469, 12 N. W. 659; Blaisdell v. Portsmouth &c. R. Co., 51 N. H. 483.

[70] Berry v. Potter, 52 N. J. Eq. 664, 29 Atl. 323.

[71] Detroit & B. Plank Rd. Co. v. Detroit Suburban R. Co., 103 Mich. 585, 61 N. W. 880; Glynn v. George, 20 N. H. 114.

[72] Lake Erie & W. R. Co. v. Michener, 117 Ind. 465, 20 N. E. 254; Fischer v. Johnson, 106 Iowa 181, 76 N. W. 658.

[73] Entwhistle v. Henke, 211 Ill. 273, 71 N. E. 990, 103 Am. St. 196; Worthen v. Garno, 182 Mass. 243, 65 N. E. 67.

[74] Clapp v. Boston, 133 Mass. 367.

[75] Black v. Elkhorn Mining Co., 49 Fed. 549; Bingham v. Salene, 15 Ore. 208, 14 Pac. 523, 3 Am. St. 152.

[76] Pierce v. Keator, 70 N. Y. 419, 26 Am. Rep. 612; Payne v. Sheets, 75 Vt. 335, 55 Atl. 656.

[77] Pierce v. Keator, 70 N. Y. 419, 26 Am. Rep. 612.

[78] Tinicum Fishing Co. v. Carter, 61 Pa. St. 21, 100 Am. Dec. 597; Youghrogheny River Coal Co. v. Pierce, 153 Pa. St. 74, 25 Atl. 1026; Cadwalader v. Bailey, 17 R. I. 495, 23 Atl. 20, 14 L. R. A. 300.

[79] Huntington v. Asher, 96 N. Y. 604, 48 Am. Rep. 652.

tenement," and the land from which the profits are taken being the "servient tenement."[80] Some of the most common profits à prendre are the right of pasture, the right to take minerals, the right to take firewood, and the right to fish.

Profits à prendre, like easements, may be acquired either by grant or by prescription; and, like easements, they may be created by words of exception or reservation.[81] If created by grant it carries with it by necessary implication all rights necessary to its full enjoyment.[82] A right of profit in gross can not be apportioned so that different persons may work it separately, but all the assignees must work it in common, otherwise there might result an overcharging of the servient estate.[83] A right of profit à prendre may be distinguished by a release of the right to the owner of the servient estate,[84] by a union of the titles to the dominant and servient estates in one person,[85] and, if common appurtenant, by an alienation of a part of the land to which the right is attached.[86]

§ 64. **Curtesy.**—Upon the marriage of a man to a woman who is seised during coverture of an estate of inheritance, and has by her issue born alive, capable of inheriting the estate, he takes an estate for life. This is sometimes called tenancy by the curtesy of England, though the same estate existed in ancient times in other countries. In this country such an estate obtains in all the states where not abolished by statute. The requisites of curtesy are (1) lawful marriage,[87] (2) legitimate issue born alive and capable of inheriting,[88] (3) sufficient seising of the wife

[80] Grubb v. Grubb, 74 Pa. St. 25; Hall v. Lawrence, 2 R. I. 218, 57 Am. Dec. 715.

[81] Stockbridge Iron Co. v. Hudson Iron Co., 107 Mass. 290; Wardell v. Watson, 93 Mo. 107, 5 S. W. 603; In re Alden's Appeal, 93 Pa. St. 182.

[82] Williams v. Gibson, 84 Ala. 228, 4 So. 350, 5 Am. St. 368; Marvin v. Brewster Iron Min. Co. 55 N. Y. 538, 14 Am. Rep. 322.

[83] Harlow v. Lake Superior Iron Co., 36 Mich. 105; Funk v. Halderman, 53 Pa. St. 229.

[84] Co. Lit. 280a.

[85] Hall v. Lawrence, 2 R. I. 218, 57 Am. Dec. 715.

[86] Van Rensselaer v. Radcliff, 10 Wend. (N. Y.) 639; 25 Am. Dec. 582; Bell v. Ohio R. Co., 25 Pa. St. 161, 64 Am. Dec. 687.

[87] Wells v. Thompson, 13 Ala. 793, 48 Am. Dec. 76; 2 Bl. Comm. 127. A statute giving the surviving husband a right of curtesy in the estate of his deceased wife has no application to marriages contracted before its enactment: Hall v. Moore, 32 Ky. L. 56, 105 S. W. 414.

[88] Nicrosi v. Phillipi, 91 Ala. 291, 8 So. 561; Goff v. Anderson, 91 Ky. 303, 12 Ky. L. 888, 15 S. W. 866, 11 L. R. A. 825; Ryan v. Freeman, 36 Miss. 175; Donogan v. Griffith, 215 Mo. 149, 114 S. W. 621, 20 L. R. A. (N. S.) 825n, 128 Am. St. 458n, 15 Ann. Cas. 724.

during coverture,[89] and (4) death of the wife in the lifetime of the husband.[90] At common law both the seising of the wife during coverture and birth of issue capable of inheriting are necessary to constitute an estate by the curtesy, but where this rule prevails it is held that a concurrence of seisin and birth of issue is not necessary to constitute an estate of this kind.[91] Thus if the wife becomes seised of lands during coverture and then be disseised, and then have issue, the husband will be tenant by the curtesy initiate, and on his wife's death may enter as such.[92]

It has been said that the estate by the curtesy had its origin in the obligation to support the children of the marriage;[93] but if this is so, the reason operates in originating only and not in bounding or limiting the estate.[94]

The husband is entitled to curtesy: (1) In his wife's estate of inheritance;[95] (2) in her equitable estate of inheritance;[96] (3) in her estates in expectancy when they vest in possession during her life;[97] (4) in her estates held in joint tenancy or in coparcenary;[98] and (5) in her determinable estates, when they are determined by a shifting use or executory devise.[99] But the husband is not entitled to curtesy (1) in his wife's life estate;[1] (2) in a reversion or remainder where the prior particular freehold estate does not determine before her death;[2] (3) in her estates in joint

[89] Stinebaugh v. Wisdom, 13 B. Mon. (Ky.) 467; Wass v. Bucknam, 38 Maine 356; Rabb v. Griffin, 26 Miss. 579; Hopper v. Demarest, 21 N. J. L. 525.

[90] Wheeler v. Hotchkiss, 10 Conn. 225; Porch v. Fries, 18 N. J. Eq. 204.

[91] Heath v. White, 5 Conn. 228; Zeust v. Staffan, 16 App. Cas. (D. C.) 141; Stewart v. Ross, 50 Miss. 776; Donovan v. Griffith, 215 Mo. 149, 114 S. W. 621, 20 L. R. A. (N. S.) 825n, 128 Am. St. 458n, 15 Ann. Cas. 724; In re Starbuck, 63 Misc., 156, 116 N. Y. S. 1030; Templeton v. Twitty, 88 Tenn. 595, 14 S. W. 435.

[92] Jackson v. Johnson, 5 Cow. (N. Y.) 75, 15 Am. Dec. 433.

[93] Hunter v. Whitworth, 9 Ala. 965; Templeton v. Twitty, 88 Tenn. 595, 14 S. W. 435.

[94] Heath v. White, 5 Conn. 228.

[95] Northcut v. Whipp, 12 B. Mon. (Ky.) 65; Janney v. Sprigg, 7 Gill (Md.) 179, 48 Am. Dec. 557; Thornton v. Krepps, 37 Pa. St. 391.

[96] Meacham v. Bunting, 156 Ill. 586, 41 N. E. 175, 28 L. R. A. 618, 47 Am. St. 239.

[97] Withers v. Jenkins, 14 S. Car. 597.

[98] Wass v. Bucknam, 38 Maine 360; Buckley v. Buckley, 11 Barb. (N. Y.) 43.

[99] Carter v. Couch, 157 Ala. 470, 47 So. 1006, 20 L. R. A. (N. S.) 858n; Martin v. Renaker, 10 Ky. L. 469, 9 S. W. 419; Hatfiel v. Sneden, 54 N. Y. 280; McMasters v. Negley, 152 Pa. St. 303, 25 Atl. 641.

[1] Janney v. Sprigg, 7 Gill (Md.) 197, 48 Am. Dec. 557; Spencer v. O'Niell, 100 Mo. 49, 12 S. W. 1054; Adams v. Ross, 30 N. J. L. 505, 82 Am. Dec. 237.

[2] Orford v. Benton, 36 N. H. 395; Adair v. Lott, 3 Hill (N. Y.) 182; Watkins v. Thornton, 11 Ohio St. 367; Hitner v. Ege, 23 Pa. St. 305.

tenancy;[3] (4) in a bare legal estate, the beneficial interest in which is in another;[4] (5) in a future estate expectant upon the termination of a present freehold estate;[5] or (6) in the homestead right of an infant wife.[6]

The husband's curtesy may be excluded: (1) By perpetual separation amounting to an absolute divorce;[7] (2) by special provision in a conveyance to the wife;[8] (3) where the husband joins his wife in a mortgage upon her lands;[9] (4) by a devise by the wife of her separate estate;[10] (5) by contract between the parties made before or after marriage,[11] and (6) by the husband's failure to claim such right as against an adverse holder for the period of limitations.[12] Where a husband has voluntarily settled lands upon his wife by deed executed to her, and there is no express or implied relinquishment in the deed of his right to claim curtesy upon her death, he will not be denied such right.[13]

The right of curtesy exists in Alabama, Alaska, Arkansas, Connecticut, Delaware, District of Columbia, Hawaii, Kentucky, Missouri, New Hampshire, New Jersey, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Tennessee, Vermont, Virginia, West Virginia and Wisconsin. In Ohio and Illinois the husband is given the right of dower in the place of curtesy. In Virginia, curtesy initiate has been abolished but curtesy consummate remains as at common law. In Connecticut every man mar-

[3] Carr v. Givens, 9 Bush (Ky.) 679, 15 Am. Rep. 747.

[4] Norton v. McDevitt, 122 N. Car. 755, 30 S. E. 24; McKee v. Jones, 6 Pa. St. 425.

[5] Planters' Bank of Tennessee v. Davis, 31 Ala. 626; Ferguson v. Tweedy, 43 N. Y. 543.

[6] Owens v. Jabine, 88 Ark. 468, 115 S. W. 383.

[7] Hartigan v. Hartigan, 65 W. Va. 471, 64 S. E. 726, 131 Am. St. 973, 19 Ann. Cas. 728.

[8] McBreen v. McBreen, 154 Mo. 323, 55 S. W. 463, 77 Am. St. 758; Haight v. Hall, 74 Wis. 152, 42 N. W. 109, 3 L. R. A. 857, 17 Am. St. 122.

[9] Hayden v. Peirce, 165 Mass. 359, 43 N. E. 119.

[10] Garner v. Wills, 92 Ky. 386, 13 Ky. L. 726, 17 S. W. 1023; Stewart v. Ross, 50 Miss. 776; Tiddy v. Graves, 126 N. Car. 620, 36 S. E. 127; Chapman v. Price, 83 Va. 392, 11 S. E. 879. It is only under some statutes that the wife may thus defeat curtesy; the general rule being that her power to make a will does not enable her to defeat the husband's curtesy. Casler v. Gray, 159 Mo. 588, 60 S. W. 1032; In re Clarke's Appeal, 79 Pa. St. 376; Alderson v. Alderson, 46 W. Va. 242, 33 S. E. 228.

[11] McBreen v. McBreen, 154 Mo. 323, 55 S. W. 463, 77 Am. St. 758; Charles v. Charles, 8 Grat. (Va.) 486, 56 Am. Dec. 155.

[12] Shortall v. Hinckley, 31 Ill. 219; Childers v. Bumgarner, 53 N. Car. 297; Crow v. Kightlinger, 25 Pa. St. 343.

[13] Ogden v. Ogden, 60 Ark. 70, 28 S. W. 796, 46 Am. St. 151; Meacham v. Bunting, 156 Ill. 586, 41 N. E. 175, 28 L. R. A. 618, 47 Am. St. 239; Tremmel v. Kleibolt, 6 Mo. App. 549; Deming v. Miles, 35 Nebr. 739, 53 N. W. 665, 37 Am. St. 464; Depue v. Miller, 65 W. Va. 120, 64 S. E. 740, 23 L. R. A. (N. S.) 775n.

ried prior to April 20, 1877, is given the right of curtesy in his wife's estate, but those married subsequent to that date take as survivor of the wife. In all other states not mentioned above curtesy has been abolished by statute.

§ 65. Dower.—By the common law a wife was entitled, on the death of her husband, to be endowed of a third part of all the lands and tenements whereof the husband was seised, in fee simple or in fee tail, at any time during coverture.[14] At first it was limited to lands held by the husband at the time of the marriage, but by the Magna Charta it was extended to all lands of which the husband was seised during coverture. This right or estate of dower exists in all the states where it has not been modified or abolished by statute. It is a right, though inchoate pending the life of the husband, is in the nature of a property right, and the wife can not be divested of it by any act of the husband, whether done in good faith, or in fraud, either of his immediate grantee or of those who may come after him.[15]

The requisites of this common-law right of estate of dower are: (1) A valid marriage;[16] (2) seisin of the husband during coverture;[17] and (3) death of the husband during the lifetime of the wife.[18]

At common law the right of dower attached only to the husband's estates of inheritance; that is, to fee simple estates or estates in fee tail.[19] Generally speaking, a wife has no dower in lands to which her husband has merely an equitable title. But by statute in many states this rule has been changed, so that the right exists in the husband's equitable estates.[20] It is generally held

[14] Sisk v. Smith, 1 Gil. (Ill.) 503; 2 Bl. Comm. 129; Co. Lit. § 30a; Co. Lit. § 36.

[15] Warner v. Norwegian Cemetery Assn., 139 Iowa 115, 117 N. W. 39.

[16] De France v. Johnson, 26 Fed. 891; Jones v. Jones, 28 Ark. 19; Higgins v. Breen, 9 Mo. 497; Pearson v. Howey, 11 N. J. L. 12; Cropsey v. Ogden, 11 N. Y. 228.

[17] Kirkpatrick v. Kirkpatrick, 197 Ill. 144, 64 N. E. 267; Smallridge v. Hazlett, 112 Ky. 841, 23 Ky. L. 2228, 66 S. W. 1043; Hill v. Pike, 174 Mass. 582, 55 N. E. 324; Wheeler v. Smith, 50 Mich. 93, 15 N. W. 108; Ellis v. Kyger, 90 Mo. 600, 3 S. W. 23; Phelps v. Phelps, 143 N. Y. 197, 38 N. E. 280, 25 L. R. A. 625; Dudley v. Dudley, 76 Wis. 567, 45 N. W. 602, 8 L. R. A. 814.

[18] Sisk v. Smith, 1 Gil. (Ill.) 503; McCraney v. McCraney, 5 Iowa 232, 68 Am. Dec. 702; Wait v. Wait, 4 N. Y. 95.

[19] Johnson v. Jacob, 11 Bush (Ky.) 646; Pinkham v. Pinkham, 55 Nebr. 729, 76 N. W. 411; Kennedy v. Kennedy, 29 N. J. L. 185; 2 Bl. Comm. 131; Co. Lit. § 36.

[20] Atkin v. Merrell, 39 Ill. 62; Stroup v. Stroup, 140 Ind. 179, 39 N. E. 864, 27 L. R. A. 523; McMahan v. Kimball, 3 Blackf. (Ind.)1; Everitt

that, though the husband's land is subject to a mortgage, which takes precedence of dower, the wife is entitled to dower in the land as against all persons except the owner of the mortgage.[21] Where the interest of the husband is that of a tenant in common or as a coparcener with others, it is subject to the wife's dower.[22] Where lands are held by the husband in partnership with another, the wife is entitled to dower in any surplus interest of her husband after payment of the firm's debts.[23] But land held by the husband with others in joint tenancy is not subject to dower, though a severance will entitle the widow to dower if the husband thereafter remains solely seised.[24] In the absence of any statutory provision to the contrary, a wife is not entitled to dower in land held in reversion or remainder by the husband, where the preceding estate does not determine during coverture.[25] And if his estate is determinable on the happening of a condition subsequent or by limitation, the determination of the estate in the lifetime of the husband will defeat the wife's right of dower.[26] But if the husband's estate is an executory devise, defeasible by the death of the husband without issue, it has been held that the widow is entitled to dower, even if there be no issue.[27] Dower can not be claimed in an estate by the entirety;[28] nor can a divorced woman

v. Everitt, 71 Iowa 221, 32 N. W. 273; Davis v. Green; 102 Mo. 170, 14 S. W. 876, 11 L. R. A. 90; McClure v. Fairfield, 153 Pa. St. 411, 26 Alt. 446. A married woman has no inchoate right of dower in real estate which her husband holds under a contract of purchase, having paid only a part of the purchase price. Nortnass v. Pioneer Townsite Co., 82 Nebr. 382, 117 N. W. 951.

[21] Cox v. Garst, 105 Ill. 342; Snow v. Stevens, 15 Mass. 278; Jones v. Bragg, 33 Mo. 337, 84 Am. Dec. 49; Wade v. Miller, 32 N. J. L. 296; Mills v. Van Voorhies, 20 N. Y. 412, 10 Abb. Prac. 152.

[22] Harvill v. Holloway, 24 Ark. 19; Ross v. Wilson, 58 Ga. 249; Cook v. Walker, 70 Maine 232; Rockwell v. Rockwell, 81 Mich. 493, 46 N. W. 8; Lee v. Lindell, 22 Mo. 202, 64 Am. Dec. 262; Whitney v. Whitney, 45 N. H. 311.

[23] Bopp v. Fox, 63 Ill. 540; Grissom v. Moore, 106 Ind. 296, 6 N. E. 629, 55 Am. Rep. 742; Dyer v. Clark, 5 Metc. (Mass.) 562, 39 Am. Dec. 697; Willet v. Brown, 65 Mo. 138, 27 Am. Rep. 265; Greenwood v. Marvin, 111 N. Y. 423, 19 N. E. 228.

[24] Mayburry v. Brien, 15 Pet. (U. S.) 21, 10 L. ed. 646; Cockrill v. Armstrong, 31 Ark. 580; Babbitt v. Day, 41 N. J. Eq. 392, 5 Atl. 275.

[25] Kirkpatrick v. Kirkpatrick, 197 Ill. 144, 64 N. E. 267; Young v. Morehead, 94 Ky. 608, 15 Ky. L. 383, 23 S. W. 511; Hill v. Pike, 174 Mass. 582, 55 N. E. 324; Von Arb v. Thomas, 163 Mo. 33, 63 S. W. 94; Dudley v. Dudley, 76 Wis. 567, 45 N. W. 602, 8 L. R. A. 814.

[26] Beardslee v. Beardslee, 5 Barb. (N. Y.) 324; Rhode Island Hospital Trust Co. v. Harris, 20 R. I. 408, 39 Atl. 750.

[27] Northcut v. Whipp, 12 B. Mon. (Ky.) 65; Clark v. Clark, 84 Hun 362, 32 N. Y. S. 325, 65 N. Y. S. 483; Pollard v. Slaughter, 92 N. Car. 72, 53 Am. Rep. 402; Contra: Edwards v. Bibb, 54 Ala. 475.

[28] Roulston v. Hall, 66 Ark. 305, 50 S. W. 690, 74 Am. St. 97.

have dower in lands owned by her former husband during the marriage.[29] A wife is not entitled to dower in lands paid for by the husband but conveyed to another;[30] in lands sold before marriage by oral contract under which the vendee had gone into possession;[31] in lands to which the husband gives a bond to convey to another at the time he acquires title;[32] or in lands held in trust by the husband for a third person.[33]

The right of dower at common law exists only in the husband's lands and tenements.[34] This includes mines and quarries belonging to the husband which were opened and worked during his life,[35] wild and unimproved lands,[36] rent charged on another's land in favor of the husband and his heirs,[37] and in a fishing privilege, or other right of profit.[38] But the wife is not entitled to dower in unopened mines,[39] in crops or timber which has been severed from the realty,[40] or in mere personal hereditaments.[41]

The right to dower may be barred or forfeited in various ways, though the husband by his act alone, without the wife's assent, can not bar it.[42] It may be barred: (1) By the husband's bona fide conveyance before marriage,[43] and sometimes after marriage;[44] (2) by the elopement and adultery of the wife;[45] (3)

[29] Allen v. Austin, 21 R. I. 254, 43 Atl. 69.

[30] Phelps v. Phelps, 143 N. Y. 197, 38 N. E. 280, 25 L. R. A. 625.

[31] Chapman v. Chapman, 92 Va. 537, 24 S. E. 225, 53 Am. St. 823.

[32] Hallett v. Parker, 68 N. H. 598, 39 Atl. 583.

[33] Gritten v. Dickerson, 202 Ill. 372, 66 N. E. 1090.

[34] 2 Bl. Comm. 131; Co. Lit. § 36.

[35] Hendrix v. McBeth, 61 Ind. 473, 28 Am. Rep. 680; Gaines v. Green Pond Iron Co., 33 N. J. Eq. 603; Sayers v. Hoskinson, 110 Pa. St. 473; Clift v. Clift, 87 Tenn. 17, 9 S. W. 198, 360.

[36] Chapman v. Schroeder, 10 Ga. 321; Schnebly v. Schnebly, 26 Ill. 116; Brown v. Richards, 17 N. J. Eq. 32. But a different rule seems to prevail in the New England states: Stevens v. Owen, 25 Maine 94; Conner v. Shepherd, 15 Mass. 164; Johnson v. Perley, 2 N. H. 56, 9 Am. Dec. 35.

[37] Chase's Cas. 1 Bland (Md.) 227, 17 Am. Dec. 277; Co. Lit. 32a.

[38] Co. Lit. 32a.

[39] Stoughton v. Leigh, 1 Taunt. 402. Contra: In re Seager, 92 Mich. 186, 52 N. W. 299; Coates v. Cheever, 1 Cow. (N. Y.) 460.

[40] Hallett v. Hallett, 8 Ind. App. 305, 34 N. E. 740.

[41] Co. Lit. § 32.

[42] Gove v. Cather, 23 Ill. 634, 76 Am. Dec. 711; McKelvey v. McKelvey, 75 Kans. 325, 89 Pac. 663, 121 Am. St. 435; Rodman v. Robinson 134 N. Car. 503, 47 S. E. 19, 65 L. R. A. 682.

[43] Daniher v. Daniher, 201 Ill. 489, 66 N. E. 239; Pratt v. Skolfield, 45 Maine 386; Beckwith v. Beckwith, 61 Mich. 315, 28 N. W. 116.

[44] Stewart v. Stewart, 5 Conn. 317; Hopkins v. Bryant, 85 Tenn. 520, 3 S. W. 827.

[45] McQuinn v. McQuinn, 110 Ky. 321, 22 Ky. L. 1770, 61 S. W. 358; Walters v. Jordan, 35 N. Car. 361, 57 Am. Dec. 558. But adultery without elopement does not bar dower. Cogswell v. Tibbetts, 3 N. H. 41; Reel v.

by divorce;[46] (4) by annulment of the marriage;[47] (5) by the loss of the husband's estate;[48] (6) by voluntary release on the part of the wife;[49] and (7) by jointure.[50]

The common-law right of dower exists in Florida, Illinois, Kentucky, Maine, Massachusetts, Michigan, Missouri, Nebraska, New Jersey, New York, North Carolina, Ohio, Oregon, Rhode Island, Virginia, West Virginia and Wisconsin. The widow is entitled to dower in one-half of the lands owned by the husband at the time of his death, if he left no lineal descendants, and to one-third if there be such, in Alabama, Arkansas and Pennsylvania. She takes one-third of all the real estate of which the husband died seised, or which came to him in right of marriage, in Georgia and New Hampshire; and the husband must have had title in fee simple in Delaware.[51] In Connecticut, Tennessee and Vermont, the widow has a right of dower during her life in one-third part of the real estate of which her husband died seised. In all other states not mentioned above, the right of dower has either been abolished by statute, or has never been adopted; but in lieu thereof the wife takes a certain share of the husband's estate under the statutes of descent and distribution.

§ 66. **Homestead.**—Generally speaking, a homestead is an artificial estate in land, usually for the life or lives of those entitled to it, exempt from the demands of creditors.[52] Strictly speaking, it is not an estate in land,[53] but a right additional to and independent of the ordinary right of ownership.[54] It is designated as a shelter of the homestead roof, and not as a mere in-

Elder, 62 Pa. St. 308, 1 Am. Rep. 414. Nor does adultery committed by the wife after her husband has driven her away bar her right to dower. Heslop v. Heslop, 82 Pa. St. 537.

[46] Kent v. McCann, 52 Ill. App. 305; Fletcher v. Monroe, 145 Ind. 56, 43 N. E. 1053; Winch v. Bolton, 94 Iowa 573, 63 N. W. 330; Calame v. Calame, 24 N. J. Eq. 440.

[47] Price v. Price, 124 N. Y. 589, 27 N. E. 383, 12 L. R. A. 359.

[48] Stribling v. Ross, 16 Ill. 122; Toomey v. McLean, 105 Mass. 122; Vickers v. Henry 110 N. Car. 371, 15 S. E. 115; McClure v. Fairfield, 153 Pa. St. 411, 26 Atl. 446.

[49] Dooley v. Greening, 201 Mo. 343, 100 S. W. 43; Hinchliffe v. Shea, 103 N. Y. 153, 8 N. E. 477.

[50] Bryan v. Bryan, 62 Ark. 79, 34 S. W. 260; Andrews v. Andrews, 8 Conn. 79; Culberson v. Culberson, 37 Ga. 296; Wentworth v. Wentworth, 69 Maine 247; Grogan v. Garrison, 27 Ohio St. 50.

[51] Bush v. Bush, 5 Del. Ch. 144.

[52] Buckingham v. Buckingham, 81 Mich. 89, 45 N. W. 504.

[53] Ellinger v. Thomas, 64 Kans. 180, 67 Pac. 529; Thomas v. Fulford, 117 N. Car. 667, 23 S. E. 635.

[54] Speyrer v. Miller, 108 La. 204, 32 So. 524, 61 L. R. A. 781.

vestment in real estate, or the rents and profits derived therefrom.[55]

[55] Lyon v. Harden, 129 Ala. 643, 29 So. 777; Norris v. Kidd, 28 Ark. 485; Dickman v. Birkhauser, 16 Nebr. 686, 21 N. W. 396.

There is no homestead exemption in Delaware, District of Columbia, Hawaii, Indiana, Maryland, New Jersey, Pennsylvania and Rhode Island; but in all the other states there are constitutional or statutory provisions exempting from execution or other forced sale for debts, to a certain extent, the homestead or residence of the debtor. The amount, extent and value of this homestead exemption vary greatly in the different states. In Alabama, the claimant is entitled to not more than one hundred and sixty acres, with improvements, and of value not to exceed two thousand dollars; in Alaska, not more than one hundred and sixty acres, and if located in a city or town, not to exceed a quarter of an acre, and the value thereof not to exceed two thousand five hundred dollars; in Arizona, one compact body, not limited in extent, but not to exceed four thousand dollars in value; in Arkansas, one hundred and sixty acres in extent and if located within a city or town, one acre, and not to exceed two thousand five hundred dollars in value; in California, the dwelling-house in which the claimant resides and the land on which the same is situated, not exceeding in value five thousand dollars for the head of the family and one thousand for any other person; in Colorado, real estate not exceeding two thousand dollars in value; in Connecticut, a dwelling-house or other real estate in connection therewith of a value not to exceed one thousand dollars; in Florida, one hundred and sixty acres of land, or half of one acre within a city or town, together with improvements thereon, regardless of value; in Georgia, real estate, or personal property, or both, to the value in the aggregate of one thousand six hundred dollars; in Idaho, real estate in value not exceeding five thousand dollars; in Illinois, the whole of the lot of land and buildings thereon occupied as a residence by the claimant, to the extent and value of one thousand dollars; in Iowa, half an acre if within a city or town, or forty acres if outside, and without limit as to value; in Kansas, one hundred and sixty acres of farming land, or one acre within the limits of a city or town, and regardless of value; in Kentucky, so much land, including, the dwelling-house and appurtenances owned by claimant, as shall not exceed in value one thousand dollars; in Louisiana, real estate of the value not to exceed two thousand dollars; in Maine, a homestead not exceeding five hundred dollars in value; in Massachusetts, real estate of the value of not more than eight hundred dollars; in Michigan, one lot or its equivalent in town or city, or not more than forty acres in the country, and not exceeding in value in either case one thousand five hundred dollars; in Minnesota, eighty acres if situated outside the limits of a city or town, and one-half acre in city or town containing less than five thousand inhabitants, and one-third acre if there be more than five thousand inhabitants; in Mississippi, not more than one hundred and sixty acres, and of the value of not more than three thousand dollars exclusive of improvements, or a residence in a city or town not to exceed in value three thousand dollars; in Missouri, not more than one hundred and sixty acres of land in the country not to exceed one thousand five hundred dollars in value, and in cities or towns having a population of forty thousand or more, not to exceed eighteen square rods of ground of the value of three thousand dollars, and in cities having a population of ten thousand and less than forty thousand, not to exceed thirty square rods of ground of the total value of one thousand five hundred dollars, and in towns of less than ten thousand, not to exceed five acres of ground, of the total value of one thousand five hundred dollars; in Montana, a homestead of value not exceeding two thousand five hundred dollars; in Nebraska, a house and one hundred and

The statutes creating homesteads have no extraterritorial force,[56] but are to be liberally construed for the benefit of those entitled to the benefits thereof.[57] This homestead legislation consists of two materially different forms; one of the federal law, and the other of the statutes of the several states. The former provides for the acquisition of land for a homestead, and incidentally exempts it from the debts of the homesteader before he acquires his patent; the latter authorizes the head of the family to designate property as a homestead, and thus exempt it from his future debts. The state homestead law does not affect the property until the owner obtains a patent.[58] The law does not generally require that the claimant of the homestead rights be the

sixty acres of land in the country or if in a town or city, not exceeding two lots, and in either case not exceeding two thousand dollars in value; in Nevada, a homestead not exceeding five thousand dollars in value; in New Hampshire, a homestead in real estate of the value of five hundred dollars; in New York, a lot of land and buildings thereon not exceeding in value one thousand dollars; in North Carolina, a homestead and dwellings and buildings used therewith, not exceeding in value one thousand dollars; in North Dakota, homestead not exceeding in value five thousand dollars, and if within a town not exceeding two acres in extent, and if not within a town not exceeding one hundred and sixty acres; in Ohio, a family homestead not exceeding one thousand dollars in value; in Oklahoma, real estate consisting of not more than one hundred and sixty acres regardless of value; in Oregon, not to exceed one hundred and sixty acres in extent if not located in a city, or one block if located in a city, in neither case to exceed one thousand five hundred dollars in value; in South Carolina, real estate of the value of one thousand dollars; in South Dakota, a tract not exceeding one hundred and sixty acres if in the country, or one acre if in a town, to the extent and value of five thousand dollars; in Tennessee, land and improvements thereon not exceeding in value one thousand dollars; in Texas, land not in city or town consisting of two hundred acres with improvements thereon, and if in city or town consisting of a lot or lots not to exceed in value five thousand dollars; in Utah, land not exceeding in value, with improvements thereon, of the sum of one thousand five hundred dollars for the head of the family, and the further sum of five hundred dollars for his wife, and two hundred and fifty dollars for each other member of the family; in Vermont, a homestead of the value of five hundred dollars; in Virginia, a homestead of the value of two thousand dollars; in Washington, homestead with improvements thereon not exceeding in value the sum of two thousand dollars; in West Virginia, a homestead of the value of one thousand dollars; in Wisconsin, not exceeding forty acres when not included in city or town, and not exceeding one-fourth of an acre and a dwelling-house thereon in city or town, in either case not exceeding in value the sum of five thousand dollars; in Wyoming, the homestead consists of a house and lot or lots in a town or city, or a farm not exceeding one hundred and sixty acres, to the value of two thousand five hundred dollars.

[56] Cherokee Const. Co. v. Harris, 92 Ark. 260, 122 S. W. 485, 135 Am. St. 177.

[57] Deere v. Chapman, 25 Ill. 610, 79 Am. Dec. 350; Barber v. Rorabeck, 36 Mich. 399; Jarvis v. Moe, 38 Wis. 440.

[58] Hesnard v. Plunkett, 6 S. Dak. 73, 60 N. W. 159.

owner of a freehold, but allows such rights to be established whether the estate be in fee, for life, or for years.[59]

One is entitled to the homestead exemption in a leasehold estate;[60] in an equitable estate;[61] in lands held in cotenancy;[62] in lands held in joint tenancy;[63] and in lands held by the entireties.[64] But, as a rule, homestead rights can not be claimed in partnership property;[65] nor in remainders and reversions after freehold interests.[66]

The general intent of the statutes is to confer the right of homestead upon the actual head of the family,[67] and so it is primarily to the husband, and on his death it inures to his widow.[68] In order that a person may successfully claim the right of homestead he must have some one dependent upon him; some one whom he is under a legal or moral obligation to support.[69]

Actual or constructive occupation of the premises as a home, is essential to give the character of homestead to real property.[70] In some states it is required, in addition to occupancy, that the claimant execute a written declaration or certificate that the

[59] Bartholomew v. West, 2 Dill (U. S.) 290, Fed. Cas. No. 1071; Tyler v. Jewett, 82 Ala. 93, 2 So. 905; Alexander v. Jackson, 92 Cal. 514, 28 Pac. 593, 27 Am. St. 158; Allen v. Hawley, 66 Ill. 164; Maatta v. Kippola, 102 Mich. 116, 60 N. W. 300; Doane v. Doane, 46 Vt. 485.

[60] Conklin v. Foster, 57 Ill. 104; In re Emerson's Homestead, 58 Minn. 450, 60 N. W. 23; Phillips v. Warner, 4 Tex. Civ. App. 147, 16 S. W. 423; Beranek v. Beranek, 113 Wis. 272, 89 N. W. 146.

[61] Myrick v. Bill, 5 Dak. 167, 37 N. W. 369; Rice v. Rice, 108 Ill. 199; Stafford v. Woods, 144 Ill. 203, 33 N. E. 539; Dessell v. Goodman, 97 Iowa 681, 66 N. W. 917, 59 Am. St. 432; McKee v. Wilcox, 11 Mich. 358, 83 Am. Dec. 743; Doane v. Doane, 46 Vt. 485; Canfield v. Hard, 58 Vt. 217, 2 Atl. 136.

[62] Chapman v. White Sewing Machine Co., 78 Miss. 438, 28 So. 735; Clark v. Thias, 173 Mo. 628, 73 S. W. 616.

[63] Swan v. Walden, 156 Cal. 195, 103 Pac. 931, 134 Am. St. 118, 20 Ann. Cas. 194; Giles v. Miller, 36 Nebr. 346, 54 N. W. 551, 38 Am. St. 730.

[64] Cole v. Cole, 126 Mich. 569, 85 N. W. 1098.

[65] Ex parte Karish, 32 S. Car. 437, 11 S. E. 298, 17 Am. St. 865; Brady v. Kreuger, 8 S. Dak. 464, 66 N. W. 1083, 59 Am. St. 771.

[66] Kingsley v. Kingsley, 39 Cal. 665; Drake v. Moore, 66 Iowa 58, 23 N. W. 263; Howell v. Jones, 91 Tenn. 402, 19 S. W. 757.

[67] Dawley v. Ayers, 23 Cal. 108; Adams v. Clark, 48 Fla. 205, 37 So. 734; Taylor v. Taylor, 223 Ill. 423, 79 N. E. 139; People v. McClay, 2 Nebr. 7; Sproul v. McCoy, 26 Ohio St. 577; Cobbs v. Coleman, 14 Tex. 594.

[68] Raggio v. Palmtag, 155 Cal. 797, 103 Pac. 312; Garwood v. Garwood, 244 Ill. 580, 91 N. E. 672; Weaver v. First Nat. Bank, 76 Kans. 540, 94 Pac. 273, 16 L. R. A. (N. S.) 110, 123 Am. St. 155.

[69] Sheehy v. Scott, 128 Iowa 551, 104 N. W. 1139, 4 L. R. A. (N. S.) 365.

[70] Aucker v. McCoy, 56 Cal. 524; Floyd County v. Wolfe, 138 Iowa 749, 117 N. W. 32; Ingels v. Ingels, 50 Kans. 755, 32 Pac. 387; Kennedy v. Duncan, 157 Mo. App. 212, 137 S. W. 299.

premises are claimed as a homestead.[71] The statutes fix the amount, extent and value of homestead, and it can not exceed the statutory limitation.[72]

The rule is universal that one can not claim homestead exemptions in more than one piece of property,[73] and hence that an actual abandonment, or the acquiring of a new homestead, will extinguish the right in the old.[74] While homestead rights are required by some statutes to be described in writing by the claimant, and the description entered upon the public records, but in the absence of such a statute an inquiry dehors the record should be made.

The statutes of many states provide for restrictions upon husband's right to convey or mortgage the homestead property without the wife joining in the conveyance.[75] Neither can the owner dispose of the homestead by will so as to cut off the rights of the wife and children to the benefits thereof after his death.[76]

In order to provide a home and shelter for a surviving husband or wife and for the minor children, the homestead acts generally provide for the descent or continuance of the homestead of a parent to or for the benefit of the surviving spouse and children.[77]

§ 67. **Widow's quarantine.**—At common law the widow was entitled to have her dower assigned to her within forty days

[71] Boreham v. Byrne, 83 Cal. 23, 23 Pac. 212; Welch v. Spragins, 98 Ky. 279, 17 Ky. L. 884, 32 S. W. 943; Donaldson v. Winningham, 48 Wash. 374, 93 Pac. 534, 125 Am. St. 937.

[72] Powe v. McLeod, 76 Ala. 418; Holley v. Horton, 164 Mich. 31, 129 N. W. 6; Acreback v. Myer, 165 Mo. 685, 65 S. W. 1015; Pickett v. Gleed, 39 Tex. Civ. App. 71, 86 S. W. 946.

[73] Atchison Sav. Bank v. Wheeler, 20 Kans. 625; Donaldson v. Lamprey, 29 Minn. 18, 11 N. W. 119.

[74] Taylor v. Hargous, 4 Cal. 268, 60 Am. Dec. 606.

[75] Miller v. Marx, 55 Ala. 322; Club v. Wise, 64 Ill. 157; Davis v. McCullouch, 192 Ill. 277, 61 N. E. 377; First Nat. Bank v. Jacobs, 50 Mich. 340, 15 N. W. 500; Morrill v. Hopkins, 36 Tex. 686; Day v. Adams, 42 Vt. 510; Riehl v. Bingenheimer, 28 Wis. 88.

[76] Bell v. Bell, 84 Ala. 64, 4 So. 189; Sulzberger v. Sulzberger, 50 Cal. 385; Wilson v. Fridenburg, 19 Fla. 461; Kleimann v. Gieselman, 114 Mo. 437, 21 S. W. 796; Norris v. Moulton, 34 N. H. 392; McCrae v. McCrae, 103 Tenn. 719, 54 S. W. 979; Hall v. Fields, 81 Tex. 553, 17 S. W. 82; In re Hatch's Estate, 62 Vt. 300, 18 Atl. 814, 22 Am. St. 109.

[77] Tartt v. Negus, 127 Ala. 301, 28 So. 713; Kirksey v. Cole, 47 Ark. 504, 1 S. W. 778; Gresham v. Johnson, 70 Ga. 631; Capek v. Kropik, 129 Ill. 509, 21 N. E. 836; Burns v. Keas, 21 Iowa 257; Barbe v. Hyatt, 50 Kans. 86, 31 Pac. 694; Gavin v. Sanders, 5 Ky. L. 321; Eaton v. Robbins, 29 Minn. 329, 13 N. W. 143; Acker v. Trueland, 56 Miss. 30; Fore v. Fore, 2 N. Dak. 260, 50 N. W. 712; Stewart v. Blalock, 45 S. Car. 61, 22 S. E. 774; Threat v. Moody, 87 Tenn. 143, 9 S. W. 424; Ashe v. Yungst, 65 Tex. 631; Knudsen v. Hannberg, 8 Utah 203, 30 Pac. 749; Austin v. Clifford, 24 Wash. 172, 64 Pac. 155; Speidel v. Schlosser, 13 W. Va. 686; Johnson v. Harrison, 41 Wis. 381.

after her husband's death. During this period she has the right to reside in the dwelling-house, occupied by the family, and to be supported out of his estate. This right is entitled the "widow's quarantine," and in some jurisdictions she is permitted to remain until her dower is assigned.[78] It has been held that the right can be claimed only as to the property of which the widow is dowable,[79] and does not extend to leasehold estates unless the same is made subject to dower.[80]

The widow's quarantine is not subject to sale on execution for her debts,[81] nor need she pay a tax on the premises.[82] Her right, however, may be forfeited by her remarriage, but the right is not forfeited by her abandonment of the premises during the term of residence.[83] Modern statutes, however, in respect to the widow's quarantine, are, as a general thing, more liberal in her favor than the common law. No change from the common law is made in Delaware, Maryland, Massachusetts, New Hampshire, New York, North Carolina and Tennessee. The period during which the widow may remain in the mansion of the deceased husband is extended to ninety days in Maine; two months, and until dower is assigned, in Arkansas; one year in Ohio, Oregon and Rhode Island; and until dower be assigned with no limit of time in Alabama, Florida, Georgia, Illinois, Kentucky, Michigan, Missouri, Nebraska, New Jersey, Vermont, Virginia, West Virginia and Wisconsin.

In those states in which dower has been abolished by statute, the homestead laws, the year's support allowed to the widow and family, and the laws regulating the descent of real estate, compensate for the right of quarantine at common law. Until the dower has been assigned the widow may not only occupy, free of rent, the dwelling-house, together with all the appurtenant belongings, and the messuage or plantations connected therewith,[84] but her right constitutes a freehold for life, unless sooner defeated by assignment of dower.[85] And it has been held that she

[78] Pharis v. Leachman, 20 Ala. 662; Rambo v. Bell, 3 Ga. 207.

[79] Harrison v. Boyd, 36 Ala. 203.

[80] Pizzala v. Campbell, 46 Ala. 35.

[81] Cook v. Webb, 18 Ala. 810. Right of widow to occupy lands of her husband with his children or heirs until her death is assigned as a personal right which she can not convey to others. Grubbs v. Leyendecker, 153 Ind. 348, 53 N. E. 940.

[82] Branson v. Yancy, 16 N. Car. 77.

[83] Doe v. Carrol, 16 Ala. 148.

[84] Inge v. Murphy, 14 Ala. 289; White v. Clarke, 7 T. B. Mon. (Ky.) 640.

[85] Miller v. Talley, 48 Mo. 503; Bleecker v. Hennion, 23 N. J. Eq. 123.

may lease such freehold to another, and will be entitled to the rent paid therefor.[86] But whether she can assign her right to remain in the mansion house to another has been differently held, the right being affirmed in some states,[87] and denied in others.[88]

[86] Reeves v. Brooks, 80 Ala. 26; Chaplin v. Simmons, 7 T. B. Mon. (Ky.) 337; McLaughlin v. McLaughlin, 22 N. J. Eq. 505.

[87] Jones v. Manly, 58 Mo. 559.

[88] Barber v. Williams, 74 Ala. 331.

CHAPTER III

TITLE TO REAL ESTATE IN GENERAL

SEC.
70. Title defined and distinguished.
71. Various estates to which title relates.
72. Allodial titles.
73. Color of title.
74. Legal and equitable titles.
75. Complete, perfect, good, and clear titles.
76. Bad, defective, imperfect, and doubtful titles.
77. Marketable titles.
78. Evidences of title.
79. Title insurance.

§ 70. Title defined and distinguished.—The term "title," as applied to real estate, may be defined as the means whereby the ownership of land is acquired or established. It is the means whereby the owner of land has the just possession of his property.[1] The term indicates the evidence of ownership, or the channel through which an estate in land is acquired, and when used in a legal sense it is sometimes said to mean ownership,[2] and estate in fee,[3] a right of possession,[4] or the evidence of one's right of possession.[5] The term "title," in the popular sense, refers rather to the instruments which are usually relied upon to evidence the title, and to the outward assertive acts that import dominion, than to the strict legal means whereby the owner of land has the just possession thereof. Title is clearly distinguishable from the property or interest which one has in lands, tenements and hereditaments. This property or interest is called an "estate," and is entirely distinct, not only from the land itself, but also from the methods of holding it, and from the title by which it may be acquired or held. An estate in land is the degree, quantity, nature or extent of interest which a person has in it; while his title to it is the evidence of his right or of the extent of his interest; the

[1] Adams v. Hopkins, 144 Cal. 19, 77 Pac. 712; Jacob Tome Institute v. Davis, 87 Md. 591, 41 Atl. 166; 2 Bl. Comm. 195.

[2] Livingston v. Ruff, 65 S. Car. 284, 43 S. E. 678.

[3] Gillespie v. Broas, 23 Barb. (N. Y.) 370.

[4] Rodgers v. Palmer, 33 Conn. 155; Dunster v. Kelly, 110 N. Y. 558, 18 N. E. 361.

[5] Chapman v. Dougherty, 87 Mo. 617, 56 Am. Rep. 469; Patty v. Middleton, 82 Tex. 586, 17 S. W. 909.

means whereby the owner is enabled to assert or maintain his possession, the right of the owner considered with reference either to the manner in which it has been acquired, or its capacity of being effectually transferred.[6]

§ 71. **Various estates to which title relates.**—It would be beyond the scope of this work to discuss at length the various kinds of estates or interests in real property, but inasmuch as they will be frequently referred to in connection with our treatment of title it is deemed important that we include a classification of them, together with a brief definition of each.

With reference to their quantum or duration estates are either: (1) Freehold estates or (2) estates less than freehold.

A freehold estate is one which is to endure for an uncertain period, which must, or at least may, last during the life of some person. Freehold estates are either estates of inheritance or estates not of inheritance. The former has reference to estates which may descend to heirs, and includes: (a) Fee simple estates and (b) estates in fee tail; while the latter has reference to estates which do not descend to heirs, and includes: (a) Life estates, (b) estates pur autre vie, (c) tenancy in tail after possibility of issue extinct, (d) dower, (e) curtesy and (f) estates during coverture. An estate in fee simple is that estate which a person has where lands are given to him and to his heirs absolutely, without any end or limit put to his estate. An estate in fee tail is an estate of inheritance which, if left to itself, will, after the death of the first taker, descend to his lawful issue as long as his posterity endures in a regular order of descent from one to another, and will terminate on the failure of such posterity. A life estate is an estate which can not extend beyond the life or lives of some particular person or persons, but may possibly continue for the period of such life or lives. If the estate is for the life of another person or persons other than the life of the tenant himself it is an estate pur autre vie. A tenancy in tail after possibility of issue extinct is where, upon the death of the appointed wife of the donee in special tail, or of one of two donees in special tail without issue living, the donee or survivor of the two donees takes for his life, possibility of issue being extinct. Dower is an

[6] Robertson v. Vancleave, 129 Ind. 217, 26 N. E. 899, 29 N. E. 781, 15 L. R. A. 68.

estate for life which a widow has in some portion of the lands and tenements of which her husband was seised at any time during coverture, and which her issue might have inherited if she had had any. An estate by the curtesy is a life estate to which a husband is entitled upon the death of his wife in lands or tenements of which she was seised in fee in possession during their coverture, provided they have any lawful issue born alive, and possibly capable of inheriting the estate. An estate during coverture is that right or interest which a husband or wife has during coverture in the lands and tenements of his or her spouse.

Estates less than freehold are: (a) Estates for years, (b) estates at will, (c) estates from year to year, and (d) estates at sufferance. An estate for years is an estate or interest in land, having for its duration a definite and ascertained period, as a term for a fixed number of weeks, months or years. An estate at will, in the primary and technical sense of that expression, is created by grant and contract, whereby one person lets land to another to hold at the will of the lessor. An estate from year to year is a qualified tenancy at will introduced to obviate the inconveniences of the latter kind of estate; and the qualification requires the determination of the will to be prospective, to take effect at the end of a current year of the tenancy. An estate at sufferance is where one who comes lawfully into possession of land holds over after his interest has determined.

Estates with regard to their time of enjoyment are either: (1) Present estates or (2) future estates. The former has reference to an estate where the tenant is in actual possession of the premises, or in receipt of the rents and other income arising therefrom. The latter is an estate in which the tenant has a present or vested contingent right of future possession and enjoyment. Future estates include: (a) Reversions, (b) remainders, (c) contingent uses, (d) springing uses, (e) shifting uses, and (f) executory devises. An estate in reversion is the residue of an estate left in the grantor to commence in possession after the determination of some particular estate granted out by him. An estate in remainder is an estate limited to take effect and be enjoyed after another estate is determined. A contingent use is a use limited in a deed or conveyance of land which may or may not happen to vest, according to the contingency expressed in the limitation of such use. A springing use is one limited to arise on a

future event, where no preceding estate is limited, and which does not take effect in derogation of any other interest than that of the grantor. A shifting use is one which takes effect in derogation of some other estate, and is either limited by the deed by which it is created, or authorized to be created by some one named in the deed. An executory devise of lands is such disposition of them by will that thereby no estate vests at the death of the testator, but only on some future contingency.

Estates classified according as they are owned by one or more persons, and according to the nature of the rights of several owners, are: (1) Estates in severalty and (2) joint estates. The former has reference to those estates which are held by a person in his own right, without any other person being joined or connected with him in point of interest during his estate. The latter has reference to estates in which two or more persons are joined in interest, and include: (a) Joint tenancy, (b) tenancy in common, (c) tenancy in coparcenary, and (d) tenancy in entirety. A joint tenancy is where lands or tenements are granted to two or more persons, to hold in fee simple, fee tail, for life, for years or at will. In such tenancies, there must be unity of interest, of title, of time and of possession. A tenancy in common is where there are several owners who may hold by different title, in different interests, which may be acquired at different times, the only unity being unity of possession. A tenancy in coparcenary is where several persons hold as one heir, whether male or female. This form of tenancy has unity of time, title, and possession, but the interests of the coparceners may be unequal. A tenancy in entirety is one arising on a conveyance to a man and his wife jointly. They are seised, not of moieties, but of entireties, and the survivor takes the whole estate.

§ 72. **Allodial titles.**—Under the feudal system in England there was no such thing as absolute ownership in land; the primary title to all lands being vested in the crown, and no method was provided by which it could divest itself thereof. Many of the old feudal tenures have been abolished, so that at the present time, in England, all lands of inheritance are held either by socage or copyhold tenure.[7]

The early English settlers in this country brought with them from the mother country such parts of the common and statutory

[7] Laws of Eng., vol. 24, pp. 147, 148.

laws as were of a general nature and applicable to their situation.[8] Lands in this country were then held in free and common socage under grants from the crown.[9] But by statute, or by force of judicial decisions, land tenures have been generally abolished in this country,[10] and the lands are said to be allodial, as opposed to feudal; by which is meant that while title is primarily vested in the sovereign power, that power may, by proper gifts or conveyances, divest itself of such title and transfer the same to individuals. Allodial lands are said to be held in absolute ownership, the same as personalty.[11]

Thus the character of the title to lands in this country since the revolution has become allodial, that is, wholly independent, and held of no superior at all. It must be remembered, however, that some rights and interests in the land are reserved to the state; such, for instance, as the right of taxation, the right of eminent domain, and the right of escheat. Land held allodially is owned subject to such rights of the state, but free and independent of all other domination or control.

§ 73. **Color of title.**—Color of title is that which in appearance is title, but which in reality is not title.[12] Color of title is an apparent title founded upon descent cast,[13] deed of conveyance,[14] an execution sale,[15] a decree of court,[16] a will,[17] a tax deed,[18] a quitclaim deed,[19] or any instrument in writing defining

[8] Bogardus v. Trinity Church, 4 Paige (N. Y.) 178.

[9] Chisholm v. Georgia, 2 Dall. (U. S.) 419, 1 L. ed. 440; Van Rensselaer v. Hays, 19 N. Y. 68, 75 Am. Dec. 278.

[10] Matthews v. Ward, 10 Gill & J. (Md.) 443.

[11] New Orleans v. United States, 10 Pet. (U. S.) 662, 9 L. ed. 573; Cook v. Hammond, 4 Mason 467, 478, Fed. Cas. No. 3, 159; Bancroft v. Cambridge, 126 Mass. 438; Minneapolis Mill Co. v. Tiffany, 22 Minn. 463.

[12] Wright v. Mattison, 18 How. (U. S.) 50, 15 L. ed. 280; Black v. Tennessee Coal &c. Co., 93 Ala. 109, 9 So. 537; Finley v. Hogan, 60 Ark. 499, 30 S. W. 1045; Millett v. Lagomarsino, 107 Cal. 102, 40 Pac. 25; Studstill v. Willcox, 94 Ga. 690, 20 S. E. 120; Kopp v. Herrman, 82 Md. 339, 33 Atl. 646.

[13] Peadro v. Carriker, 168 Ill. 570, 48 N. E. 102; Miller v. Davis, 106 Mich. 300, 64 N. W. 338.

[14] Chickering v. Failes, 26 Ill. 508; Welborn v. Anderson, 37 Miss. 155. But see Wright v. Tichenor, 104 Ind. 185, 3 N. E. 853.

[15] Kendrick v. Latham, 25 Fla. 819, 6 So. 871; Falls of Neuse Mfg. Co. v. Brooks, 106 N. Car. 107, 11 S. E. 456.

[16] Owsley v. Matson, 156 Cal. 401, 104 Pac. 983; Huls v. Buntin, 47 Ill. 396.

[17] Baldwin v. Ratcliff, 125 Ill. 376, 17 N. E. 794; Holloway v. Jones, 143 Pa. St. 564, 22 Atl. 710.

[18] McIntyre v. Thompson, 4 Hughes (U. S.) 562, 10 Fed. 531, 4 Hughes 562; Chicago v. Middlebrooke, 143 Ill. 265, 32 N. E. 457.

[19] Safford v. Stubbs, 117 Ill. 389, 7 N. E. 653; contra, Swift v. Mulkey, 14 Ore. 59, 12 Pac. 76.

the extent of the disseisor's claim.[20] Any instrument may constitute color of title, within the meaning of the statute of limitations, which purports to convey the land and shows the extent and boundaries of the premises conveyed, although it is void as a muniment of title.[21] "When we say a person has color of title, whatever may be the meaning of the phrase, we express the idea, at least, that some act has been previously done, or some event transpired, by which some title, good or bad, to a parcel of land of definite extent has been conveyed to him."[22]

It is not necessary that the title under which the disseisor claims should be a valid one.[23]

§ 74. Legal and equitable titles.—The classification of titles into legal and equitable has reference more particularly to the courts by which they are recognized. For instance, a person has a legal title to land when he has a right thereto in the nature of ownership cognizable by, and enforcible in, a court of law. Actual or constructive possession, coupled with the legal right of possession, will constitute a good and sufficient legal title. This legal right of possession must be such as would authorize a court of law to award a possessory writ. So, when we speak of a person having title to a piece of land we mean that he has a legal title, or one without qualification.[24] When the title to real estate is spoken of without qualifying terms, a legal title is understood as meant.[25]

An equitable title is the right in a party to whom it belongs to have the legal title to land transferred to him.[26] It is such an interest as is cognizable solely in a court of equity. Such a title exists where the legal title is vested in one person and the beneficial interest inures to another person, who may be named in the deed or who may not be named at all, but whose right may exist by parol. Thus where title to land for which a wife paid the purchase-money is taken in the name of her husband, an equitable

[20] Cook v. Norton, 43 Ill. 391; Thompson v. Burhans, 79 N. Y. 93.

[21] Joplin Brewing Co. v. Payne, 197 Mo. 422, 94 S. W. 896, 114 Am. St. 770.

[22] St. Louis v. Gorman, 29 Mo. 593, 77 Am. Dec. 586.

[23] Hall v. Law, 102 U. S. 461, 26 L. ed. 217; Hecock v. Van Dusen, 80 Mich. 359, 45 N. W. 343; Jackson v. Newton, 18 Johns. (N. Y.) 355.

[24] Hoult v. Donahue, 21 W. Va. 294.

[25] Spencer v. Winselman, 42 Cal. 479.

[26] Thygerson v. Whitbeck, 5 Utah 406, 16 Pac. 403.

title exists in favor of the wife, and a court of equity will decree a transfer of the legal title to her.[27] Likewise, where the legal title to lands sold remains in the vendor until the purchase-money has been paid, the vendee acquires an equitable title only, and upon payment of the full amount of the purchase-money, he can compel the vendor to transfer the legal title to him.[28] Although an equitable title is one that a court of equity will enforce, it has been repeatedly held that a purchaser can not be compelled to take such a title,[29] especially where the equity is controverted.[30] It will be remembered, however, that the vendor will, if time is not material, be allowed time in which to get the legal title.

§ 75. Complete, perfect, good, and clear titles.—To constitute in one a complete title to real estate, he must have acquired, from one or more sources, the possession, the right of possession, and the right of property.[31] Where any one or more of these elements is wanting, the title is defective or does not exist. While the element of the right of property is sometimes said to have disappeared from our modern law, yet it is still to be found as a distinct entity in some jurisdictions; and clearness of conception of how ownership becomes complete, through various sources of acquisition, often depends on a careful inquiry regarding all three of these elements.

It is apparent that one may have possession or actual occupation without any pretense of right; or one may have the right of possession, while another has the possession in fact; or one may have the mere right of property, while possession and right of possession may be in another. These elements must be united in one person to constitute a complete title.[32] By statute in most jurisdictions, the right of property as distinct from the right of possession is now recognized. The two go hand in hand, so that, generally speaking, adverse possession may now complete a title, by transferring all the elements of ownership, in the period fixed by the statute.

[27] Beringer v. Lutz, 188 Pa. St. 364, 41 Atl. 643.

[28] Jennisons v. Leonard, 21 Wall. (U. S.) 302, 22 L. ed. 539.

[29] Waggoner v. Waggoner, 3 B. Mon. (Ky.) 556; Morris v. Mowatt, 2 Paige (N. Y.) 586, 22 Am. Dec. 661; Jones v. Taylor, 7 Tex. 240, 56 Am. Dec. 48; Littlefield v. Tinsley, 26 Tex. 353; Newberry v. French, 98 Va. 479, 36 S. E. 519.

[30] Ankeny v. Clark, 148 U. S. 345, 13 S. Ct. 617, 37 L. ed. 475.

[31] Dingey v. Paxton, 60 Miss. 1038.

[32] Ehle v. Quackenboss, 6 Hill (N. Y.) 537.

To constitute a perfect title there must be a union of the same elements, namely, actual possession, the right of possession, and the right of property.[33] Strictly speaking, there is no such title as a "perfect title." Where the phrase was embodied in a contract of sale, it was said to mean such a title as is perfect and safe to a moral certainty; a title which does not disclose a patent defect which suggests the possibility of a lawsuit to defend it; a title such as a well-informed and prudent person paying full value for the property would be willing to take.[34] "A perfect title always carries with it, in legal contemplation, lawful seisin and possession. Such seisin and possession is co-extensive with the right, and deemed to continue until ouster by actual possession of another under claim of right."[35]

The term "good title" does not necessarily mean one perfect of record.[36] It consists in the rightful ownership of property and in the rightful possession thereof, together with the appropriate legal evidence of rightful ownership. As between vendor and purchaser, it means the legal estate in fee, free and clear of all valid claims, liens or encumbrances whatsoever.[37] It means a title free from litigation, palpable defects, and grave doubts. It should consist of both legal and equitable titles, fairly deducible of record.[38] "A good title means not merely a title valid in fact, but a marketable title, which can again be sold to a reasonable purchaser or mortgaged to a person of reasonable prudence as security for a loan of money. A purchaser will not generally be compelled to take a title when there is a defect in the record title which can be cured only by a resort to parol evidence."[39] In a contract to convey a good title, the word "good" comprehends all that the word "clear" does.[40] And the term "clear title," as used in such contract, means that there are no incumbrances on the land.[41] Where a contract of sale provided that the vendor was to furnish an abstract of title "showing a good and clear title,

[33] Donovan v. Pitcher, 53 Ala. 411, 25 Am. Rep. 634; Converse v. Kellogg, 7 Barb. (N. Y.) 590.

[34] Birge v. Bock, 44 Mo. App. 69.

[35] Altschul v. O'Neill, 35 Ore. 202, 58 Pac. 95.

[36] Bloch v. Ryan, 4 App. Cas. (D. C.) 283.

[37] Jones v. Gardner, 10 Johns. (N. Y.) 269.

[38] Reynolds v. Borel, 86 Cal. 538, 25 Pac. 67.

[39] Moore v. Williams, 115 N. Y. 586, 22 N. E. 233, 5 L. R. A. 654, 12 Am. St. 844.

[40] Oakey v. Cook, 41 N. J. Eq. 350, 7 Atl. 495.

[41] Roberts v. Bassett, 105 Mass. 409.

free from defects," it was held that the contract was not performed where the abstract shows defects which may or may not exist in the title as tested by the original records, and an incumbrance which may or may not be barred by limitation.[42]

§ 76. **Bad, defective, imperfect and doubtful titles.**—A bad title is one which conveys no property to the purchaser of the estate.[43] But the word "bad," when used in connection with title, is merely a vulgarism, and the fact that it is commonly used does not make it any the less a vulgarism.

A title is said to be defective when the party who claims to own the land has not the whole title, but some other person has title to a part or portion of it.[44] A defective title is the same as no title whatever.[45]

An imperfect title is one where something remains to be done by the granting power to pass the fee in land.[46]

A doubtful title is one which turns upon some question of law or fact which the court considers so doubtful that the purchaser will not be compelled to accept the title and incur the risk of a lawsuit by adverse claimants. Just what matters of law or fact are sufficient to make a title so doubtful as to be unmarketable can not be indicated by positive rules. A doubtful title has also been defined to be one which conveys no property to the purchaser of the estate.[47] Every title is doubtful which invites or exposes the party holding it to litigation.[48]

§ 77. **Marketable titles.**—The term "marketable title," when applied to real estate, means a title free from reasonable doubt.[49] A reasonable doubt concerning the title exists when there is uncertainty as to some fact appearing in the course of its deduction, and the doubt must be such as affects the value of the property or will interfere with its sale.[50] It means a title that is

[42] Kane v. Rippey, 24 Ore. 338, 33 Pac. 936.

[43] Heller v. Cohen, 15 Misc. 378, 36 N. Y. S. 668, 71 N. Y. St. 582.

[44] Copertini v. Oppermann, 76 Cal. 181, 18 Pac. 256.

[45] Place v. People, 192 Ill. 160, 61 N. E. 354.

[46] Paschal v. Perez, 7 Tex. 348.

[47] Heller v. Cohen, 15 Misc. 378, 36 N. Y. S. 668, 71 N. Y. St. 582.

[48] Herman v. Somers, 158 Pa. St. 424, 27 Atl. 1050, 38 Am. St. 851.

[49] Austin v. Barnum, 52 Minn. 136, 53 N. W. 1132; Sproule v. Davies, 69 App. Div. 502, 75 N. Y. S. 229; Holmes v. Woods, 168 Pa. St. 530, 32 Atl. 54; Morrison v. Waggy, 43 W. Va. 405, 27 S. E. 314.

[50] Vought v. Williams, 120 N. Y. 253, 24 N. E. 195, 8 L. R. A. 591, 17 Am. St. 634; Schenck v. Wicks, 23 Utah 576, 65 Pac. 732.

reasonably free from such doubts as will affect the market value of the estate; one which a reasonably prudent person with knowledge of all the facts and their legal bearing would be willing to accept.[51]

The title should be not only good, but indubitable.[52] It should at least be such a title as would insure to the purchaser a peaceful enjoyment of the property.[53] If a reasonable doubt remains, after the vendor has produced all the proof he is able to produce, the title is not marketable, and the purchaser is not obliged to take it.[54] A title may be perfect, and yet not be marketable. For instance, suppose the validity of A's title depends upon the question whether or not he is next of kin to B. If he is in fact the next of kin to B, his title is perfect. But if he is unable to show to the court beyond a reasonable doubt that he is such, then his title, though really perfect if all the facts could be shown, will be deemed unmarketable.[55] The title may be good in fact, but to be marketable it must be good of record.[56] The fact that the title is capable of being made good by the production of oral testimony or by affidavits, does not make it a marketable title where the record does not show the title to be good.[57] "The authorities hold that to render a title marketable it is only necessary that it shall be free from reasonable doubt; in other words, that a purchaser is not entitled to demand a title absolutely free from every possible suspicion. He can only demand such title as a reasonably well-informed and intelligent purchaser, acting upon business principles, would be willing to accept."[58] "A title open to a reasonable doubt is not a marketable title. The court can not make it such by passing upon an objection depending upon a disputed question of fact or a doubtful question of law, in the absence of the party in whom the outstanding right was vested. He would

[51] Roberts v. McFadden, 32 Tex. Civ. App. 47, 74 S. W. 105.

[52] Ormsby v. Graham, 123 Iowa 202, 98 N. W. 724.

[53] Barnard v. Brown, 112 Mich. 452, 70 N. W. 1038, 67 Am. St. 432.

[54] Shriver v. Shriver, 86 N. Y. 575.

[55] Eggers v. Busch, 154 Ill. 604, 39 N. E. 619; Reynolds v. Strong, 82 Hun (N. Y.) 202, 31 N. Y. S. 329, 63 N. Y. St. 778.

[56] Bloch v. Ryan, 4 App. D. C. 283; Close v. Stuyvesant, 132 Ill. 607, 24 N. E. 868, 3 L. R. A. 161; Brown v. Widen (Iowa), 103 N. W. 158; Horn v. Butler, 39 Minn. 515, 40 N. W. 833; Kane v. Rippey, 22 Ore. 296, 23 Pac. 180; Speakman v. Forepaugh, 44 Pa. St. 363.

[57] Howe v. Coates, 97 Minn. 385, 107 N. W. 397, 4 L. R. A. (N. S.) 1170, 114 Am. St. 723; Speakman v. Forepaugh, 44 Pa. St. 363.

[58] Cummings v. Doian, 52 Wash. 496, 100 Pac. 989, 132 Am. St. 986.

not be bound by the adjudication, and could raise the same question in a new proceeding. * * * It would especially be unjust to compel a purchaser to take a title, the validity of which depended upon a question of fact, where the facts presented upon the application might be changed on a new inquiry or are open to opposing influences."[59]

§ 78. **Evidences of title.**—The legal title to land is made up of a series of documents required to be executed with the solemnities prescribed by law, and of facts not evidenced by documents, which show that the claimant is a person to whom the law gives the estate, such as an heir, a tenant in dower, and an adverse holder for the statutory period of limitation. Documentary evidences of title consist of voluntary grants by the sovereign, deeds of conveyance and wills by individuals, conveyances by statutory or judicial permission, deeds made in connection with a sale of land for delinquent taxes, proceeding in the exercise of the power of eminent domain, and deeds executed by ministerial or fiduciary officers. A person is not deemed the legal owner of land until there exists such documents and facts as the law requires for the transfer of title to him. He may be entitled to a conveyance, but is not deemed the legal owner until the proper conveyance has been made.[60] It is with the instruments which are relied upon to evidence the title, and to the outward assertive acts that import dominion, that the abstracter has to do in compiling an abstract, and that the attorney must examine in order to determine the true status of the title.

§ 79. **Title insurance.**—The business of insuring titles to real estate has become quite extensive in the larger cities and older settled parts of the country. Financial corporations of large capital and established responsibility, that have, practically, perpetual chartered life, empowering them to issue policies of insurance of titles, operative without limit as to time, are to be found in almost every state. In consideration of the payment of a certain premium, the amount of which is fixed by special agreement, guided by rates proportional to the amount insured, these companies issue such policies to owners of lands, or to their mortgagees, agreeing to insure the party interested and his trans-

[59] Fleming v. Burnham, 100 N. Y. 1, 2 N. E. 905.

[60] Page v. Rogers, 31 Cal. 294.

ferees, his heirs, devisees, and personal representatives, against all loss or damage, not exceeding the sum named in the policies, which the insured shall sustain, not only by reason of any defects of title, or from incumbrances affecting the designated property, but also against all loss or damage by reason of the unmarketability of the title of the insured in the premises. By force of such policies, the liability of the insuring companies extends, not merely in favor of the contracting party and his heirs, etc., but also in favor of any third person to whom he may have transferred the policy. It also extends to defects of title, and to the existence of any encumbrance, whether discoverable or not by the most thorough and complete searches, provided only that any judgments adverse to the title shall be pronounced, under the conditions named, by any competent court. As a rule the defects insured against must exist at the time the contract is entered into, and any defects arising after the date of the policy are not covered by it. But it is not necessary that the defect should actually exist at the date of the policy in order to bind the insurer in case of subsequent loss. It is sufficient if there be in existence on the date of the policy an inchoate or potential defects which the happening of some subsequent event renders substantial and real. In all cases of title insurance the rights and liabilities of the parties are measured by the terms and conditions of the contract. The policy is usually issued on a written application by the insured, and it usually provides that the application shall be held to be a warranty of the facts therein stated. When the contract has been agreed upon and the policy issued, it is subject to the same rules of construction as are applicable to policies of other kinds of insurance.

CHAPTER IV

METHODS OF ACQUIRING TITLE

SEC.
85. Title by descent and by purchase.
86. Title by descent based on laws of inheritance.
87. Common-law canons of descent.
88. Rules of descent under the civil law.
89. Consanguinity and affinity.
90. Fact of death.
91. Fact of intestacy.
92. Title by purchase classified.
93. Title by private deed.
94. Official grants.
95. Public grants.
96. Devise.
97. Title by estoppel in general.
98. Estoppel by record.
99. Estoppel by deed.
100. Estoppel in pais.
101. Relation.
102. Prescription and limitation.
103. Accretion and alluvion.
104. Title to riparian lands.
105. Dedication.
106. Confirmation.
107. Occupancy.
108. Abandonment.
109. Eminent domain.
110. Title and rights acquired by condemnation.
111. Escheat.
112. Confiscation.
113. Forfeiture.

§ 85. Title by descent and by purchase.—Most authorities agree that title to real property is acquired either by descent or by purchase. The former method includes only those cases in which property passes from an ancestor to his heirs by virtue of the law of descent. The latter method includes all those cases where title to property is acquired by a method other than by descent. It is only when the law transfers property to an heir that title is obtained by descent.[1] The interests of dower and curtesy, though created by law, do not come within the doctrine of descents.[2] But where the heirs at law of a testator are given the same estates or shares that the law would have cast upon them in case of intestacy, they are said to take by descent, even though the estate be charged with incumbrances.[3]

The principal distinction between title by descent and title by purchase is that by the latter method the estate acquires a new inheritable quality and is rendered descendible to the blood in general of the person acquiring it. An estate thus acquired will not,

[1] Hutchinson Investment Co. v. Caldwell,, 152 U. S. 65, 14 Sup. Ct. 504, 38 L. ed. 356.

[2] 4 Kent Com., p. *374, note (c).

[3] Jackson v. Alsop, 67 Conn. 249, 34 Atl. 1106; Thomas v. Miller, 161 Ill. 60, 43 N. E. 848; Frick Coal Co. v. Laughead, 203 Pa. 168, 58 Atl. 172.

like that acquired by descent, render the owner answerable for the acts of his ancestors.[4] Such statutory rules as require ancestral blood as a prerequisite to descent do not operate upon estates acquired by purchase.[5] In title by descent, the inheritance is cast upon the heir, whether he is willing or not, immediately upon the death of the ancestor.

§ 86. Title by descent based on laws of inheritance.—Inheritance is not a natural or absolute right, but is purely a creature of statutory law, and the state may enact laws under which real property may descend, and may preclude any other mode or law of descent.[6] It may designate what person or persons shall inherit an estate, or whether the estate shall be inherited by any person whomsoever. Hence, at any time prior to the vesting of an estate by the death of the owner thereof, the line of inheritance may be changed by statute, and the statute affecting such change will control the succession of the estate, and may increase or diminish the number of the heirs at law; may entirely destroy the expectancy of the heir apparent, or may cast the descent upon those who previously did not possess the right of inheritance.[7] But after the interest of an heir has become vested by the death of his ancestor, it remains subject to administration, and may be sold to pay decedent's debts and the expenses of administration.[8]

The right to inherit is said to rest in public policy, and is dependent upon the will of the legislature, except as restricted by constitutional provision.[9] To discover who are the rightful heirs, and to provide how and in what proportions the inheritance shall pass, is the purpose of all statutes and canons of descent. In most of the states of this country, the statutes of descent are modeled after the English statutes for the distribution of personalty, and these statutes were taken from the rules of the civil law.[10] The great object of these statutes of distribution was to accomplish an equal distribution of the estate. In this respect their pro-

[4] Kohl v. United States, 91 U. S. 367, 23 L. ed. 449; Burt v. Merchants' Ins. Co., 106 Mass. 356, 8 Am. Rep. 339.

[5] Ramsey v. Ramsey, 7 Ind. 607.

[6] Wilson v. Storthz, 117 Ark. 418, 175 S. W. 45; National Safe Deposit Co. v. Stead, 250 Ill. 584, 95 N. E. 973; Northern Trust Co. v. Buck, 263 Ill. 222, 104 N. E. 1114; Cole v. Taylor, 132 Tenn. 92, 177 S. W. 61.

[7] Gregley v. Jackson, 39 Ark. 487.

[8] Overturf v. Dugan, 29 Ohio St. 230.

[9] In re Colbert's Estate, 44 Mont. 259, 119 Pac. 791.

[10] Rountree v. Pursell, 11 Ind. App. 522, 39 N. E. 747; Blackborough v. Davis, 1 P. Wms. 41; Lloyd v. Tench, 2 Vesey 215.

visions were in striking contrast with the common-law canons of descent. The intention of the modern statutes of descent is to follow the lead of the natural affections of the intestate, and to consider as most worthy the claims of those who stand nearest to his affections.[11] While it is true that the descent and distribution of property in most states is governed entirely by statute, it is also true that in the construction of such statutes and in determining the meaning of the words and terms employed, heed is given to the meaning attached to such words and terms by the common law. When words of a definite signification under the common law are used in such statutes, and there is nothing to show that they are used in a different sense, they are deemed to be employed in their known and defined common-law meaning.[12]

§ 87. **Common-law canons of descent.**—The feudal system introduced in England a theory for the devolution of lands and landed property founded upon military services. With some modifications, it became the common law of descent in that country. By its rules, actual seisin or seisin in deed was indispensable to the inheritable quality of estates. If the ancestor was not seised, no matter how clear his right of property, the heir could not inherit. Hereditaments descended lineally, but could never ascend. The oldest son was admitted to the inheritance, to the exclusion of his brothers and sisters, and males before females. Lineal descendants in infinitum represented their ancestors, standing in the same place the ancestor would have stood if living; and on failure of lineal descendants, the inheritance descended to the collateral relations, being of the blood of the first purchaser, subject to the preceding rules. The collateral heir of the intestate was required to be his collateral kinsman of the whole blood. In collateral inheritances, the male stock was preferred to the female, and kindred of the blood of the male ancestor, however, remote, was admitted before those of the blood of the female, however near, unless the lands in fact descended from a female. These canons of descent had two leading purposes in view: The first, to preserve the inheritance in the blood of that family by whom it was originally acquired;

[11] Garland v. Harrison, 8 Leigh (Va.) 368.

[12] Holt v. Agnew, 67 Ala. 360; Truelove v. Truelove, 172 Ind. 441, 86 N. E. 1018, 88 N. E. 516, 27 L. R. A. (N. S.) 220n, 139 Am. St. 404; Allen's Appeal, 99 Pa. St. 196, 44 Am. Rep. 101n; Apple v. Apple, 38 Tenn. 348.

the second, to preserve the inheritance entire by keeping it for the time being in a single representative of that family by which it was acquired. While these common-law canons of descent have never been in force to any considerable extent in this country, and while our statutes are designed to cover every conceivable case or state of circumstances that can surround the descent of property,[13] yet as our laws of descent are so interwoven with the common law, and are so generally based upon it, a review of the common-law canons will not be out of place in this connection; and an examination of each will show how far the spirit of such canons is incorporated, if at all, in our statutes of descent. These canons are usually given as seven in number, and are as follows:

(1) Inheritances shall lineally descend to the issue of the person who died last actually seised, in infinitum, but shall never lineally ascend.[14]

(2) The male issue shall be admitted before the female.[15]

(3) That where there are two or more males in equal degree, the eldest only shall inherit, but the females altogether.[16]

[13] Cloud v. Bruce, 61 Ind. 171; Bruce v. Bissell, 119 Ind. 525, 22 N. E. 4, 12 Am. St. 436.

[14] Bates v. Brown, 5 Wall. (U. S.) 710, 18 L. ed. 535; Rountree v. Pursell, 11 Ind. App. 522, 39 N. E. 747; 2 Bl. Comm. 208. Descent in this country is traced from the person last entitled to the land regardless of whether he was actually seised, or whether he obtained the land by purchase or descent. 4 Kent's Comm. 388; Kelly v. McGuire, 15 Ark. 555; Thompson v. Sanford, 13 Ga. 238; Guion v. Burton, Meigs (Tenn.) 565. The principle that inheritances shall never lineally ascend is also generally abrogated, and in most jurisdictions parents and grandparents are now permitted to inherit in case there be no issue of the intestate owner. Magness v. Arnold, 31 Ark. 103; Gardner v. Collins, 2 Pet. (U. S.) 58, 7 L. ed. 347; Leonard v. Lining, 57 Iowa 648, 11 N. W. 623; Albee v. Vose, 76 Maine 448; McDowell v. Adams, 45 Pa. St. 430; 2 Bl. Comm. 212. This rule of descent has never been adopted in this country, so that for all purposes of inheritance no distinction is made between males and females in either lineal or collateral lines of inheritance. Albee v. Vose, 76 Maine 448; McCracken v. Rogers, 6 Wis. 278.

[15] However, a modified preference for males may be found in some states in cases where the estate has come to the intestate by purchase. In such cases it passes first to those of the paternal ancestral line in preference to those of the maternal kin in the same degree. Kountz v. Davis, 34 Ark. 590; Magee v. Doe, 9 Fla. 382; In re Kane's Estate, 38 Misc. 276, 77 N. Y. S. 874; Wright v. Wright, 100 Tenn. 313, 45 S. W. 672. In other states no preference is given to the male line, but where the estate came to the intestate in any manner other than by gift, devise, or descent, it is divided into two equal parts and given one part each to the paternal and maternal line, and on failure of either the other takes the whole estate. Murphy v. Henry, 35 Ind. 442.

[16] This rule has never prevailed in this country, but instead, all descendants of equal degree of consanguinity to the ancestor, take in equal shares as tenants in common, regardless of sex. Jewell v. Jewell, 28 Cal. 232; Brewer v. Blougher, 14 Pet. (U. S.) 178, 10 L. ed. 408; Jewell v.

(4) That the lineal descendants in infinitum of any deceased person shall represent their ancestor, that is, shall stand in the same place as the person himself would have done had he been living.[17]

(5) On failure of lineal descendants, or issue of the person last seised, the inheritance shall descend to his collateral relations, being of the blood of the first purchaser, subject to the preceding rules.[18]

Jewell, 28 Cal. 232; Joslin v. Joslin (Iowa), 75 N. W. 487; Dodge v. Beeler, 12 Kans. 524; Benson v. Swan, 60 Maine 160; Benedict v. Beurmann, 90 Mich. 396, 51 N. W. 461; Waldron v. Taylor, 52 W. Va. 284, 45 S. E. 336.

[17] 2 Bl. Comm. 217. This doctrine is called taking by right of representation or per stirpes. By statute in a great many states this right is extended to grandchildren and more remote descendants, and all relations of the intestate, whether lineal or collateral. Under such statutes, those nearest in degree of consanguinity to the intestate, remaining alive at his death, are taken as the basis of distribution. Cox v. Cox, 44 Ind. 368; Balch v. Stone, 149 Mass. 39, 20 N. E. 322. When all the heirs are in the same or equal degree of consanguinity to the intestate, they take per capita, or in equal shares. Taylor v. Cribbs, 174 Ala. 217, 56 So. 952; Baker v. Bourne, 127 Ind. 466, 26 N. E. 1078; Pittsburg &c. R. Co. v. Reed, 44 Ind. App. 635, 88 N. E. 1080; Snow v. Snow, 111 Mass. 389; Staubitz v. Lambert, 71 Minn. 11, 73 N. W. 511; Fisk v. Fisk, 60 N. J. Eq. 195, 46 Atl. 538; Barber v. Brundage, 50 App. Div. 123, 63 N. Y. S. 347; Ellis v. Harrison, 140 N. Car. 444, 53 S. E. 299; In re Cremer's Estate, 156 Pa. St. 40, 26 Atl. 782. But if the heirs are in different degrees of consanguinity, the more remote take per stirpes, or by representation. Kilgore v. Kilgore, 127 Ind. 276, 26 N. E. 56; Ernest v. Freeman, 129 Mich. 271, 88 N. W. 636; In re Shedaker, 74 N. J. Eq. 802, 70 Atl. 659; In re Dunning, 48 Misc. 482, 96 N. Y. S. 1110; Pond v. Bergh, 10 Paige (N. Y.) 140; In re Person's Appeal, 74 Pa. St. 121; Haynes v. Walker, 111 Tenn. 106, 76 S. W. 902. By statute in some states no representation shall be admitted among collaterals beyond the children of brothers and sisters. Campbell's Appeal, 64 Conn. 277, 29 Atl. 494, 24 L. R. A. 667; In re Schlosser, 116 N. Y. S. 796; Conant v. Kent, 130 Mass. 178; In re Rogers' Estate, 131 Pa. St. 382, 18 Atl. 871.

[18] 2 Bl. Comm. 220. This rule is now altered so that the estate goes to the lineal ascendants, if any, in preference to collateral relations. 4 Kent Comm. 392; Magness v. Arnold, 31 Ark. 103; Hillhouse v. Chester, 3 Day (Conn.) 166, 3 Am. Dec. 265; Leonard v. Lining, 57 Iowa 648, 11 N. W. 623; Bolinger v. Beacham, 81 Kans. 746, 106 Pac. 1094; King v. Middlesbough Town &c. Co., 106 Ky. 73, 50 S. W. 37, 1108, 20 Ky. L. 1859. In so far as this canon requires the heir to be of the blood of the first purchaser, it may be said to have but limited application in this country, as here regard is generally had only to the immediate descent from the ancestor last seised. Murphy v. Henry, 35 Ind. 442. Those having the blood of the last ancestor may inherit, and the word ancestor in this connection means the person from whom the immediate descent is had and not the first purchaser. This includes the half, as well as the whole blood for by the blood of the ancestor it is merely intended to mark the class in which the heirs are to be found. In re Ranck's Appeal, 113 Pa. St. 98, 4 Atl. 924; Miller v. Speer, 38 N. J. Eq. 567; Brower v. Hunt, 18 Ohio St. 311. By this rule an inheritance could not pass in the ascending line, except only through some collateral ascendant; Smith v. Gaines, 35 N. J. Eq. 65.

(6) The collateral heirs of the person last seised must be the next collateral kinsman of the whole blood.[19]

(7) In collateral inheritance male stock shall be preferred to female, unless where the lands have in fact descended from a female.[20]

§ 88. **Rules of descent under the civil law.**—Under the civil-law rules of descent three orders of succession were created: (1) That of descendants, (2) that of ascendants, and (3) that of collaterals. The descendants of an intestate ancestor, whether adoptive or natural, or whether emancipated or not, succeed to his estate, without any distinction as to sex or degree, to the exclusion of all the other relatives of such ancestor. If such descendants were all in the first degree of relationship to the ancestor they shared the succession per capita, otherwise it passed per stirpes. If such ancestor left no such descendants the inheritance belonged to the heirs of the ascending line, with the exception that where there were brothers and sisters of the whole blood of such intestate surviving him, the inheritance was divided between them, and the heirs of the ascending line share and share alike. But if there were no brothers or sisters of the whole blood, the nearest ascendant took the entire estate to the exclusion of

[19] 2 Bl. Comm. 224. This rule of excluding the half blood is not in harmony with the spirit of our laws of descent, and has never been adopted by any of the states. In some states, however, a preference is given to kinsmen of the whole blood in the amount of the estate to be taken; Petty v. Malier, 15 B. Mon. (Ky.) 591; Hulme v. Montgomery, 31 Miss. 105; Marlow v. King, 17 Tex. 177; and in others the half blood is postponed in the inheritance to those of the whole blood. Chirac v. Reinecker, 2 Pet. (U. S.) 613, 7 L. ed. 538; Keller v. Harper, 64 Md. 74, 1 Atl. 65; Stark v. Stark, 55 Pa. St. 62. Where the statute provides that collateral kindred of the half blood take equally with those of the whole blood, except where the estate came to the intestate by gift, devise, or descent from an ancestor, such kindred of the half blood share only where they are of the blood of the ancestor from whom the estate came. Gardner v. Gardner 42, Utah 40, 129 Pac. 360; Stevenson v. Gray, 46 Ind. App. 412, 89 N. E. 509; Stockton v. Frazier, 81 Ohio St. 227, 90 N. E. 168, 26 L. R. A. (N. S.) 603n. But, generally speaking, no discrimination is made against those of the half blood, and they will, as a rule, inherit equally with those of the whole blood in the same degree. Carter v. Carter, 234 Ill. 507, 85 N. E. 292; Pond v. Irwin, 113 Ind. 243, 15 N. E. 272; Finley v. Abner, 4 Ind. Terr. 386, 69 S. W. 911; Tays v. Robinson, 68 Kans. 53, 74 Pac. 623; Larrabee v. Tucker, 116 Mass. 562; Stark v. Stark, 55 Pa. St. 62.

[20] Bl. Comm. 234. This rule does not obtain in this country. Generally, no preference, even among collaterals, is given on account of sex. But in some states male ascendants are given preference over female ascendants. Kountz v. Davis, 34 Ark. 590; In re Kane's Estate, 38 Misc. 276, 77 N. Y. S. 874; Wright v. Wright, 100 Tenn. 313, 45 S. W. 672.

those more remote. If ascendants of the same degree were part in the paternal line and part in the maternal, the inheritance was given in equal parts to each line without any regard as to whether there were more in the same degree in the one line than in the other. Each line took one-half the inheritance. In the absence of heirs, either in the ascending or descending line, the collateral heirs succeeded. First, brothers and sisters of the whole-blood, and then brothers and sisters of the half-blood. By right of representation the children of a deceased brother or sister were entitled to the share of their deceased parent, but this right of representation did not extend to grandchildren of such deceased brother or sister. If there were no brothers or sisters of either the whole or the half-blood, or children of such brothers or sisters, the inheritance passed to the nearest relation in whatever degree, and where there were several of the same degree they took such inheritance per capita, not per stirpes.[21]

§ 89. **Consanguinity and affinity.**—Consanguinity is the connection or relation of persons descended from the same stock or common ancestor.[22] It is having in common the blood of such ancestor.[23] Some portion of the blood of such common ancestor flows through the veins of all his descendants, however mixed such blood may be with that of others, and constitutes the kindred by blood between any two of such descendants. Such blood relationship is of two kinds, either lineal or collateral. Lineal consanguinity is that which subsists between persons, one of whom is in a direct line from the other, either upward in direct ascending line as from son to father or grandfather, or downward in the direct descending line, as from father to son or grandson; and in every generation in lineal, direct consanguinity constitutes a different degree, reckoning either upward or downward.[24] Collateral consanguinity, on the other hand, is that which subsists between persons who are lineally descended from the same common ancestor, but not from each other.[25]

In considering this subject of consanguinity care should be

[21] 118, 127 Justinian, Sanders' Institutes 388.

[22] State v. DeHart, 109 La. 570, 33 So. 605; Farmers' Loan &c. Co. v. Iowa Water Co., 80 Fed. 467.

[23] Holt v. Watson, 71 Ark. 87, 71 S. W. 262; Sweezey v. Willis, 1 Bradf. (N. Y.) 495; Blodget v. Brinsmaid, 9 Vt. 27.

[24] Brown v. Baraboo, 90 Wis. 151, 62 N. W. 921, 30 L. R. A. 320.

[25] Oklahoma Rev. Laws (1910) § 8423; McDowell v. Addams, 45 Pa. St. 430.

taken not to confound the rules for ascertaining the degree of kindred with the rules of descent. A canon of descent is one thing, a rule for the ascertainment of the next of kin is another.[26]

Affinity is the relationship contracted by marriage between a husband and his wife's kindred and between a wife and her husband's kindred, in contradistinction from relationship by consanguinity or blood.[27] By marriage one spouse holds by affinity the same relation to the kindred of the other that the other holds by consanguinity. And such relationship is no more lost by the dissolution of the marriage than the relationship by blood is lost through death.[28] Relationship by affinity ceases with the dissolution of the marriage creating it, except so far as the children of such marriage are concerned.[29] But there is no affinity between the blood relatives of the husband and the blood relatives of the wife.[30]

While the words "of consanguinity" import the same as the word kindred,[31] and while a man's kindred, in the proper signification of the term, means such persons as are related to him by the ties of consanguinity,[32] the terms must not be taken as strictly synonymous, as the word kindred is given a broader meaning that may include relatives in law and by affinity or even by adoption, as well as those by blood.[33]

§ 90. Fact of death.—One can not take the property of another as his heir, or claim a succession through him, without proof of the death of such other, or the establishment of such facts as will raise a presumption of his death.[34] The claimant has the burden of proving the facts necessary to sustain his right, including the death of the alleged intestate or of facts from which his death may be legally presumed.[35]

[26] Humphries v. Davis, 100 Ind. 274, 50 Am. Rep. 788.

[27] Farmers' Loan &c. Co. v. Iowa Water Co., 80 Fed. 467; Holt v. Watson, 71 Ark. 87, 71 S. W. 262; Ex parte Harris, 26 Fla. 77, 7 So. 1, 6 L. R. A. 713, 23 Am. St. 548; Tegarden v. Phillips (Ind.), 39 N. E. 212.

[28] Spear v. Robinson, 29 Maine 531; Carman v. Newell, 1 Denio (N. Y.) 25; Waterhouse v. Martin, Peck, (Tenn.) 392.

[29] Trout v. Drawhorn, 57 Ind. 570.

[30] Trout v. Drawhorn, 57 Ind. 570; Paddock v. Wells, 2 Barb. Ch. (N. Y.) 331.

[31] Leigh v. Leigh, 15 Ves. 92.

[32] Wetter v. Walker, 62 Ga. 142; Farr v. Flood, 11 Cush. (Mass.) 24.

[33] Power v. Hafley, 85 Ky. 671, 4 S. W. 683; Delano v. Bruerton, 148 Mass. 619, 20 N. E. 308, 2 L. R. A. 698.

[34] Boe v. Filleul, 26 La. Ann. 126.

[35] Hurdle v. Stockley, 6 Houst. (Del.) 447; Martin v. Royse, 21 Ky. L. 775, 52 S. W. 1062; Miller v. McElwee, 12 La. Ann. 476; Johnson v. Merithew, 80 Maine 111, 13 Atl. 132, 6 Am. St. 162; Schaub v. Griffin, 84 Md. 557, 36 Atl. 443; In re Taylor, 20 N. Y. S. 960.

Some statutes provide that where a person has been absent from his last place of residence without having been heard from for seven years by those who would naturally have heard from him if he had been alive, and where diligent and ineffectual search has been made wherever there was a reasonable probability that he could be found or information leading to the discovery of his whereabouts, a presumption of his death arises and authorizes letters of administration upon his estate.[36] There is no presumption as to the time of death within the seven years, and in the absence of proof the absentee is presumed to be living for seven years from the time of his disappearance.[37] These statutes have a limited application and do not include cases lying outside the letter of them, and in cases not connected with administration of the estates of absentees the common-law rule that one is not presumed dead until after an unexplained absence of seven years still obtains.[38] It is within the power of a state to provide for the administration of the estates of persons who are absent for such a length of time as gives rise to a reasonable presumption of death, and while probate courts possess general authority to settle estates of deceased persons, they are without authority to administer the property of living persons.[39] The general rule is, that letters of administration, granted upon the estate of a living person, are absolutely void, and it makes no difference if, through his absence long continued, a presumption of death has arisen. In such case the presumption may be overthrown, and a decree granting letters may be collaterally impeached.[40] So if any person presumed to be dead is, in fact, alive, any distribution of his estate to those who would be entitled to it if he were dead would be void and would not affect his title.[41] Ordinarily, however, the death of a person leaving property to be administered upon is a matter of such notoriety that proof of his death is of

[36] Donovan v. Major, 253 Ill. 179, 97 N. E. 231; Policemen's Benevolent Assn. v. Ryce, 213 Ill. 9, 72 N. E. 764, 104 Am. St. 190; Henderson v. Bonar, 11 Ky. L. 219, 11 S. W. 809; Esterly's Appeal, 109 Pa. St. 222.

[37] Schaub v. Griffin, 84 Md. 557, 36 Atl. 443; in re Mutual Benefit Co., 174 Pa. St. 1, 34 Atl. 283, 52 Am. St. 814.

[38] Connecticut Mut. L. Ins. Co. v. King 47 Ind. App. 587, 93 N. E. 1046.

[39] Cunnius v. Reading School Dist., 198 U. S. 458, 25 Sup. Ct. 721, 49 L. ed. 1125, 3 Ann. Cas. 1121.

[40] Griffith v. Frazier, 8 Cranch (U. S.) 9, 3 L. ed. 471; Duncan v. Stewart, 25 Ala. 408, 60 Am. Dec. 527; Jochumsen v. Suffolk Sav. Bank, 3 Allen (Mass.) 87; Devlin v. Commonwealth, 101 Pa. St. 273; 47 Am. Rep. 710; Fisk v. Norvel, 9 Tex. 13, 58 Am. Dec. 128.

[41] Stevenson v. Montgomery, 104 N. E. 1075, 263 Ill. 93, Ann. Cas. 1915 C, 112n.

easy access among his neighbors and relatives. Whatever may be the facts presented to the probate court in support of death, if deemed sufficient to confer jurisdiction, is prima facie evidence of the fact of such death. So the issue of letters testamentary or of administration is taken as prima facie evidence of the death of the person named therein as testator or intestate, and is regarded as the highest and best evidence of title in the heir.

§ 91. **Fact of intestacy.**—Intestacy will be presumed upon proof of death and heirship;[42] but this presumption may be rebutted.[43] Testacy is an affirmative, and intestacy a negative, fact.[44] And one whose claim to heirship is uncontroverted is not called upon to show negatively that his decedent did not die testate.[45] Where an unmarried person has been absent for such a length of time as will create the presumption of death, he will be presumed to have died intestate.[46] Upon the failure of a devise, the land descends to the heirs of the testator as intestate property.[47] A statute prescribing rules of descent when a person seised of lands dies "without having devised" them, does not apply when the owner dies testate as to the lands.[48]

§ 92. **Title by purchase classified.**—For convenience, title by purchase may be divided into: (1) Title by alienation, and (2) title by purchase other than by alienation. Under the first division are included: (1) Alienation by deed or grant, and (2) alienation by devise. Under the second division, or title by purchase other than by alienation, may be classed: (1) Title by escheat, (2) title by occupancy, (3) title by accretion, (4) title by forfeiture, (5) title by abandonment, (6) title by estoppel, (7) title by prescription, (8) and title by adverse possession. In the sections following these various methods of requiring title by purchase will be briefly considered, and only those general

[42] Sims v. Boynton, 32 Ala. 353, 70 Am. Dec. 540; Murphy v. Crowley, 140 Cal. 141, 73 Pac. 820; Whitham, v. Ellsworth, 259 Ill. 243, 102 N. E. 223; McClanahan v. Williams, 136 Ind. 30, 35 N. E. 897; Baxter v. Bradbury, 20 Maine 260, 37 Am. Dec. 49; Barson v. Mulligan, 191 N. Y. 306, 84 N. E. 75, 16 L. R. A. (N. S.) 151.

[43] Sielbeck v. Grothman, 248 Ill. 435, 94 N. E. 67, 21 Ann. Cas. 229.

[44] Lyon v. Kain, 36 Ill. 362.

[45] Chase v. Woodruff, 133 Wis. 555, 113 N. W. 973, 126 Am. St. 972.

[46] Barson v. Mulligan, 191 N. Y. 306, 84 N. E. 75.

[47] Walker v. Bradbury, 15 Maine 207; In re Filbert, 195 Pa. St. 295, 45 Atl. 733.

[48] Morse v. White (Mich.) 148 N. W. 970.

features that the examiner of titles should know will be presented.

§ 93. Title by private deed.—Conveyances of estates of inheritance or freehold in land, or of any interest in it more than for a short term of years, must be by deed in writing; and this is expressly declared by statute in many states, and is implied by the statutory provisions of other states. Statutes providing for the conveyance of interests in real property by deed do not attempt to define a deed nor to state all its essentials, hence resort must be had to the common law for a definition of the term. The common-law understanding of a deed "is an instrument written in parchment or paper, whereunto ten things are necessarily incident, viz.: (1) Writing; (2) parchment or paper; (3) a person able to contract; (4) by a sufficient name; (5) a person able to be contracted with; (6) by a sufficient name; (7) a thing to be contracted for; (8) apt words required by law; (9) sealing; (10) delivery."[49] While the word "deed," at common law, implied a sealed instrument,[50] under modern statutes the seal may be dispensed with.[51] The word "deed" in its broadest meaning includes all varieties of sealed instruments; in its secondary and more common meaning it signifies a writing under seal conveying real estate.[52] In some jurisdictions the term "deed" embraces every instrument in writing by which any real estate or interest therein is created, aliened, mortgaged, or assigned, or by which the title thereto may be affected in law or equity, except last wills and leases for one year or less.[53] A deed of conveyance is not merely evidence of a gift or other grant; but it is the gift or grant itself, and ipso facto operates to transfer or convey the title of the property described to the donee or grantee.[54] In order for an instrument to be good as a deed it must convey a present interest in the property attempted to be conveyed.[55]

[49] Co. Lit. 35b.

[50] People v. Watkins, 106 Mich. 437, 64 N. W. 324; Jackson v. Wood, 12 Johns. (N. Y.) 73; McLeod v. Lloyd, 43 Ore. 260, 71 Pac. 795, 74 Pac. 491.

[51] Burk v. Johnson, 146 Fed. 209, 76 C. C. A. 567; Tatum v. Tatum, 81 Ala. 388, 1 So. 195; Atlanta, &c. R. Co. v. McKinney, 124 Ga. 929, 53 S. E. 701, 6 L. R. A. (N. S.) 436, 110 Am. St. 215.

[52] Malsby v. Gamle, 61 Fla. 310, 54 So. 766; Fisher v. Pender, 52 N. Car. 483.

[53] Solt v. Anderson, 71 Nebr. 826, 99 N. W. 678.

[54] Alferitz v. Arrivillaga, 143 Cal. 646, 77 Pac. 657.

[55] Givens v. Ott, 222 Mo. 395, 121 S. W. 23.

§ 94. **Official grants.**—Official grants are such as are made by state or federal officers acting under statutory or judicial authority, and which do not dispose of public property, but transfer title from one private person to another without the cooperation of the former, and even against his wish in certain cases. They are illustrated by sales under execution; foreclosure sales; conveyances by guardians, executors and administrators under statutory or judicial permission; sales for non-payment of taxes and assessments; and other transfers under judicial process, judgment or decree. While these conveyances are variously termed "judicial sales," "involuntary sales," etc., it is deemed proper to include them under the head of "official grants" to distinguish them from private and public grants.

The transfer of real estate by official grant is sometimes said to be an involuntary transfer on the part of the owner. It is true, however, that when such owner incurs or assumes a debt, he impliedly consents to or authorizes the sale of his property on execution for the purpose of paying the debt. In any event the validity of the title passed by such sale does not depend upon his mental attitude, but upon a compliance with the law of procedure in making the sale and transfer. Title by official grant will be discussed at some length in subsequent chapters, as great care and skill must be exercised by both abstracter and counsel in dealing with them as muniments of title.

§ 95. **Public grants.**—A direct conveyance of public lands from the state or federal government to a private person is usually termed a "public grant." Such conveyances are supposed to rest upon a different foundation from that of private conveyances. They emanate from the sovereign power, according to certain rules and forms of proceeding prescribed by itself for the regulation of its own action. Such a grant is not only an appropriation of the land, but is itself a perfect title.[56]

Officers are appointed and commissioned by the government for the express purpose of conducting and supervising all the preliminary proceedings from the origin to the consummation of the title; and when these incipient measures are completed, and the grant issued, the law presumes that the government agents have performed their duty and that the grant is valid.[57] But a

[56] Green v. Liter, 8 Cranch (U. S.) 229, 3 L. ed. 545.

[57] Brush v. Ware, 16 Pet. (U. S.) 93, 10 L. ed. 672.

claimant of public lands acquires no vested rights, as against the sovereign, until all the prerequisites for the acquisition of the title have been complied with.[58] Before such grants can be made the lands must be surveyed in accordance with the federal laws,[59] unless there is a special statute to the contrary.[60]

The usual method by which the sovereign divests itself of title to public lands is by patent issued in conformity to prescribed legal formalities, but a settler who has entered public lands, has from such entry, an inchoate title, which is in legal sense, property, and subject to defeat only by his failure to comply with the conditions imposed by the acts of congress.[61] While the naked legal title remains in the government until a patent is issued, the beneficial ownership or equitable title is vested in the entryman from the time he receives a certificate of purchase from the government showing full payment for the land. When such patent is issued, it does not convey to the entryman a new or independent title derived from such entry and final payment, but converts the imperfect or equitable title into a perfect legal title.[62] Also a legislative confirmation of a claim to land is a recognition of the validity of such claim, and operates as effectually as a grant from the government.[63] The sovereign being the source of title for all lands, the original grant therefrom is the first link in the chain of title, and whatever may be the form of this grant, the abstract should, whenever practicable, begin with that document.

§ 96. **Devise.**—The term "devise" means primarily a dividing or division, and when used as a noun denotes a gift of real property by will. When used as a verb, however, it denotes the act of disposing of real property by will; and when used in the latter sense it is the proper term to be used in a will to denote a gift of real property. Alienation by devise is secondary in common use only to deeds as a mode of transferring title to real estate. The instrument by which this form of alienation of land is effected is termed a will. The land thus alienated, as

[58] Guthrie v. Beamer, 3 Okla. 652, 41 Pac. 647.

[59] Stark v. Starrs, 6 Wall. (U. S.) 402, 18 L. ed. 925; Rector v. Gaines, 19 Ark. 70; Daniels v. Lansdale, 43 Cal. 41 (affirmed 100 U. S. 113, 25 L. ed. 587).

[60] Carson v. Smith, 5 Minn. 78, 77 Am. Dec. 539.

[61] Culbertson Irr. &c. Co. v. Olander, 51 Nebr. 539, 71 N. W. 298.

[62] Hagan v. Ellis, 39 Fla. 463, 22 So. 727, 63 Am. St. 167.

[63] Langdean v. Hanes, 88 U. S. (21 Wall.) 521, 22 L. ed. 606.

well as the title thereto, is called a devise, and the beneficiary named in the instrument, a devisee. The will is a legal declaration of the testator's intention or wish respecting what shall be done after his death touching the disposition of his property. It does not pass a present interest or right in the property, but such right or interest takes effect only at his death. During his lifetime it is entirely inoperative; in other words, the will is ambulatory during the life of its maker. It is in effect reiterated as his will at each moment during his life. It will be distinguished from a deed in that the latter instrument must pass a present interest in the land. Whether, therefore, an instrument be a deed or a will, depends upon whether the maker intended the estate to vest before his death and upon execution of the instrument, or whether he intended that all the interest and estate should take effect only after his death. If the former, it is a deed; if the latter, a will; and it is immaterial whether he calls it a will or a deed, the instrument will operate according to its legal effect.[64] Where the instrument is in the form of a deed, but possession and enjoyment is postponed until after the death of the grantor, it is a deed nevertheless.[65] While alienation by devise is an effective mode of transferring title to real estate, yet such title is subject to be defeated by a sale to make assets for the payment of the testator's debts and the expenses of administration.

§ 97. **Title by estoppel in general.**—Title by estoppel "is where equity, and in some cases the law, in order to accomplish the purposes of justice which can not be otherwise reached, draws certain conclusions from the acts of one party in favor of another, in respect to the ownership of lands, which it does not allow the first to controvert or deny."[66] It arises from the fact that he who would otherwise be the owner of property is precluded by his own act or representation to assert, as against another claimant, his right or interest therein. The doctrine of estoppel does not operate to force a title on one against his will.[67] But it is generally held that when a real estoppel affecting land is established, it does transfer the title from the person estopped, in

[64] Adair v. Craig, 135 Ala. 332, 33 So. 902; Wall v. Wall, 30 Miss. 91, 64 Am. Dec. 149.

[65] West v. Wright, 115 Ga. 277, 41 S. E. 602.

[66] 3 Wash. Real Prop. § 70.

[67] Tucker v. Clarke, 2 Sandf. Ch. (N. Y.) 96.

such manner that the person estopped can not subsequently transfer to another any substantial interest.[68] "The vital principle of estoppel is that he who by his language or conduct leads another to do what he would not otherwise have done shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is strictly forbidden. It involves fraud and falsehood, and the law abhors both. This remedy is always applied so as to promote the ends of justice. It is available only for protection, and can not be used as a weapon of assault. It accomplishes that which ought to be done between man and man, and is not permitted to go beyond that limit. It is akin to the principle involved in the limitation of actions, and does its work of justice and repose where the statute can not be invoked."[69] Like the office of injunctions in equity, estoppel at law precludes rights that can not be asserted consistently with good faith and justice, and prevents wrongs for which there might be no adequate remedy.[70] The relation of the parties must be such that the estoppel may be mutual.[71] It follows from the very principle on which the whole doctrine of estoppel rests, that they operate neither in favor of nor against strangers, but affect only the parties thereto and their privies, either in blood, in estate, or in law; and hence a stranger can neither take advantage of, nor be bound by, an estoppel. This principle applies equally to estoppels by deed, by record, and in pais.[72]

§ 98. **Estoppel by record.**—By estoppel by record is meant the preclusion by a party to deny the truth of matters set forth in judicial or legislative records. A judgment, sentence, order, or decree passed by a court of competent jurisdiction, which creates or charges a title or any interest in an estate, is not only final as to the parties themselves, and all claiming under them, but furnishes conclusive evidence to all mankind that the right or interest belongs to the party to whom the court ad-

[68] Contra Salisbury Savings Soc. v. Cutting, 50 Conn. 113; Thalls v. Smith, 139 Ind. 496, 39 N. E. 154; Ayer v. Philadelphia & Boston B. Co., 159 Mass. 84, 34 N. E. 177; Mutual Life Ins. Co. v. Corey, 135 N. Y. 326, 31 N. E. 1095.

[69] Dickerson v. Colgrove, 100 U. S. 578, 25 L. ed. 618.

[70] Van Rensselaer v. Kearney, 11 How. (U. S.) 297, 13 L. ed. 703; Buckingham v. Hanna, 2 Ohio 551.

[71] Wilson v. Holt, 91 Ala. 204, 8 So. 794.

[72] Simpson v. Pearson, 31 Ind. 1, 99 Am. Dec. 577.

judges it.[73] So the recital in the record of a court imparts absolute verity, and all parties thereto are estopped from denying its truth.[74]

The general rule is that a judgment record is evidence by way of estoppel in subsequent actions, only of such facts as were legitimately within the issues to be tried therein as a part of the merits of the case, and either expressly, or by necessary implication, determined.[75] To constitute an estoppel by a former judgment, the precise point which is to create the estoppel must have been put in issue and decided; and this must appear from the record alone.[76] But it has been held that the effect of a former adjudication extends to all the issues which might have been raised and litigated in the case.[77] The estoppel of a judgment binds the privies as well as the parties.[78] A party to a suit may be estopped by the averments of his pleadings.[79] A decree alloting dower to a widow in all the lands of which her husband died seised will estop her from subsequently asserting a parol trust in her favor in any such lands.[80] Estoppel by judgment is merely an arbitrary arrangement based on no other principle than political necessity.

§ 99. Estoppel by deed.—An estoppel by deed is that which arises from the covenants or recitals in a deed, by which the grantor makes it appear that he is the rightful owner of the estate therein described; in such case if the grantor has no title at the time of the conveyance, but afterwards acquires title, either by descent or purchase, he is precluded from asserting the same against his grantee, he being estopped to deny that he had, at the time when he executed the deed, the title or estate described in such deed.[81] Of this form of estoppel it has been said: "No

[73] Prince v. Antle, 90 Ky. 138, 13 S. W. 436, 11 Ky. L. 927; Grevemberg v. Bradford, 44 La. 400, 10 So. 786.

[74] Ex parte Rice, 102 Ala. 671, 15 So. 450.

[75] Fairman v. Bacon, 8 Conn. 418; Woodgate v. Fleet, 44 N. Y. 1, 11 Abb. Prac. (N. S.) 41.

[76] Wixon v. Devine, 91 Cal. 477, 27 Pac. 777; Williams v. Hacker, 16 Colo. 113, 26 Pac. 143; Smith v. Sherwood, 4 Conn. 276, 10 Am. Dec. 143; Stephens v. Motl, 82 Tex. 81, 18 S. W. 99.

[77] Donnell v. Wright, 147 Mo. 639, 49 S. W. 874.

[78] Cox v. Crockett, 93 Va. 50, 22 S. E. 840.

[79] Winn v. Strickland, 34 Fla. 610, 16 So. 606.

[80] Boyd v. Redd, 118 N. Car. 680, 24 S. E. 429.

[81] Croft v. Thornton, 125 Ala. 391, 28 So. 84; Watkins v. Wassell, 15 Ark. 73; Klumpke v. Baker, 68 Cal. 559, 10 Pac. 197; Parker v. Jones, 57 Ga. 204; Owen v. Brookport, 208 Ill. 35, 69 N. E. 952; Glendinning v. Superior Oil Co., 162 Ind. 642, 70 N. E.

person can be allowed to dispute his own solemn deed, which is therefore conclusive against him, and those claiming under him, even as to the facts recited in it. The general rule is that an indenture estops all who are parties to it, while a deed poll only estops the party who executes it, since it is his sole language and act."[82] An estoppel by recital binds the grantor and all who take his estate, privies in blood, privies in estate, and privies in law.[83] The recital does not bind persons who are not privies of the grantor, such as claimants by adverse or prior title, or the grantor's creditors.[84] A party to a deed must be, sui juris, competent to make an effectual contract, to be estopped by a recital.[85] In a deed by a corporation, a recital by the person who executes it in behalf of the corporation, that he was duly authorized to execute it, estops him to deny that he was so authorized.[86] But, even as between the parties, recital is not binding when the proceeding is really collateral to the deed and the title thereby conveyed. In such case the facts recited may be disputed.[87] A conveyance is not affected by a false recital made by the same grantor on the same day in conveying an adjoining lot to a different grantee.[88]

A recital, to have the effect of an estoppel, must be a distinct recital of particular facts, and not a recital in general terms. Where a distinct statement of a particular fact is made in a recital, and the parties act with reference to that recital, it is not, as between them, competent for the party bound to deny the recital.[89] A recital, to operate as an estoppel, must also be clear

976; Dickerson v. Talbot, 53 Ky. 60; Benton v. Sentell, 50 La. Ann. 869, 24 So. 297; Williams v. Thurlow, 31 Maine 392; Williams v. Peters, 72 Md. 584, 20 Atl. 175; Dye v. Thompson, 126 Mich. 597, 85 N. W. 1113; Kaiser v. Earhart, 64 Miss. 492, 1 So. 635; Jewell v. Porter, 11 Fost. (N. H.) 34; Moore v. Rake, 26 N. J. L. 584; Jackson v. Winslow, 9 Cow. (N. Y.) 13; Hallyburton v. Slagle, 130 N. Car. 482, 41 S. E. 877; Broadwell v. Phillips, 30 Ohio St. 255; Taggart v. Risley, 3 Ore. 306; Wingo v. Parker, 19 S. Car. 9; Johnson v. Brauch, 9 S. Dak. 116, 68 N. W. 173; Burkitt v. Twyman, (Tex. Civ. App.) 35 S. W. 421; Raines v. Walker, 77 Va. 92; Walker v. Arnold, 71 Vt. 263, 44 Atl. 351; Clark v. Lumbert, 55 W. Va. 512, 47 S. E. 312; Shepherd v. Kahle, 120 Wis. 57, 97 N. W. 506; Balch v. Arnold, 9 Wyo. 17, 59 Pac. 434.

[82] Shep. Touch. 53.

[83] Doe v. Errington, 6 Bing. N. Cas. 79; Bank of U. S. v. Benning, 4 Cr. C. C. 81.

[84] De Farges v. Ryland, 87 Va. 404, 12 S. E. 805, 24 Am. St. 659; West v. Pine, 4 Wash. (U. S.) 691, Fed. Cas. No. 17423.

[85] Bank of America v. Banks, 101 U. S. 240, 25 L. ed. 850.

[86] Stow v. Wyse, 7 Conn. 214, 18 Am. Dec. 99.

[87] Bank of America v. Banks, 101 U. S. 240, 25 L. ed. 850.

[88] Bay v. Pasner (Md.) 29 Atl. 11.

[89] Carpenter v. Buller, 8 Mees. & W. 209.

and without ambiguity,[90] and the instrument must be so executed as to be binding on both parties.[91]

If one having no title to land conveys it with covenants of warranty, and this is duly recorded, and afterwards the grantor acquires title to the land, the estoppel by which he is bound under the covenants is turned into a good estate in interest in the grantee, so that by operation of law the title is considered as vested in him in the same manner as if it had been conveyed to the grantor before he executed the deed. The grantor is estopped to say he was not then seised. Then, if the grantor executes another conveyance, and this and the deed by which the grantor acquired his title are both recorded together, which grantee has the better title? The estoppel binds not only the grantor and his heirs, but his assigns as well. A second grantee is therefore estopped to aver that the grantor was not seised at the time of his making the first conveyance, and that conveyance being first recorded must have priority.[92] But if a mortgagor has title at the time of executing two mortgages, the fact that one contains covenants of warranty does not give it priority over the other which contains no such covenants, if the latter be first filed for record.[93]

A quitclaim deed or other deed without warranty does not have the effect of estopping the grantor from setting up a superior right and title subsequently acquired from another source.[94] To sustain a deed made before the grantor acquires title is certainly a violation of the spirit of the registry system, under which a record is notice only to subsequent purchasers and incumbrancers in the line of the title to which the recorded deed belongs. It has been insisted, therefore, with much force, that a second grantee, under a deed made after the grantor had acquired title and recorded his deed to himself, should be preferred to the first grantee, whose deed the second grantee, in following the title back to the

[90] Palmer v. Ekins, 2 Ld. Raym. 1550.

[91] Chicago &c. R. Co. v. Keegan, 152 Ill. 413, 39 N. E. 33.

[92] Christy v. Dana, 34 Cal. 548, 42 Cal. 174; Salisbury Sov. Soc. v. Cutting, 50 Conn. 113; Boone v. Armstrong, 87 Ind. 168; Warburton v. Mattox, Morris (Iowa) 367; Pike v. Galvin, 29 Maine 183, 30 Maine 539; Knight v. Thayer, 125 Mass. 25; Bramlett v. Roberts, 68 Miss. 325, 10 So. 56; Gotham v. Gotham, 55 N. H. 440; Semon v. Terhune, 40 N. J. Eq. 364, 2 Atl. 18; Crane v. Turner, 67 N. Y. 437; Philly v. Sanders, 11 Ohio St. 490, 78 Am. Dec. 316; Jarvis v. Aikens, 25 Vt. 635. See, however, White & Tudor's Lead. Cases in Eq. 4th Am. ed. Vol. 2, pt., p. 212.

[93] Vandercook v. Baker, 48 Iowa 199.

[94] Smith v. Pollard, 19 Vt. 272; Doswell v. Buchanan, 3 Leigh 365, (Va.) 23 Am. Dec. 280.

time his grantor acquired title, would not find of record. In this view of the question, a subsequent purchaser or creditor is not bound to take notice of a conveyance not lying in the line of title, though actually recorded; and he is not bound to search for conveyances as against his grantor previous to the time when the grantor obtained his title to the land.[95] "A recorded deed by one who has no title, but who afterwards acquires the title by recorded deed, is not constructive notice to a subsequent purchaser in good faith from the common grantor. We think when he searches till he finds the deed by which his grantor acquires the title, he is not bound to look for deeds made prior to that time. Such prior deeds are not 'in the line of title,' as that term is used by conveyancers and searchers."[96] But notwithstanding the objections, the title by estoppel in such cases is sometimes sustained; and if a purchaser fails to examine the record, to ascertain whether the grantor had made a conveyance prior to the time of receiving and recording the conveyance to himself, he runs the risk of acquiring an imperfect title.[97]

§ 100. **Estoppel in pais.**—The doctrine of estoppel in pais is that, one can not deny the existence of the state of facts which he, or one in privity with him, with full knowledge of the facts, or with the duty of knowing the facts, has asserted to be true, or where he has by false representations, intended to deceive, or by silence when under a duty to speak, or by any other acquiescence, after discovering the right, or by conduct calculated to mislead, induced another to act, or refrain from acting, to his prejudice.[98]

[95] Prince v. Case, 10 Conn. 381, 27 Am. Dec. 675; Salisbury Sav. Soc. v. Cutting, 50 Conn. 113, and note 122; Way v. Arnold, 18 Ga. 181; Farmers' Loan &c. v. Maltby, 8 Paige (N. Y.) 361; Woods v. Farmere, 7 Watts, (Pa.) 382; M'Lanahan v. Reeside, 9 Watts (Pa.) 508; Calder v. Chapman, 52 Pa. St. 359, 91 Am. Dec. 163. See also Rawle on Covenants, 4th ed. 428; Bigelow on Estoppel, 331; McCusker v. McEvey, 9 R. I. 528, 11 Am. Rep. 295; 10 R. I. 606.

[96] Ford v. Unity Church Soc., 120 Mo. 498, 25 S. W. 394, 23 L. R. A. 561, 41 Am. St. 711. See also Crockett v. Maguire, 10 Mo. 34; Dodd v. Williams, 3 Mo. App. 278.

[97] Digman v. McCollum, 47 Mo. 372; Buckingham v. Hanna, 2 Ohio 551.

[98] Crawford v. Engram 157 Ala. 314, 47 So. 712; Waits v. Moore, 89 Ark. 19, 115 S. W. 931; Hancock v. King, 133 Ga. 734, 66 S. E. 949; Seberg v. Iowa Trust &c. Bank, 141 Iowa 99, 119 N. W. 378; Criley v. Cassel, 144 Iowa 685, 123 N. W. 348; Schott v. Linscott, 80 Kans. 536, 103 Pac. 997; Conley v. Murdock, 106 Maine 266, 76 Atl. 682; Barbieri v. Messner, 106 Minn. 102 118 N. W. 258; Mason v. Ross, 75 N. J. Eq. 136, 71 Atl. 141; In re Saunders, 129 App. Div. 406, 113 N. Y. S. 251; Rothschild v. Title Guarantee &c. Co., 139 App. Div. 672, 124 N. Y. S. 441; Falls City Lumber Co. v. Watkins, 53 Ore. 212,

This form of estoppel is based upon the principle that, if a party, having proprietary rights, so conducts himself in regard thereto as to induce another party to act in regard to the same property upon a different assumption to his loss, the former is thereby estopped from asserting the contrary thereafter, because his otherwise innocent conduct would not only be changed to fraud, but he would be enabled to profit thereby. In other words, where one has done an act or said a thing, and another has relied on the act or word, as he had a right to do, and has shaped his conduct accordingly, and will be injured if the former can repudiate the act, the actor or speaker is estopped from so doing.[99]

The essential elements necessary to create estoppel in pais are that the party sought to be estopped has previously, by words, acts or conduct made representations or concealment of material facts, inconsistent with those forming the basis of the present claim; that he knew or should have known the falsity of such representations, or pretended to know the facts when he did not know them; that he had the present intent to influence the conduct of another thereby, or should know that a reasonably prudent man would suppose it was intended to be acted on; that the latter was ignorant of the true facts and had no convenient opportunity to learn them; and that the latter in good faith relied thereon to his prejudice.[1] The person claiming the estoppel must have been without knowledge, actual or constructive, of the facts,[2] and must himself have been free from fraud,[3] since the doctrine of estoppel, being a creature of equity, can be interposed only to prevent injustice, and not to work injustice.[4] An estoppel can not be based on a mere mistake of law,[5] and one can not claim estoppel by reason of an agreement which he must have known as a matter of law was unenforcible.[6] Nor can one base an estoppel on declarations not made to him, nor intended to be communicated

99 Pac. 884; In re Kimmel's Estate, 226 Pa. 47, 75 Atl. 23; Kenny v. McKenzie, 25 S. Dak. 485, 127 N. W. 597; Ragley-McWilliams Lumber Co. v. Hare, 61 Tex. Civ. App. 509, 130 S. W. 864; Bender v. Brooks, 61 Tex. Civ. App. 464, 130 S. W. 653; Dudley v. Strain (Tex. Civ. App.) 130 S. W. 778.

[99] Fagan v. Stuttgart Normal Institute, 91 Ark. 141, 120 S. W. 404; Trimble v. King, 131 Ky. 1, 114 S. W. 317, 22 L. R. A. (N. S.) 880n.

[1] Musconetcong Iron Works v. Delaware &c. R. Co., 76 N. J. L. 717, 76 Atl. 971.

[2] Logan v. Davis, 147 Iowa 441, 124 N. W. 808.

[3] Breaux v. Hanson Lumber Co., 125 La. Ann. 421, 51 So. 444.

[4] Mattox v. Hightshue, 39 Ind. 95.

[5] Logan v. Davis, 147 Iowa 441, 124 N. W. 808.

[6] Norris v. Letchworth, 140 Mo. App. 19, 124 S. W. 559.

to him.[7] An estoppel can not arise in favor of one who knows the truth;[8] and where both parties have equal knowledge or equal means of ascertaining the truth there can be no estoppel.[9] Acts committed by one when ignorant of his rights can not create an estoppel.[10]

That a state or the United States, as well as individuals, may be estopped by its acts, conduct, silence, and acquiescence, is established by a line of well adjudicated cases.[11] There are cases, however, which hold that the doctrine does not apply to a state as it does to individuals.[12] These latter holdings are based upon the general doctrine that the state can not divest herself of title except by grant or other record evidence.[13]

No estoppel can ordinarily arise from the act of a municipality or officer thereof done in violation or without authority of law.[14] But it has been held that a city is estopped to set up any claim to streets, alleys, and public squares, which had been platted as such, but had remained in one body and had been utilized by the original owners and their grantees for more than thirty years, and continuously subject to taxation as private property.[15] The rights of property in land, depending for proof of their existence upon the testimony of adverse possession, are also rights by estoppel but it is the estoppel in pais that operates. If the owner of land permits another to occupy it under a claim of title for the statutory period of limitation, he is estopped from denying that the occupant has legal title. The law presumes from the adverse holding, first, a grant in fee from the state, and second, either that the occupant is that grantee, as the original party, or as a secondary party by descent, devise, or assignment; and the party claiming otherwise, is estopped to show the contrary. When the fact of adverse possession is established it is accepted in law

[7] Townsend Sav. Bank v. Todd, 47 Conn. 190; Morgan v. Spangler, 14 Ohio St. 102; McLaren v. Jones, 89 Tex. 131, 33 S. W. 849.

[8] Brigham-Young Trust Co. v. Wagner, 12 Utah 1, 40 Pac. 764.

[9] Crabtree v. Bank of Winchester, 108 Tenn. 483, 67 S. W. 797; Parkey v. Ramsey, 111 Tenn. 302, 76 S. W. 812; Cautley v. Morgan, 51 W. Va. 304, 41 S. E. 201.

[10] Briggs v. Murray, 29 Wash. 245, 69 Pac. 765.

[11] State v. Milk, 11 Fed. 389; Hough v. Buchanan, 27 Fed. 328; United States v. McLaughlin, 30 Fed. 147 (affirmed 127 U. S. 428, 8 S. Ct. 1177, 32 L. ed. 213); Commonwealth v. Andre, 3 Pick. (Mass.) 224; State v. Flint &c. R. Co., 89 Mich. 481, 51 N. W. 103.

[12] Farish v. Coon, 40 Cal. 33; Fannin Co. v. Riddle, 51 Tex. 360.

[13] Saunders v. Hart, 57 Tex. 8.

[14] Seeger v. Mueller, 133 Ill. 86, 24 N. E. 513.

[15] Smith v. Osage, 80 Iowa 84, 45 N. W. 404, 8 L. R. A. 633.

as substitutional evidence of title in the place of charters, patents, deeds, and all other kinds of evidence used in the law to prove title.

§ 101. Relation.—Relation is a fiction of law whereby an act done at one time operates as if done at another time. By its operation effect is given to instruments, which without it would be invalid. Thus, a deed not acknowledged until long after its execution has been held to take effect from its date, the acknowledgement operating as of that time by relation.[16] It has its most frequent application to sheriff's sales, where the deed is not made for some time after the sale, but when it is made, relates back to the sale, and, in so far as the defendant in the execution and his privies and strangers purchasing with notice are concerned, vests the title in the purchaser from that time.[17] "The title acquired by the deed of the officer relates back to the date of the judgment lien, for the judgment is the source of his authority, and by such relation the last act is carried back to the first in making out the title, and takes priority as of the date of the first, which is the day of the judgment lien."[18] Where a deed is delivered in escrow the title only passes on the performance of the condition or the happening of the event, except in certain cases where by the doctrine of relation the deed is allowed to take effect from the first delivery. This relation back to the first delivery is permitted, however, only in cases of necessity and where no injustice will be done, to avoid injury to the operation of the deed from events happening between the first and second delivery.[19]

The doctrine is applicable for the purpose of protecting the equities of the parties on the performance of the conditions of delivery,[20] but is inapplicable to a case where the death of the grantor renders a subsequent performance of conditions impossible.[21] As between the parties to a deed it may sometimes, for the furtherance of justice, be permitted, in its operation, to relate back to the date of a contract of purchase, unless to so permit

[16] Lincoln v. Thompson, 75 Mo. 613.

[17] Ozark Land &c. Co. v. Franks, 156 Mo. 673, 57 S. W. 540.

[18] Hibberd v. Smith, 67 Cal. 547, 4 Pac. 473, 8 Pac. 46, 56 Am. Rep. 726.

[19] Prutsman v. Baker, 30 Wis. 644, 11 Am. Rep. 592.

[20] Whitmer v. Schenk, 11 Idaho 702, 83 Pac. 775.

[21] McIntyre v. McIntyre, 147 Mich. 365, 110 N. W. 960.

it would operate to do wrong to strangers.[22] Where a deed once executed has been lost and the grantor executes a second deed, it may, in some instances, be permitted to relate back to the time of the first deed.[23]

§ 102. **Prescription and limitation.**—Prescription is a term applied to the mode of acquiring title to incorporeal hereditaments by immemorial or long-continued use and enjoyment. The period of such use and enjoyment now generally corresponds with the period of legal limitation for obtaining title to land by adverse possession.[24] To acquire title by prescription the user must be adverse,[25] exclusive,[26] peaceable,[27] notorious,[28] and continuous.[29] "Prescription" implies an original grant,[30] and can only be for things which may be created by grant.[31]

Both prescription and limitation are dependent for their validity upon possession, and in each case the possession must be that of him who claims title by virtue thereof. In both cases this possession must be coupled with lapse of time in order to complete the title. In prescription, the common law fixes what length of enjoyment shall be deemed evidence of an ownership of an incorporeal right, while as to limitation, being land, the period is fixed by statute beyond which no one may set up a title adverse to the presumed title of him who has for that length of time enjoyed the uninterrupted possession of same.[32] The statutes of limitations usually provide that no action for the recovery of the title or possession of real estate shall be maintained after twenty years from the time the cause of action accrued, while in case the adverse holder claims a title exclusive of any other right, founding his claim upon some written instrument, judgment or decree, a shorter time is frequently sufficient.[33] A title founded upon prescription or limitation is good as against all save the sovereign power,[34] and where, as sometimes happens, it is diffi-

[22] Jackson v. Bard, 4 Johns. (N. Y.) 230, 4 Am. Dec. 267.
[23] Hodges v. Spicer, 79 N. Car. 223.
[24] Nicholls v. Wentworth, 100 N. Y. 455.
[25] Dexter v. Tree, 117 Ill. 532.
[26] Kilburn v. Adams, 7 Metc. (Mass.) 33.
[27] Lehigh Valley R. Co. v. McFarlan, 31 N. J. Eq. 706.
[28] Carbrey v. Willis, 7 Allen (Mass.) 368.
[29] Pollard v. Barnes, 2 Cush. (Mass.) 191.
[30] Ft. Smith v. McKibbin, 41 Ark. 45, 48 Am. Rep. 19.
[31] State v. Kansas City &c. R. Co., 45 Iowa 139.
[32] 3 Washb. Real Prop. 51.
[33] Adverse Title, Chap. 29.
[34] Gardiner v. Miller, 47 Cal. 570.

cult to trace title from a definite owner, conveyances are often accepted on the strength of an adverse holding for the statutory period of limitation.

§ 103. Accretion and alluvion.—Accretion is the increase of land by the addition of portions of soil made by the washing of the sea, a navigable river, or other water course to which the land is contiguous, whenever such increase is through the operation of natural causes and is deposited gradually so that the process can not be noticed at any moment of time.[35] The riparian rights of the owner of land bounded by a stream of water vest him with ownership of alluvial accretions gradually formed on the adjacent bank by the action of waters.[36]

The courts have not been fully agreed as to the principle on which the law of accretion is founded. The reason of the rule giving accretions to a riparian owner is that every owner of land bounded by a stream of water is subject, by reason of the gradual changing of the course thereof, to lose a portion of his land, or have the same increased in quantity by accumulations thereto, and, inasmuch as he is wholly without remedy if a loss occurs by the water washing away his land, he is entitled to whatever increase, also, that is caused by the gradual accretion or reliction.[37] Sometimes the rule is based on the riparian owners' right of access to the water.[38] When particles of the soil of one owner is gradually worn away and deposited upon the land of another, such other is entitled to claim the deposit upon the theory that the soil so deposited can not be identified by its former owner.[39] The new land formed by the addition of sand or soil by the action of the water is sometimes called "accretion,"[40] but "alluvion" is a better term for such deposit, while "accretion" more properly denotes the process by which it is deposited.[41] If an

[35] Lovingston v. St. Clair Co., 64 Ill. 56, 16 Am. Rep. 516; Benson v. Morrow, 61 Mo. 352; De Lassus v. Faherty, 164 Mo. 361, 64 S. W. 183, 58 L. R. A. 193; Houseman v. International Nav. Co., 214 Pa. 552, 64 Atl. 379.

[36] Coulthard v. Stevens, 84 Iowa 241, 50 N. W. 983, 35 Am. St. 304; Gill v. Lydick, 40 Nebr. 508, 59 N. W. 104; Denny v. Cotton, 3 Tex. Civ. App. 634, 22 S. W. 122.

[37] Sweringen v. St. Louis, 151 Mo. 348, 52 S. W. 346.

[38] Lamprey v. State, 52 Minn. 181, 53 N. W. 1139, 18 L. R. A. 670, 38 Am. St. 541.

[39] Welles v. Bailey, 55 Conn. 292, 10 Atl. 565, 3 Am. St. 48; Stern v. Fountain, 112 Iowa 96, 83 N. W. 826.

[40] Stern v. Fountain, 112 Iowa 96, 83 N. W. 826.

[41] St. Louis, &c. R. Co. v. Ramsey, 53 Ark, 314, 13 S. W. 931, 8 L. R. A. 559, 22 Am. St. 195.

island be formed in a non-navigable river between the thread thereof and one of its banks, the owner of such bank is deemed the owner of the island,[42] but if the island is formed in the middle of the river, so that the thread of the stream passes through the island, it belongs to the opposite owners in severalty, the dividing line running according to the original thread.[43] Where islands are formed in navigable rivers, lakes, or the sea, they belong to the state or national government owning the land under the water.[44]

§ 104. **Title to riparian lands.**—By the common law, both the title and the dominion of the sea, and all rivers and arms of the sea, where the tide ebbs and flows, and of all the lands below high-water mark, within the jurisdiction of the crown of England, are in the king. Such waters, and the lands which they cover, either at all times, or at least when the tide is in, are incapable of ordinary and private occupation, cultivation, and improvement; and their natural and primary uses are public in their nature for highways of navigation and commerce, domestic and foreign, and for the purpose of fishing by all the king's subjects.[45] The common law of England upon this subject, at the time of the emigration of our ancestors, is the law of this country, except so far as it has been modified by the charters, constitutions, statutes, or usages of the several colonies and states, or by the constitution and laws of the United States. In this country there is no universal and uniform law upon the subject, but each state has dealt with the lands under the tide waters within its borders according to its own views of justice and policy. The law is general that private ownership of land bordering on tide water extends only to high-water mark. The space between high and low-water mark is variously dominated "the shore," "the beach," "the flats," "the strand," "the sand," and is also designated by several other less familiar terms. The general rule is, that a boundary on the sea, a bay, navigable or tide water river is a boundary at the ordinary high-water mark.[46] A grant from the sovereign of land

[42] Grand Rapids, &c. R. Co. v. Butler, 159 U. S. 87, 15 Sup. Ct. 991, 40 L. ed. 85.

[43] Ingraham v. Wilkinson, 4 Pick. (Mass.) 268, 16 Am. Dec. 342.

[44] Cox v. Arnold, 129 Mo. 337, 31 S. W. 592, 50 Am. St. 450.

[45] Shively v. Bowlby, 152 U. S. 1, 14 Sup. Ct. 548.

[46] Long Beach Land Co. v. Richardson, 70 Cal. 206, 11 Pac. 695; Storer v. Freeman, 6 Mass. 435, 4 Am. Dec. 155; Martin v. O'Brien, 34 Miss. 21; Yard v. Ocean Beach Assn.,

bounded by the sea, or by any navigable tide water, does not pass any title below the tide water mark, unless through the language of the grant or long usage under it, it clearly indicates that such was the intention.[47] The common-law rule that the title to the shore is in the state does not include the possibility of private title derived from the sovereign or obtained by prescription.[48] In the New England states the rule of private ownership of the shore was established by an early colonial ordinance, and by usage founded thereon.[49] By virtue of this ordinance the owner in fee of upland adjoining tide waters whether of the sea or of a tidal stream, becomes the owner also of the adjacent shore, flats, or beach, one hundred rods in extent, if the tide ebbs and flows that distance; and a conveyance of upland bounded by such waters passes the grantor's title to the same extent.[50] There is a presumption that the grantor conveys the title to land covered by water so far as his own title extends, whether the conveyance is bounded by the sea, a tidal river, or a fresh-water stream, unless he expressly reserves the land under the water, or the terms of the deed indicate an intention to reserve it.[51] But this presumption may always be overcome by language in the deed showing an intention not to convey any title to the land covered by water.[52] Of course the owner in any sale may sever the upland from the flats, selling either without the other at his pleasure.[53]

The land covered by fresh-water streams not navigable is prima facie the property of the riparian proprietors, to the center of the stream. But if the same person owns the land on both sides of the stream, he owns the entire river-bed so far as his lands extend.[54] In many states the common-law rule as regards navigable lakes and rivers has been changed, and in its place the civil-law rule has been adopted, which recognizes as navigable all streams and lakes which are really so, though they are not tide

49 N. J. Eq. 306, 24 Atl. 729; New York v. Hart, 95 N. Y. 443, effg. 16 Hun 380.

[47] Shively v. Bowlby, 152 U. S. 1, 14 Sup. Ct. 548, 38 L. ed. 331.

[48] Oakes v. DeLancey, 71 Hun (N. Y.) 49, aff'd. 143 N. Y. 673, 14 N. Y. S. 294.

[49] Mass. Colony Laws (ed. 1606) p. 50.

[50] Clancey v. Houdlette, 39 Maine 451.

[51] Houck v. Yates, 82 Ill. 179; Paine v. Woods, 108 Mass. 160; Carter v. Chesapeake &c. Co., 26 W. Va. 644, 53 Am. Rep. 116.

[52] People v. Madison Co., 125 Ill. 9, 17 N. E. 147.

[53] Ladies Seamen's Friends' Soc. v. Halstead, 58 Conn. 144, 19 Atl. 658; Erskine v. Moulton, 66 Maine 276.

[54] Packer v. Bird, 137 U. S. 661, 11 Sup. Ct. 210, 34 L. ed. 819.

water rivers, and this is now the prevailing doctrine in this country.[55] A division of waters into public and private waters has been adopted in some recent decisions, and undoubtedly the tendency is to extend and assert public rights against private ownership in lakes and rivers, without much regard to any test or definition of navigability.[56]

§ 105. **Dedication.**—Dedication is the setting apart of land for public use.[57] It is essential to every valid dedication that it should conclude the owner, and that as against the public it should be accepted by the proper local authorities or by general public user.[58]

There are two kinds of dedications, statutory dedication, which is by way of grant, and common law dedication, which arises by way of an estoppel in pais. Where the statute requires that the dedication shall be evidenced in a particular way, as by plats or maps, and that they shall be acknowledged before some competent officer, these requirements must be strictly complied with.[59] The owner of land may, by virtue of his absolute dominion over it, donate or dedicate it to whomsoever he pleases. He may give it to the public, to a body corporate capable of holding it, or to a natural person, for such purposes, either public or private, as the donor sees fit to appoint. But to render such gift effectual the owner must grant or convey to the donee the land, or such interest therein as he wishes to donate, either by deed or by some equivalent mode of conveyance recognized by law. But, by the rules applicable to what is known as "common-law dedications," lands or easements therein may be dedicated to the public, so as to become effectually vested, without the aid of any conveyance. It may be done in writing, by parol, or by acts in pais, or even by acquiescence in the use of the easement by the public. A dedica-

[55] Barney v. Keokuk, 4 U. S. 324, 24 L. ed. 224; Packer v. Bird, 137 U. S. 661, 11 Sup. Ct. 210, 34 L. ed. 819; Hess v. Cheney, 83 Ala. 251, 3 So. 791; Martin v. Evansville, 32 Ind. 85; Wood v. Fowler, 26 Kans. 682, 40 Am. Rep. 330; Lamprey v. State, 52 Minn. 181, 53 N. W. 1139, 18 L. R. A. 670, 38 Am. St. 541; Benson v. Morrow, 61 Mo. 345; Hodges v. Williams, 95 N. Car. 331, 59 Am. Rep. 242.

[56] Lamprey v. State, 52 Minn. 181, 53 N. W. 1139, 18 L. R. A. 670, 38 Am. St. 541.

[57] M. E. Church v. Mayor &c. of Hoboken, 33 N. J. L. 13, 97 Am. Dec. 696.

[58] Brakken v. Minneapolis &c. R. Co., 29 Minn. 41, 11 N. W. 124; Buchanan v. Curtis, 25 Wis. 99, 3 Am. Rep. 23.

[59] Wilder v. Aurora &c. R. &c. Co., 216 Ill. 493, 75 N. E. 194.

tion of this character, to be effectual, must be to the public,[60] and not merely a public corporation.[61]

As a general rule, in order to create a common-law dedication there must be an acceptance in behalf of the public by the public authorities.[62] By the common-law method of dedication a mere easement in the land dedicated passes to the public, while the fee remains in the donor subject to be sold and conveyed by him to third persons. In such case the right of the public is paramount to that of the owner of the fee.[63] In statutory dedications the fee may vest in the public, although no express words creating such an estate are used, but this is only so in cases where the statute under which the dedication is made provides that the fee shall vest,[64] and counsel should consult the local statute on this proposition wherever dedication is involved in the title.

Dedication may be established against the owner of the soil by showing that he has platted the ground, representing streets and alleys on the plat, and has sold lots with reference to it,[65] or by showing that he has adopted a map or plat made by public officers, or other persons,[66] or by showing that he has sold lots describing them as bounded by a street or road.[67] Dedication by maps and plats are sometimes so made as to render it difficult to determine their nature and extent, and their construction is often one of difficulty for counsel in passing upon a title where such dedication is relied upon.

§ 106. **Confirmation.**—"A confirmation is the conveyance of an estate or right, that one hath in or unto lands or tenements, to another that hath possession thereof, or some estate therein, whereby a voidable estate is made sure and unavoidable, or whereby a particular estate is increased or enlarged."[68] A confirmation makes a voidable estate sure, or increases a particular

[60] Lake Erie & W. R. Co. v. Whitham, 155 Ill. 514, 40 N. E. 1014, 28 L. R. A. 612, 68 Am. St. 355.

[61] Todd v. Pittsburgh &c. R. Co., 19 Ohio St. 514.

[62] Trine v. Pueblo, 21 Colo. 102, 39 Pac. 330.

[63] M. E. Church v. Hoboken, 33 N. J. L. 13.

[64] Maywood &c. Co. v. Maywood, 118 Ill. 61, 6 N. E. 866; Wisby v. Boute, 19 Ohio St. 238.

[65] Gormley v. Clark, 134 U. S. 338, 10 Sup. Ct. 554, 33 L. ed. 909; Miller v. Indianapolis, 123, Ind. 196, 24 N. E. 228.

[66] Moale v. Baltimore, 5 Md. 314, 61 Am. Dec. 276; Methodist Church v. Hoboken, 33 N. J. L. 13.

[67] Durkin v. Cobleigh, 156 Mass. 108, 30 N. E. 474, 17 L. R. A. 270, 32 Am. St. 436.

[68] Shep. Touch. 311. See also De Mares v. Gilpin 15 Colo. 76, 24 Pac. 568; Northern Pac. R. Co. v. Majors, 5 Mont. 111, 2 Pac. 322.

estate. There must be a previous estate on which it is to operate.[69] This is the proper form of conveyance when one having aliened land for a particular purpose, voidable at his option, subsequently desires to make the estate of his grantee certain and unavoidable. It does not regularly create the estate, but operates on an existing estate by strengthening the title of the grantee who already has, or claims some right or interest therein. It is of a nature similar to a release.[70] If the original conveyance which it is attempted to validate was originally void it can not be rendered valid by a confirmation,[71] but only confirms its infirmity;[72] although such an instrument may be operative as a deed of bargain and sale.[73]

The proper words used in a deed of confirmation are "given," "granted," "ratified," "approved," and "confirmed," although other words which sufficiently show an intention to confirm may be used.[74] In modern practice the quitclaim deed is generally used instead of a confirmation.

The transfer of property of infants and other incapacitated persons may take place through the medium of a parent, guardian, committee, or next friend under order of a court of competent jurisdiction, and when the transfer is confirmed by the court the title passes to the transferee by what is termed "office grant." Confirmation by the court is a signification of its approval, and the sale is not complete without it.[75]

Conveyances defective in form, and accordingly inoperative in law, may be corrected, deeds made to the wrong grantees may be replaced by others to the right persons, or an official omission of duty may be supplied through office grants as directed by statute.[76]

Congress has made provision for the confirmation of uncertain and inchoate interests of persons claiming title through the national government or from foreign powers, and when confirmation is had by virtue of such provisions it is conclusive as between the government and the confirmee.[77] Confirmation of such claims may also be made by special act of congress. Confirmation

[69] Jackson v. Root, 18 Johns (N. Y.) 60.

[70] Turk v. Skiles, 45 W. Va. 82, 30 S. E. 234.

[71] Barr v. Schroeder, 32 Cal. 609.

[72] Branham v. San Jose, 24 Cal. 585.

[73] Fauntleroy v. Dunn, 3 B. Mon. (Ky.) 594.

[74] 2 Bl. Comm. 325.

[75] Johnson v. Cooper, 56 Miss. 608.

[76] Watson v. Mercer, 8 Pet. (U. S.) 88, 8 L. ed. 876; Leavitt v. Thornton, 123 App. Div. (N. Y.) 683, 108 N. Y. S. 162.

[77] Meader v. Norton, 11 Wall. (U. S.) 442, 20 L. ed. 184.

of such claims, whether made by commissioners, by the federal court, or by special act, has been held as to all intents and purposes a grant from the government,[78] yet it would seem that the confirmee under any such method has the equitable title only until a patent has issued for the land.[79]

§ 107. **Occupancy.**—Mere possession or occupancy is the lowest form of title, but it is good in the occupant against all the world until some one shows a better title. Occupancy is ownership with a present active use.[80] As a mode of acquiring title it does not seem to be recognized in this country. In this country there is no such thing as common property in lands. When not owned by private individuals, they are the property of either the state or national government. At the time of discovery by the nations of Europe the Indians held the use and enjoyment of his lands by occupancy, but this holding has never been regarded as property in the soil, and this government has ever reserved the right to extinguish the Indian claim by purchase or conquest.[81] Squatter sovereignty is no longer recognized, and the title to all lands rests either with the government or some private individual or corporation. Formerly in England the law restricted the right of acquiring title by occupancy to the single instance where one was tenant for the life of another who outlived him. In such case, he who could first enter on the land might lawfully retain the possession thereof so long as such person lived, by right of occupancy.[82] At the present time, however, both in England and in this country, provision is made by statute that the interest left at his death by a tenant pur autre vie, who dies prior to the one by whose life the estate is measured, is governed by the laws of descent and distribution.[83] In case the occupancy takes the form of adverse possession, or if it continues for such a period of time as to invoke the protection of the statute of limitations, we then have title by adverse possession, or prescription, or, possibly, by estoppel.

§ 108. **Abandonment.**—Strictly speaking there can be no abandonment of a legal title to real estate by mere failure to assert

[78] Challefoux v. Ducharme, 4 Wis. 554.
[79] Le Beau v. Armitage, 47 Mo. 138.
[80] New England Hospital v. Boston, 113 Mass. 518.
[81] Johnston v. McIntosh, 8 Wheat, (U. S.) 543, 5 L. ed. 681.
[82] 2 Bl. Comm. 258.
[83] 3 Washb. Real Prop. 51.

it in the absence of adverse possession. If there can not be a devolution of title by operation of an adverse possession, no abandonment for any period of time will divest the owner of title.[84] Mere abandonment of corporeal property does not effect a loss thereof; and in a strict sense this is true of incorporeal property.[85]

The term "abandonment," as used in this connection, has reference to a method of extinguishing intangible rights. Thus the right which a disseisor has before the full period of limitation has run may be lost by abandonment before such time has expired;[86] but if he holds possession until his title has become perfected by limitation, his subsequent abandonment does not divest him of such title.[87] The doctrine of abandonment, therefore, when applied strictly, has to do with incorporeal hereditaments. Title is thus lost by one, and an advantage or a title gained by another, when an owner of an easement or other servitude leaves it unused under circumstances indicating an intention not to reassert his right and the servient land is then properly so used by its owner, or some other rightful holder, that he will be injured by any further use or employment of the easement as such.[88] It must be remembered that intent becomes a material element in abandonment. Mere non-user for a certain length of time does not constitute abandonment.[89] Abandonment is a question of fact to be determined from the circumstances of each particular case.[90] Whenever it may be inferred as a matter of law, from the acts of the owner of an easement or servitude, that it was his intention to give up his rights and to lay no further claim thereto, such owner will lose his title rather upon the ground of

[84] East Tennessee Iron &c. Co. v. Wiggin, 68 Fed. 446, 15 C. C. A. 510.

[85] Holmes v. Cleveland &c. R. Co., 3 Ohio Dec. 416. It has been said, however, that "if a person having the disposing power absolutely, does an act sufficient in itself, legally to divest his title with the express intention of relinquishing and abandoning the property, it is not easy to perceive why he may not do so. Abandonment, it is said, is the relinquishment of a right; the giving up something to which one is entitled. If the owner sees proper to abandon his property, and evidences his intention by an act legally sufficient to vest or divest ownership, why may he not do so in the case of land, as well as of a chattel? It might go to the government instead of the first occupant, upon the principle upon which land escheated or became derelict." Dikes v. Miller, 24 Tex. 417.

[86] Bennett v. Atlantic Coast Line Co., 126 Ga. 411, 55 S. E. 177.

[87] Sage v. Rudnick, 67 Minn. 362, 69 N. W. 1096.

[88] Farrell v. Lockhart, 210 U. S. 142, 52 L. ed. 994.

[89] McKee v. Perchment, 69 Pa. St. 349.

[90] Corning v. Gould, 16 Wend. (N. Y.) 531.

an estoppel in pais than upon the theory of abandonment.[91] An abandonment can not be made in favor of any particular person, and must be without any intention or desire that any other particular person shall thereby acquire any rights in the property.[92]

The abandonment of a homestead by the widow or minor children destroy their homestead right in the premises.[93] But their temporary absence from the premises has been held not an abandonment such as will deprive them of the right.[94]

§ 109. Eminent domain.—Among the ways of acquiring title by purchase may be included title acquired by the exercise of the right of eminent domain.[95] Eminent domain is the rightful authority which exists in every sovereignty to control and regulate those rights of a public nature which pertain to its citizens in common, and to appropriate and control individual property for the public benefit, as the public safety, necessity, convenience, and welfare may demand. This power has its limits fixed by the constitution of the United States and of the several states which provide that private property shall not be taken for public use without just compensation.[96] The right to exercise this power is limited to cases in which the public have an interest.[97] The power may be delegated to corporations, public[98] or private,[99] and even to individuals,[1] providing such corporations or individuals are engaged in some public enterprise, and the property is taken for the benefit of the public.[2]

Cities and towns take property in this manner for streets and parks; railroad, turnpike, telegraph, telephone, canal, ferry, gas, water, and irrigation companies condemn land for right of way, and exercise this right when authorized to do so by the legisla-

[91] Welland Canal v. Hathaway, 8 Wend. (N. Y.) 840, 24 Am. Dec. 51.
[92] Stephens v. Mansfield, 11 Cal. 363.
[93] Farnan v. Borders, 119 Ill. 228, 10 N. E. 550; Carrigan v. Rowell, 96 Tenn. 185, 34 S. W. 4.
[94] Carter v. Randolph, 47 Tex. 376.
[95] Kohl v. United States, 91 U. S. 367, 23 L. ed. 449; Burt v. Merchants' Ins. Co., 106 Mass. 356, 8 Am. Rep. 339.
[96] 2 Kent Comm. 339.
[97] Board of Health v. Van Hoesen, 87 Mich. 533, 49 N. W. 894.
[98] Warner v. Gunnison, 2 Colo. App. 430, 31 Pac. 238; Kansas City v. Marsh Oil Co., 140 Mo. 458, 41 S. W. 943.
[99] Postal Telegraph-Cable Co. v. Chicago &c. R. Co., 30 Ind. App. 654, 66 N. E. 919.
[1] Pool v. Simmons, 134 Cal. 621, 66 Pac. 872; Peterson v. Bean, 22 Utah 43, 61 Pac. 213.
[2] Gaylord v. Sanitary Dist., 204 Ill. 576, 68 N. E. 522, 63 L. R. A. 582, 98 Am. St. 235; Peterson v. Bean, 22 Utah 43, 61 Pac. 213.

ture, with whom rests the power to determine the manner in which, and the purposes for which, it may be exercised.[3]

Where the public necessity requires it, any kind of property, whether tangible or intangible, is subject to condemnation.[4] Thus, where the public necessity requires it, condemnation may be had of church property,[5] a private bridge,[6] the property of a railway company,[7] the water flowing from springs,[8] the waters of a creek,[9] lands belonging to the state,[10] property of a cemetery association,[11] a homestead occupied as a residence,[12] the franchise of a corporation,[13] and lands under navigable waters owned by private individuals.[14] Also property already devoted to public use may be thus appropriated.[15]

Where it is desired to appropriate land for the purpose of establishing navy yards, arsenals, or for sites for post-office buildings, custom houses and the like, the government, if it can not secure desirable property by purchase, institutes by its proper officers proceedings in the proper courts within whose jurisdiction the land lies, to have the value of the land ascertained. Upon payment of the amount so ascertained, the title vests in the government. But this right is exercised in another way when private individuals or corporations for their own profit embark in enterprises which perform some public service. It can only be exercised by them where the property is taken for a public use, and where the property condemned is necessary to enable the public use to be carried into effect. It is also a condition that compensation must be made to the owner, and it is generally held that payment must be made before entry.[16]

[3] New York &c. R. Co. v. Long. 69 Conn. 424, 37 Atl. 1070; Chicago &c. R. Co. v. Pontiac, 169 Ill. 155, 48 N. E. 485.

[4] Rigney v. Chicago, 102 Ill. 64.

[5] Macon &c. R. Co. v. Riggs, 87 Ga. 158, 13 S. E. 312.

[6] Blaine County v. Brewster, 32 Nebr. 264, 49 N. W. 183.

[7] Pittsburgh Junction R. Co. v. Alleghany R. Co., 146 Pa. St. 297, 23 Atl. 313.

[8] Ely v. Ferguson, 91 Cal. 187, 27 Pac. 587.

[9] Santa Cruz v. Enright, 95 Cal. 105, 30 Pac. 197.

[10] Friedrichs v. New Orleans, B. & T. Co., 114 La. 95, 38 So. 32.

[11] Woodmere Cemetery v. Roulo, 104 Mich. 595, 62 N. W. 1010.

[12] Jockheck v. Board of Commissioners, 53 Kans. 780, 37 Pac. 621.

[13] Southern Pac. R. Co. v. Southern Cal. R. Co., 111 Cal. 221, 43 Pac. 602.

[14] Kerr v. West Shore R. Co., 127 N. Y. 269, 27 N. E. 833.

[15] Samish River Boom Co. v. Union Boom Co., 32 Wash. 586, 73 Pac. 670.

[16] Southern R. Co. v. Hayes, 150 Ala. 212 43 So. 487; Knoth v. Manhattan R. Co., 187 N. Y. 243, 79 N. E. 1015; State v. Wells, 142 N. Car. 590, 55 S. E. 210; McCord v. Eastern R. Co. 136 Wis. 254, 116 N. W. 845.

§ 110. **Title and rights acquired by condemnation.**—As a general rule the right or interest acquired by the exercise of the power of eminent domain is limited to the use of the property appropriated, and does not deprive the owner of the fee therein.[17] This is especially true of property condemned for a public highway,[18] a turnpike,[19] a street,[20] a park,[21] an aqueduct,[22] or a telephone route.[23] The right acquired is an easement running with the land,[24] and is usually regarded as perpetual, but in case of non-user or failure to pay damages the land reverts to the owner of the fee disincumbered of the easement.[25] While the condemnation of land for railroad purposes will usually pass an easement only,[26] yet it has been held to vest a fee in the company.[27]

The fee simple title to condemned property passes only where the absolute and unconditional price is paid therefor,[28] or where the statute provides that a complete title shall pass.[29] The power of eminent domain "when exercised acts upon the land itself, not upon the title, or the sum of the titles if there are diversified interests. Upon appropriation all inconsistent proprietary rights are divested, and not only privies but strangers are concluded. Thereafter whoever may have been the owner, or whatever may have been the quality of his estate he is entitled to full compensation according to his interest and the extent of the taking, but the paramount right is in the public, not as claiming under him, by a statutory grant, but by an independent title."[30]

[17] Morris v. Schollsville &c. Tpk. Rd., 6 Bush (Ky.) 671; Shields v. Norfolk &c. R. Co., 129 N. Car. 1, 39 S. E. 582; Muhle v. New York &c. R. Co., 86 Tex. 459, 25 S. W. 607.

[18] Hagaman v. Moore, 84 Ind. 496.

[19] Kelly v. Donahoe, 2 Metc. (Ky.) 482.

[20] Harris v. Chicago, 162 Ill. 288, 44 N. E. 437.

[21] Devine v. Lord, 175 Mass. 384, 56 N. E. 570.

[22] In re Thompson, 57 Hun (N. Y.) 419, 10 N. Y. S. 705.

[23] Lockie v. Mutual Union Tel. Co., 103 Ill. 401.

[24] Deavitt v. Washington County, 75 Vt. 156, 53 Atl. 563.

[25] Waterbury v. Platt, 76 Conn. 435, 56 Atl. 856; Chicago &c. R. Co. v. Clapp, 201 Ill. 418, 66 N. E. 223; Remey v. Iowa Cent. R. Co., 116 Iowa 133, 89 N. W. 218.

[26] Union Pacific R. Co. v. Colorado Postal Tel. &c. Co., 30 Colo. 133, 69 Pac. 564, 97 Am. St. 106; Gurney v. Minneapolis Union Elevator Co., 63 Minn. 70, 65 N. W. 136, 30 L. R. A. 534.

[27] Challiss v. Atchison &c. R. Co., 16 Kans. 117; Troy &c. R. Co. v. Potter, 42 Vt. 265, 1 Am. Rep. 325.

[28] Driscoll v. New Haven, 75 Conn. 92, 52 Atl. 618; Detroit City R. Co. v. Mills, 85 Mich. 634, 48 N. W. 1007; U. S. Pipe Line Co. v. Delaware &c. R. Co., 62 N. J. L. 254, 41 Atl. 759, 42 L. R. A. 572.

[29] Fox v. Western Pac. R. Co., 31 Cal. 538; Dodson v. Cincinnati, 34 Ohio St. 276.

[30] Weeks v. Grace, 194 Mass. 296; 80 N. E. 220, 9 L. R. A. (N. S.) 1092n, 10 Ann. Cas. 1077.

§ 111. **Escheat.**—Under the feudal system an escheat was the resumption of the fee by the lord when issue failed or where the estate was lost by the crime of the tenant. In this country when a man dies intestate and without heirs, the title to his real property reverts or escheats to the people, as forming part of the common stock of the community, it being a fundamental principle that, if the ownership of property becomes vacant, the right must necessarily subside into the whole community in whom it was vested at the origin of society. The state by sovereign right, and as the original source of all title, ownership and right of possession in lands, becomes entitled, upon the failure of heirs, to the estate of an intestate as the final and ultimate heir.

Escheat by forfeiture for corruption of blood by attainder for crime is prohibited generally in this country. With us escheat takes place only in case an owner dies intestate without heirs capable of inheriting.[31] An escheat will not be permitted so long as kindred capable of inheriting can be found. The title to land can not be in abeyance but must vest somewhere, and where the escheat is for want of heirs, it takes place at the instant the owner dies intestate and no inquisition of office is needed to vest the title.[32] In some jurisdictions, however, when property is thus acquired, the state can not make its title available without first establishing it in the manner prescribed by law.[33] But where an inquisition is provided for, it is only the means by which the state declares, ascertains, or furnishes record evidence of an escheat.[34] Lands which fall to the state by virtue of an escheat are not in the position of vacant lands, but come to the state with such rights as the last tenant held in them,[35] and will be held liable for the debts of the last owner.[36] Statutes providing for the disposition of estates of unknown heirs is, to a certain extent, a species of escheat. If such estates are not claimed it would seem that they would lapse to the state as unclaimed estates.[37]

At common law the lands of an alien may be claimed by the

[31] Meadowcroft v. Winnebago Co., 181 Ill. 504, 54 N. E. 949; Crane v. Reeder, 21 Mich. 24, 4 Am. Rep. 430; Van Kleek v. O'hanlon, 21 N. J. L. 582.

[32] State v. Reeder, 5 Nebr. 203; Mooers v. White, 6 Johns. Ch. (N. Y.) 360; Rubeck v. Gardner, 7 Watts (Pa.) 455.

[33] Wallahan v. Ingersoll, 117 Ill. 123, 7 N. E. 519.

[34] Sands v. Lynham, 27 Grat. (Va.) 291, 21 Am. Rep. 348.

[35] Hughes v. State, 41 Tex. 10.

[36] State v. Meyer, 63 Ind. 33.

[37] State v. Meyer, 63 Ind. 33.

state by escheat upon office found, but until so claimed he may convey title thereto;[38] but it has been held that the estate so conveyed may be forfeited in the hands of the grantee.[39] At common law, in the absence of direct heirs, the estates of illegitimates dying intestate escheated to the state.[40] Upon the death of an intestate owner without heirs, but leaving a wife surviving, the escheat of the property does not affect the right of dower in the wife.[41]

§ 112. **Confiscation.**—Confiscation is the act of the sovereign against a rebellious subject, or against an alien enemy during war, whereby the property of such subject or enemy is appropriated to the use of the state. It is either based upon penal justice for the punishment of crimes against the state or upon the exercise of a belligerent right against the property of public enemies.[42] The term ordinarily implies a taking by some extraordinary process, or for some extraordinary purpose other than the general purpose of government or the general process of taxation.[43] It may be employed as a punishment for carrying contraband of war, or for attempting to carry supplies to a place besieged or blockaded. It may be effected by such means, summary or arbitrary, as the sovereign, expressing its will through lawful channels, may please to adopt.[44] The estate forfeited by a proceeding in confiscation is the life estate of the offender, the fee remaining in him after the confiscation, but without power of alienation until his disability is removed.[45] It has been held that after confiscation the fee simple title was withheld from confiscation exclusively for the benefit of the heirs of the offender, and that they alone could take it at the termination of the life estate which was conveyed to the purchaser at the confiscation sale.[46]

§ 113. **Forfeiture.**—Title by forfeiture is a title which the state acquires to the property of a felon who, with his heirs, dev-

[38] Halstead v. Lake Co., 56 Ind. 363; Sheaffe v. O'Neil, 1 Mass. 256; Montgomery v. Darion, 7 N. H. 475; Abrams v. State, 45 Wash. 327, 88 Pac. 327.

[39] Scanlan v. Wright, 13 Pick (Mass.) 523, 25 Am. Dec. 344; People v. Conklin, 2 Hill (N. Y.) 67.

[40] Doe v. Bates, 6 Blackf. (Ind.) 533.

[41] 4 Kent Comm. 49.

[42] The Globe, 10 Fed. Cas. No. 5484.

[43] State v. Sargent, 12 Mo. App. 228.

[44] Winchester v. United States, 14 Ct. Cl. 13.

[45] United States v. Dunnington, 146 U. S. 338, 13 Sup. Ct. 79; Menger v. Carruthers, 3 Kans. App. 75, 44 Pac. 1096.

[46] Ledoux v. Lavedan, 52 La. Ann. 311, 27 So. 196.

isees and legatees, are deprived of it on account of, and as a punishment for, high crimes. Such forfeitures are by constitutions of many states prohibited. The constitution of the United States forbids forfeiture beyond the life of the offender, and when forfeiture is enforced, the state or national government takes only the title of the offender.[47] By statute in some states a person may be deprived of his property for certain specified causes, such for illustration as in West Virginia for failure during five consecutive years to enroll it for taxes.[48] Some states have reserved the right to take realty from a corporation that attempts to acquire more than it is authorized to hold.[49]

As between individuals forfeiture has reference to the method by which real estate reverts to a former owner by operation of law where the estate is upon condition and there has been a breach. Where the nonfulfilment of a condition works a forfeiture of the estate the grantor may re-enter at this will.[50] Conditions involving forfeitures are, however, not favored in law, and in case it is doubtful whether a clause in a deed or a covenant, the courts will construe the clause as a covenant rather than a condition.[51]

[47] Shields v. Shiff, 124 U. S. 351, 8 Sup. Ct. 510, 31 L. ed. 445.

[48] King v. Mullins, 171 U. S. 404, 18 S. Ct. 925, 43 L. ed. 214.

[49] National Bank v. Matthews, 98 U. S. 621, 25 L. ed. 188; Matter of McGraw, 111 N. Y. 66, 19 N. E. 233; Commonwealth v. New York &c. R. Co., 132 Pa. St. 591, 19 Atl. 291, 7 L. R. A. 634; Fayette L. Co. v. Louisville &c. R. Co., 93 Va. 274, 24 S. E. 1016.

[50] Woodruff v. Trenton Water Power Co., 10 N. J. Eq. 489.

[51] Peden v. Chicago &c. R. Co., 73 Iowa 328, 35 N. W. 424, 5 Am. St. 680.

CHAPTER V

THE PUBLIC RECORDS

SEC.
115. Public records generally.
116. Style of office under which recording is done.
117. What constitutes recording.
118. Object of recording acts.
119. Particular instruments which may be recorded.
120. Proper execution and acknowledgment as a prerequisite to recording.
121. Books in which instruments must be recorded.
122. Time of recording.
123. Time allowed by statute for recording deeds and other instruments.
124. Place of recording.
125. Effect of a record duly made.
126. The doctrine of notice.
127. Actual notice.
128. Implied notice.
129. Constructive notice.
130. Official tract indexes.
131. General index of records.
132. Whether the index is a part of the record.
133. Records of attachment and lis pendens.
134. Index of judgment records.
135. Tax records.
136. Records of vital statistics.
137. Abstracters' use of public records.
138. Loss or destruction of records.

§ 115. **Public records generally.**—As an abstract must set out the items of record which affect the title to a particular tract of land, the examiner must make himself familiar with the public records of the jurisdiction in which the search is to be carried on. The information or data from which the abstract must be compiled will be found in certain depositories prescribed by law, as will be hereinafter shown.

By "public record" is meant any "written memorial made by a public officer authorized by law to perform that function, and intended to serve as evidence of something written, said or done."[1] By such records interested persons may ascertain the ownership of a particular tract of land, all estates or interests therein and all liens and incumbrances thereon. By such record the deeds through which a purchaser derives his title are put in a permanent shape. Because of the fact that the entries made therein by a public officer are of public interest and notoriety such records are designated as "public records." It is a public document, belonging to the state, and is in no sense a private memorandum.[2]

[1] Bouvier Law Dict., Vol. 2, p. 424.
[2] Coleman v. Commonwealth, 25 Grat. (Va.) 865, 18 Am. Rep. 711; Clay v. Ballard, 87 Va. 787, 13 S. E. 262.

In order to give a document the character of a public record it is not necessary that there be an express statutory requirement that it shall be kept, or that it be of such a nature that its keeping is indispensable. The acts of congress and of the state legislatures are public records, and when signed by the presiding officer of both houses, approved by the executive, and filed in the proper public office, they become permanent public records of the highest type. A written history of an action at law or a suit in equity from its commencement to its termination, drawn up by the proper officer and entered upon a record provided for that purpose, is a public record of recognized dignity. In this country every conveyance of real estate by deed or mortgage is subject to recording laws, by which its priority as respects other conveyances depends for the most part upon priority of record. These laws grew up with the country, and records made in pursuance of such laws are public records. Such acts of the different states are alike in their purpose and in their most important features, but differ in minor matters and in details. Records made in pursuance of such acts are of controlling efficacy in the state where made, and full faith and credit is given in each state of the records of every other state.

§ 116. **Style of office under which recording is done.**— Public records must be kept by proper authority, and the officer making the entries must have express or implied authority to make same,[3] and the instrument must be filed with such accompaniments as make it the duty of the officer to receive it for registration.[4]

The officer charged with the duty of keeping such record and of making entries therein is variously named in the different jurisdictions. In some states the authority and duty of receiving and recording deeds is incident to an office primarily created for a different purpose. Thus in Illinois the clerk of the circuit court in all counties having a population of less than sixty thousand has the duty of registering deeds. In Nebraska the county clerk in all counties having a population not exceeding eighteen thousand and three is the proper recorder of deeds. In Maine, New Hampshire, Massachusetts, Michigan, Wisconsin, Minne-

[3] Adams v. Buhler, 131 Ind. 66, 30 N. E. 883.

[4] Cunninggim v. Peterson, 109 N. Car. 33, 13 S. E. 714.

sota, Kansas, Nebraska and the Dakotas the officer is called a "registrar of deeds;" in North Carolina and Tennessee, a "register;" in Arkansas, California, Colorado, Idaho, Illinois, Indiana, Montana, Pennsylvania and West Virginia, a "recorder;" in Delaware and Missouri, a "recorder of deeds;" and in Iowa, Nevada, Ohio and Oregon, a "county recorder." In Connecticut, Rhode Island and New Hampshire, the town clerk has the duty of recording the deeds to real estate within the corporate limits of towns, but in all other states the county is the unit for recording all instruments relating to real property. In the city of New York the "register of deeds" records all instruments of conveyance pertaining to real estate within the city limits, but deeds to lands outside the city are recorded by the clerk of the county wherein the land is situated. In New Jersey, Virginia, Kentucky, Texas, Maryland, Florida, Mississippi and Georgia, the clerk of the court of the county has the duty of recording such instruments. In Alabama such record is made and kept by the judge of the probate court. In Washington this duty is performed by the county auditor.

§ 117. **What constitutes recording.**—A deed is sufficiently recorded by depositing it with the person in charge of the registration office, though such person be neither the official recorder nor a deputy of his, for the recorder is responsible for the acts of the person whom he has placed in charge of the office and the acts of such person in custody of the records are the acts of the recorder.[5] The registration of a conveyance being purely a ministerial act, the recorder is not disqualified from acting by reason of his being a party to the deed.[6] The recorder is usually required by statute to attest the record by his signature, but in the absence of such requirement a copy of the record is admissible in evidence though this has not been signed by the officer.[7] The payment of the recording fee is not a prerequisite to a valid record of a deed if the recorder receives it for record. If he waives his right to a prepayment of such fee, he is bound to make a proper record of the deed.[8] But where the statute provides that the registration tax shall be paid before the instrument is re-

[5] Cook v. Hall, 6 Gil. (Ill.) 575; Bishop v. Cook, 13 Barb. (N. Y.) 326.
[6] Brockenborough v. Melton, 55 Tex. 493.
[7] Wilt v. Cutler, 38 Mich. 189.
[8] Bussing v. Crain, 8 B. Mon. (Ky.) 593; People v. Bristol, 35 Mich. 28.

corded, such payment must be made before the instrument left for record will operate as notice to creditors or innocent purchasers for value.[9] Even a provision of a statute, that no deed shall be admitted to record until the fee for recording is paid, is regarded as directory merely, and the record is valid. The recorder in such case assumes the fee or tax.[10] But if a deed is sent to a recorder by mail or otherwise to be recorded, without the fee for recording, and the recorder in consequence of not receiving the fee "pigeon-holes" it, the deed is not lodged for record so as to be notice to a subsequent bona fide creditor of the vendor.[11] But if the recorder receives the deed without the fee being paid and enters it as a deed received, or indorses such entry upon the deed, and he allows the entry to stand, he can not be held to contradict such entry upon finding that his fees are not in fact paid.[12] Under a statute giving instruments of title effect from the time they are filed for record, and requiring the recorder to keep a book for indexing all papers presented for record, the failure of such officer to keep the index will not prejudice the title of one leaving his deed for record.[13] Nor will a mistake on the part of the officer in making the record prejudice the grantee; he being protected by leaving his deed for record.[14]

A mortgage duly filed for record is, in contemplation of law, deemed recorded, and becomes notice to all the world. But if it is subsequently withdrawn from the files by the mortgagee before being spread upon the record, it is ineffectual as notice until reinstated.[15] A grantee who deposits his deed for record in the auditor's office, which deed is received by that officer, discharges his duty of notice to the public, and his title can not be prejudiced through the fault of the auditor. A title paper is deemed to be filed when it is delivered to the proper officer, and by him received to be kept on file or recorded.[16] When a person deposits his title papers in the proper custody and for the proper purpose to charge others with notice, he has discharged his whole duty in the mat-

[9] Martin v. Bates, 20 Ky. L. 1798, 50 S. W. 38; Orr v. Sutton, 119 Minn. 193, 137 N. W. 973, 42 L. R. A. (N. S.) 146.

[10] Hoffman v. Mackall, 5 Ohio St. 124, 64 Am. Dec. 637; Lucas v. Claflin, 76 Va. 269.

[11] Burnham v. Farmers' Loan &c. Co., 44 Nebr. 438, 63 N. W. 45; Dickerson v. Bowers, 42 N. J. Eq. 295, 11 Atl. 142.

[12] Simon v. Sewell, 64 Ala. 241.

[13] Cook v. Hall, 6 Gil. (Ill.) 579.

[14] Merrick v. Wallace, 19 Ill. 496.

[15] Worcester Nat. Bank v. Cheeney, 87 Ill. 602.

[16] Oats v. Walls, 28 Ark. 244; Reed v. Acton, 120 Mass. 130.

ter. The law does not impose upon him the task of following the officer to see that he discharges his official duties in respect to the matter.[17]

§ 118. Object of recording acts.—Registry laws are intended to furnish the best and most easily accessible evidence of the title to real estate; to the end that those designing to purchase may be fully informed of instruments of prior date affecting the subject of their contemplated purchase, and also that having availed themselves of this means of knowledge they may rest there, and purchase in absolute security; provided, that they do so without knowledge, information or such suggestions from other facts, as would be gross negligence to ignore, of some antecedent conveyance or equitable claim. The object of recording acts is to impart information to parties dealing with property respecting its transfers and incumbrances, and thus to protect them from prior secret conveyances and liens.[18] The policy of such acts is that the title to real estate and all that effects it should be disclosed by the public records, and upon the theory that the record makes such disclosure, the rule obtains that a purchaser may rely upon the title as it appears of record, and that he will be protected against unrecorded conveyances, outstanding equities, secret liens and conditions of which he has no notice.[19] These acts in substance provide that all conveyances of real estate shall be void as against subsequent purchasers in good faith without notice, unless they are recorded in the registry of deeds for the county where the land lies.[20]

Every subsequent purchaser is bound to take notice of a re-

[17] Lytle v. Arkansas, 9 How. (U. S.) 314, 13 L. ed. 153; Oats v. Walls, 28 Ark. 244; Merrick v. Wallace, 19 Ill. 486; Lee v. Bermingham, 30 Kans. 312, 1 Pac. 73; Mangold v. Barlow, 61 Miss. 593, 48 Am. Rep. 84; In re Woods' Appeal, 82 Pa. St. 116; Nichols v. Reynolds, 1 R. I. 30, 36 Am. Dec. 238; Throckmorton v. Price, 28 Tex. 605, 91 Am. Dec. 334; Ferris v. Smith, 24 Vt. 27.

[18] Patterson v. De La Ronde, 8 Wall. (U. S.) 292, 19 L. ed. 415.

[19] Williams v. Jackson, 107 U. S. 478, 2 Sup. Ct. 814, 27 L. ed. 529; Kearnes v. Hill, 21 Fla. 185; Hathorn v. Maynard, 65 Ga. 168; Quick v. Milligan, 108 Ind. 419, 9 N. E. 392, 58 Am. Rep. 49; Testart v. Belot, 31 La. Ann. 795; Bailey v. Myrick, 50 Maine 171; Columbia Bank v. Jacobs, 10 Mich. 349, 81 Am. Dec. 792; Cogan v. Cook, 22 Minn. 137; Roll v. Rea, 50 N. J. L. 266, 12 Atl. 905; Harrington v. Erie County Sav. Bank, 101 N. Y. 257, 4 N. E. 346; Ramsey v. Jones, 41 Ohio St. 685; Pancake v. Couffman, 114 Pa. St. 113, 7 Atl. 67; Wright v. Lassiter, 71 Tex. 604, 10 S. W. 295; Hart v. Farmers' &c. Bank, 33 Vt. 252; Hoyt v. Jones, 31 Wis. 389.

[20] See statutes of various states.

corded deed in the line of title previously recorded, although he has no actual notice of it. If he has relied upon the representations of his grantor in regard to the title to the premises without consulting the record, which is always open to his inspection, he has done so at his peril; and although he may in such case be an innocent purchaser in fact, he is not regarded as such in law.[21] The purpose of such acts is by registration to impart constructive notice of deeds and other instruments affecting the title to real estate, and to authorize priority of title in accordance with priority of registration. In general, registration is equivalent to actual notice, and actual notice is equivalent to registration. But the record imparts constructive notice only to such instruments as the statutes require or authorize the recording of. And though the recording of the instrument is authorized, if entries are made in the reception-book, or in the index, which are not required or authorized to be made, purchasers are not charged with constructive notice of such entries.[22]

Unless an instrument is such as the law requires to be recorded, putting it on the record is of no avail as notice to persons dealing with the same grantor and the same land. As between the parties themselves, registration is generally unnecessary and without effect.[23] It is as against subsequent purchasers or incumbrancers for value without notice, that recording is necessary; and as against such purchasers recording is necessary to protect any title or interest in the land, though this be a mere easement such as a right of way.[24] Though recording is not necessary as against the grantor's heirs, it is necessary as against a purchaser from such heirs having no notice of the prior conveyance.[25] There are, however, a few cases in which it has been held that the protection af-

[21] Buchanan v. International Bank, 78 Ill. 500; Acer v. Westcott, 46 N. Y. 384, 7 Am. Rep. 355.

[22] Ahern v. Freeman, 46 Minn. 156, 48 N. W. 677, 24 Am. St. 206.

[23] Smith v. Branch Bank, 21 Ala. 125; Warnock v. Harlow, 96 Cal. 298, 31 Pac. 166, 31 Am. St. 209; Christy v. Burch, 25 Fla. 942, 2 So. 258; Roane v. Baker, 120 Ill. 308, 11 N. E. 246; Shirk v. Thomas, 121 Ind. 147, 22 N. E. 976, 16 Am. St. 381; Davis v. Lutkiewiez, 72 Iowa 254, 33 N. W. 670; Van Husan v. Heames, 96 Mich. 504, 56 N. W. 22; Stevens v. Hampton, 46 Mo. 404; Stevens v. Morse, 47 N. H. 532; Brem v. Lockhart, 93 N. Car. 191.

[24] Warnock v. Harlow, 96 Cal. 298, 31 Pac. 166, 31 Am. St. 209; Prescott v. Beyer, 34 Minn. 493, 26 N. W. 732; Merriman v. Hyde, 9 Nebr. 113, 2 N. W. 218; Russell v. Nall, 2 Tex. Civ. App. 60, 20 S. W. 1006, 23 S. W. 901.

[25] Kennedy v. Northup, 15 Ill. 148; Earle v. Fiske, 103 Mass. 491; Welch v. Ketcham, 48 Minn. 241, 51 N. W. 113; Youngblood v. Vastine, 46 Mo. 239, 2 Am. Rep. 509.

forded by the registration laws against unrecorded conveyances extends only to purchasers from the grantor himself, and not to purchasers from his heirs or devisees.[26]

§ 119. Particular instruments which may be recorded.— Statutes very generally provide that all instruments in any manner affecting the title to land shall be apparent on the record, so that interested parties may easily and accurately trace the title to all interests therein.[27] Such requirement is either specifically made, or may be implied. Thus where the statute provided for recording of "deeds," it was held that the term embraced every instrument in writing by which any real estate or interest therein is created, aliened, mortgaged, or assigned, or by which title to real estate may be affected in law or equity, except wills and leases for one year or less.[28] Where recording acts make no mention of instruments eo nomine, but the expression is, in effect, that all transfers of any interest in land must be recorded, they have been held to embrace mortgages and assignment of mortgages,[29] equitable mortgages,[30] agreement for extension of a mortgage,[31] an instrument by a first mortgagee waiving his priority in favor of a subsequent incumbrancer,[32] mortgages of school certificates,[33] mortgage of a leasehold estate,[34] leases and assignment of leases,[35] deed of gift,[36] deed of assignment,[37] revocation of a power of attorney,[38] grant of an easement or

[26] Hill v. Meeker, 24 Conn. 211; Hancock v. Beverly, 6 B. Mon. (Ky.) 531.

[27] Bush v. Golden, 17 Conn. 594; Shaw v. Wilshire, 65 Maine 485; Henderson v. Pilgrim, 22 Tex. 464.

[28] Ames v. Miller, 65 Nebr. 264, 91 N. W. 250.

[29] Hassey v. Wilke, 55 Cal. 528; Ames v. Miller, 65 Nebr. 204, 91 N. W. 250; Decker v. Boice, 83 N. Y. 220; Gibson v. Thomas, 180 N. Y. 483, 73 N. E. 484; Merrill v. Luce, 6 S. Dak. 354, 61 N. W. 43, 55 Am. St. 894.

[30] Pierce v. Jackson, 56 Ala. 599; Putnam v. White, 76 Maine 551; Alderson v. Ames, 6 Md. 52; Edwards v. McKernan, 55 Mich. 520, 22 N. W. 20; Clamorgan v. Lane, 9 Mo. 446; Hunt v. Johnson, 19 N. Y. 279; In re Russell's Appeal, 15 Pa. St. 319; Smith v. Neilson, 13 Lea (Tenn.) 461.

[31] Kraft v. Holzman, 206 Ill. 548, 69 N. E. 574.

[32] Clason v. Shepherd, 6 Wis. 369.

[33] Dodge v. Silverthorn, 12 Wis. 644.

[34] Lembeck & Bretz Eagle Brewing Co. v. Kelly, 63 N. J. Eq. 401, 51 Atl. 794.

[35] Such seems to be the case in Alabama, Arkansas, Arizona, Alaska, Colorado, Georgia, Iowa, Illinois, Kansas, Michigan, Minnesota, Mississippi, Missouri, Nevada, New Mexico, Oregon and Texas. And see Crouse v. Mitchell, 130 Mich. 347, 90 N. W. 32, 97 Am. St. 479.

[36] Foster v. Mitchell, 15 Ala. 571.

[37] Reeves v. Estes, 124 Ala. 303, 26 So. 935; Steifel v. Barton, 73 Md. 408, 21 Atl. 63; Eggleston v. Harrison, 61 Ohio St. 397, 55 N. E. 993.

[38] Arnold v. Stevenson, 2 Nev. 234.

right of way,[39] receipt given for an advancement,[40] a written ratification by an adult of a conveyance made by him during minority,[41] contracts of sale of real estate,[42] title bonds,[43] party wall contracts,[44] certificate of sale issued to a purchaser at an execution or foreclosure sale,[45] an instrument acknowledging the nonpayment of purchase-money and giving the vendor the right of possession until payment,[46] an assignment of purchase-money notes secured by a lien,[47] an instrument by a partner releasing his interest in partnership real estate.[48]

Where a statute applies in terms to the recording of deeds by natural persons it has been held to include deeds of corporations also.[49] The statutes of some states require maps and plats of land to be recorded.[50] Also wills are sometimes required to be recorded like deeds and other conveyances inter vivos.[51] But in many states there is no such requirement.[52] But the courts have refused to extend the acts by construction so as to embrace such instruments as a bond for the support of a mortgagee,[53] an assignment of an unrecorded contract for the sale of land,[54] a bond for title and writings assigning it,[55] or an assignment of a land certificate.[56]

Patents from the United States are not within the purview of recording acts unless they are specially included;[57] the original

[39] Prescott v. Beyer, 34 Minn. 493, 26 N. W. 73; Taylor v. Albermarle Steam Nav. Co., 105 N. Car. 484, 10 S. E. 897; Parker v. Meredith (Tenn.), 59 S. W. 167.

[40] Pinckney v. Pinckney, 114 Iowa 441, 87 N. W. 406.

[41] Black v. Hills, 36 Ill. 376, 87 Am. Dec. 224; Weaver v. Carpenter, 42 Iowa 343.

[42] Kent v. Williams, 146 Cal. 3, 79 Pac. 527; Baltimore & O. S. W. R. Co. v. Brubaker, 217 Ill. 462, 75 N. E. 523; McPheeters v. Ronning, 95 Minn. 164, 103 N. W. 889.

[43] McFarran v. Knox, 5 Colo. 217; De Wolf v. Pratt, 42 Ill. 198; Macrae v. Goodbar, 80 Miss. 315, 31 So. 812; Hunt v. Johnson, 19 N. Y. 279; Scarborough v. Arrant, 25 Tex. 129.

[44] Parsons v. Baltimore Bldg. &c. Assn., 44 W. Va. 335, 29 S. E. 999, 67 Am. St. 769.

[45] Webber v. Kastner, 5 Ariz. 324, 53 Pac. 207; Raymond v. Pauli, 21 Wis. 531.

[46] Melross v. Scott, 18 Ind. 250.

[47] First Nat. Bank v. Edgar, 65 Nebr. 34, 91 N. W. 404.

[48] Pegram v. Owens, 64 Tex. 475.

[49] Sheehan v. Davis, 17 Ohio St. 571.

[50] Bauman v. Ross, 167 U. S. 548, 17 Sup. Ct. 966, 42 L. ed. 270.

[51] Harrison v. Weatherly, 180 Ill. 418, 54 N. E. 237; Evansville Ice and Cold Storage Co. v. Winsor, 148 Ind. 682, 48 N. E. 592; Keith v. Keith, 97 Mo. 223, 10 S. W. 597; Lovejoy v. Raymond, 58 Vt. 509, 2 Atl. 156.

[52] Currell v. Villars, 72 Fed. 330.

[53] Noyes v. Sturdivant, 18 Maine 104.

[54] Early Times Distillery Co. v. Zeiger, 11 N. Mex. 221, 67 Pac. 734.

[55] Cochran v. Adler, 121 Ala. 442, 25 So. 761.

[56] Falkner v. Jones, 12 Ala. 165.

[57] Rhinehart v. Schuyler, 7 Ill. 473; David v. Rickabaugh, 32 Iowa 540; Sands v. Davis, 40 Mich. 14; Evitts v. Roth, 61 Tex. 81; Sayward v.

record in the general land office from which they are issued being held notice to the world of their existence.[58]

It is provided by statute in nearly all the states, though in somewhat varying terms, that a power of attorney to convey or incumber real estate must be executed, acknowledged and recorded in the same manner that conveyances are, and the record of the deed or other instrument without the power has no legal effect.[59] While modern recording acts generally include powers of attorney,[60] yet it would seem that they need not be recorded where there are no provisions specifically enumerating them and making them subject to the operation of the acts.[61]

§ 120. Proper execution and acknowledgment as a prerequisite to recording.—The first requisite to the valid record of any instrument affecting the title of real estate is that it shall be executed according to law. If defectively executed, it is not generally entitled to be recorded; but even if it is recorded it is not constructive notice, so as to vest in a grantee, mortgagee or other incumbrancer, any interest in the premises as against a subsequent purchaser in good faith without notice.[62] The recording acts generally prescribe certain formalities in the execution of such instruments which must be complied with to entitle them to be recorded. Thus the real estate to be conveyed or incumbered must be described so as reasonably to enable subsequent purchasers or incumbrancers to identify the land; otherwise the record of the instrument is not constructive notice.[63] It has been

Thompson, 11 Wash. 706, 40 Pac. 379. But see Coles v. Berryhill, 37 Minn. 56, 33 N. W. 213.

[58] Lomax v. Pickering, 165 Ill. 431, 46 N. E. 238; Stevens v. Geiser, 71 Tex. 140, 8 S. W. 610.

[59] Carnall v. Duvall, 22 Ark. 136; Graves v. Ward, 2 Duv. (Ky.) 301; Lowry v. Harris, 12 Minn. (Gil. 166) 255.

[60] Gratz v. Land &c. Co., 82 Fed. 381; Hager v. Spect, 52 Cal. 579; Hughes v. Wilkinson, 37 Miss. 482.

[61] Valentine v. Piper, 22 Pick. (Mass.) 85, 33 Am. Dec. 715.

[62] McMinn v. O'Connor, 27 Cal. 238; Sumner v. Rhodes, 14 Conn. 135; Keech v. Enriquez, 28 Fla. 597, 10 So. 91; Herndon v. Kimball, 7 Ga. 432, 50 Am. Dec. 406; Barney v. Little, 15 Iowa 527; Brown v. Lunt, 37 Maine 423; Cockey v. Milne, 16 Md. 200; Blood v. Blood, 23 Pick. (Mass.) 8; Galpin v. Abbott, 6 Mich. 17; Cogan v. Cook, 22 Minn. 137; Bass v. Estill, 50 Miss. 300; Bishop v. Schneider, 49 Mo. 472, 2 Am. Rep. 533; Fryer v. Rockefeller, 63 N. Y. 268; Todd v. Outlaw, 79 N. Car. 235; White v. Denman, 1 Ohio St. 110; McKean & Elk Land Imp. Co. v. Mitchell, 35 Pa. St. 269, 78 Am. Dec. 335; Holliday v. Cromwell, 26 Tex. 188; Pope v. Henry, 24 Vt. 560; Pringle v. Dunn, 37 Wis. 449, 19 Am. Rep. 772.

[63] Bright v. Buckman, 39 Fed. 243; Adams v. Edgerton, 48 Ark. 419, 3 S. W. 628; Chamberlain v. Bell, 7 Cal. 292, 68 Am. Dec. 260; Rodgers v. Kavanaugh, 24 Ill. 583; Murphy v. Hendricks, 57 Ind. 593; Peters v.

held, however, that a deed, though void on its face, is nevertheless entitled to record.[64]

Registration is constructive notice only of what appears on the face of the instrument. It is not notice of what one might possibly ascertain by such inquiries as an examination of the record might induce a prudent man to make.[65] But when a description in a deed or mortgage is erroneous, and it is apparent what the error is, the record is constructive notice of the deed or mortgage of the land intended to be described.[66] If the description is such as reasonably to put one upon inquiry as to the property intended to be conveyed or mortgaged, and to lead him to ascertain what that property is, the record will afford constructive notice of a conveyance or mortgage of that property.[67]

The record of a deed without the signature of the grantor is not constructive notice; and this is so though the instrument was in fact signed, but the signature was omitted by mistake from the record.[68] A signature is binding if made at the proper time and duly acknowledged, whether signed by the person owning the same, or by some one else by his consent.[69]

Conveyances must generally be executed under seal to entitle them to be recorded.[70] In several states the use of a seal has been wholly dispensed with by statute.[71] In others a scroll is given the same effect as a seal.[72] But where the use of a seal or of its equivalent is required, and an instrument purporting to be a mortgage is not executed under a seal, it is not entitled to be recorded; and if it be copied in the records, it does not impart notice

Ham, 62 Iowa 656, 18 N. W. 296; Green v. Witherspoon, 37 La. Ann. 751; Barrow v. Baughman, 9 Mich. 213; Bailey v. Galpin, 40 Minn. 319, 41 N. W. 1054; Eggleston v. Watson, 53 Miss. 339; Banks v. Ammon, 27 Pa. St. 172; Waters v. Spofford, 58 Tex. 115; Warren v. Syme, 7 W. Va. 474.

[64] Bliss v. Tidrick, 25 S. Dak. 533, 127 N. W. 852, Ann. Cas. 1912C 671.

[65] McLouth v. Hurt, 51 Tex. 115.

[66] Anderson v. Baughman, 7 Mich. 69, 74 Am. Dec. 699; Wolfe v. Dyer, 95 Mo. 545, 8 S. W. 551; People v. Storms, 97 N. Y. 364; Tousley v. Tousley, 5 Ohio St. 78.

[67] Tranum v. Wilkinson, 81 Ala. 408, 1 So. 201; Citizens' Nat. Bank v. Dayton, 116 Ill. 257, 4 N. E. 492; Roberts v. Bauer, 35 La. Ann. 453; Anderson v. Baughman, 7 Mich. 69, 74 Am. Dec. 699; Knox Co. v. Brown, 103 Mo. 223, 15 S. W. 382; Tousley v. Tousley, 5 Ohio St. 78; Nye v. Moody, 70 Tex. 434, 8 S. W. 606.

[68] Shepherd v. Burkhalter, 13 Ga. 443, 58 Am. Dec. 523.

[69] Johnson v. Van Velsor, 43 Mich. 208, 5 N. W. 265.

[70] Hebron v. Centre Harbor, 11 N. H. 571; Evans v. Mengel, 3 Pa. St. 239.

[71] This is true in Alabama, Arkansas, California, Colorado, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, South Dakota, Tennessee, Texas and Wyoming.

[72] In the following states the seal is required but a scroll answers for a

to subsequent purchasers or incumbrancers.[73] A seal need not be copied in the record. All that is necessary is, that the record should afford some indication that the instrument was under seal.[74]

The record of a deed not executed in compliance with a statute requiring that it shall be attested by two witnesses is not constructive notice.[75]

An acknowledgment or proof of the instrument before some officer is, in most of the states, an essential prerequisite to recording. Without an acknowledgment, or with one that is defective, the record of the instrument is unauthorized and is not constructive notice.[76] The registration of a conveyance, acknowledged or proved before an officer who has not been duly appointed or qualified, has no effect in rendering it operative against subsequent purchasers.[77] When a statute requires that a certificate of the official character of the officer before whom the acknowledgment was made shall accompany the certificate of acknowledgment, the filing of the instrument for record without the latter certificate does not constitute a record of it. Upon the same principle, also, when a statute requires that the officer shall certify that he is personally acquainted with the party making the acknowledgment, the omission so to do renders null the acknowledgment and the record.[78] The requirement must be substantially complied with.[79]

seal: Arizona, Delaware, Florida, Georgia, Idaho, Illinois, Maryland, Minnesota, Missouri, New Jersey, New Mexico, North Carolina, Oregon, Pennsylvania, Utah, Virginia, Washington, West Virginia and Wisconsin.

[73] Racouillat v. Sansevain, 32 Cal. 376; Arthur v. Screven, 39 S. Car. 77, 17 S. E. 640.

[74] Smith v. Dall, 13 Cal. 510; Summer v. Mitchell, 29 Fla. 179, 10 So. 56, 14 L. R. A. 815, 30 Am. St. 106.

[75] Gardner v. Moore, 51 Ga. 268; Thompson v. Morgan, 6 Minn. (Gil. 199) 292; Van Thorniley v. Peters, 26 Ohio St. 471; Potter v. Stransky, 48 Wis. 235, 4 N. W. 95.

[76] Dufphey v. Frenaye, 5 St. & P. (Ala.) 215; Jacoway v. Gault, 20 Ark. 190, 73 Am. Dec. 494; Willard v. Cramer, 36 Iowa 22; Meskimen v. Day, 35 Kans. 46, 10 Pac. 14; Sitler v. McComas, 66 Md. 135, 6 Atl. 527; Blood v. Blood, 23 Pick. (Mass.) 80; Parret v. Shaubhut, 5 Minn. 323, 80 Am. Dec. 424; Bass v. Estill, 50 Miss. 300; Bishop v. Schneider, 46 Mo. 472, 2 Am. Rep. 533; Irwin v. Welch, 10 Nebr. 479, 6 N. W. 753; Frost v. Beekman, 1 Johns. Ch. (N. Y.) 288; Todd v. Outlaw, 79 N. Car. 235; White v. Denman, 1 Ohio St. 110; Fleschner v. Sumpter, 12 Ore. 161, 6 Pac. 506; Woolfolk v. Graniteville Mfg. Co., 22 S. Car. 332; Hill v. Taylor, 77 Tex. 295, 14 S. W. 366; Wood v. Cochrane, 39 Vt. 544; Raines v. Walker, 77 Va. 92; Cox v. Wayt, 26 W. Va. 807; Girardin v. Lampe, 58 Wis. 267, 16 N. W. 614. In the following states acknowledgment is not a prerequisite to registration: Alabama, Colorado, Connecticut, Illinois, Michigan and Washington.

[77] Worsham v. Freeman, 34 Ark. 55.

[78] Kelsey v. Dunlap, 7 Cal. 160.

[79] Ritter v. Worth, 58 N. Y. 627.

The certificate of acknowledgment is not conclusive; but when it is correct in form, and is apparently executed by one authorized to act in the matter, and within his jurisdiction, it is sufficient to admit the deed to record, and is prima facie good.[80] Delivery is another incident necessary to giving effect to the conveyance even as to the parties to it.[81] Although the deed be recorded, if it has not been delivered, but the delivery was authorized, a subsequent conveyance by the grantor, or a subsequent judgment against him, will take precedence.[82] Although a deed is of no effect until there has been a delivery of it to the grantee, yet if it is made for a good consideration, as, for instance, an existing debt and is filed for record without delivery, a subsequent acceptance of the deed has been held to ratify the making and recording of it, and to give it legal effect from the time of filing, as against intermediate incumbrancers.[83]

§ 121. Books in which instruments must be recorded.— In most of the states all instruments relating to the title to real estate are recorded in the same books of record, but in several states it is provided that all mortgages shall be recorded in separate books kept for this purpose only.[84] A record not made in the proper book does not operate as constructive notice.[85] The record of a deed in the mortgage record is not constructive notice of the deed to subsequent purchasers.[86]

Usage may determine the validity of a record. Thus, where mortgages of real and personal property are required to be recorded in separate books, and a mortgage embracing both real and personal property is recorded only in the book of real estate mortgages it is held to be sufficiently recorded to be constructive notice of the lien on the personal property, if it appear that it is the custom to record such mortgages in this manner without making a double record. But where a mortgage covers both

[80] People v. Snyder, 41 N. Y. 397.

[81] Freeman v. Peay, 23 Ark. 439; Goodwin v. Owen, 55 Ind. 243; Ward v. Small, 90 Ky. 198, 12 Ky. L. 58, 13 S. W. 1070; Maynard v. Maynard, 10 Mass. 452, 6 Am. Dec. 146.

[82] Woodbury v. Fisher, 20 Ind. 387, 83 Am. Dec. 325.

[83] Carnall v. Duval, 22 Ark. 136.

[84] See statutes of various states.

[85] Kent v. Williams, 146 Cal. 3, 79 Pac. 527; Gossett v. Tolen, 61 Ind. 388; Baker v. Lee, 49 La. Ann. 874, 21 So. 588; Parsons v. Lent, 34 N. J. Eq. 67; Deane v. Hutchinson, 40 N. J. Eq. 83, 2 Atl. 292; Van Thorniley v. Peters, 26 Ohio St. 471.

[86] Neslin v. Wells, 104 U. S. 428, 26 L. ed. 802; Colomer v. Morgan, 13 La. Ann. 202; Abraham v. Mayer, 7 Misc. 250, 27 N. Y. S. 264, 58 N. Y. St. 29; In re Luch's Appeal, 44 Pa. St. 519; Drake v. Reggel, 10 Utah 376, 37 Pac. 583.

realty and personalty the recording of it in the record of personal property mortgages does not constitute a compliance with the requirement of the statute concerning the recording of the real estate mortgages.[87] The record of a deed of standing timber made in a book called "Miscellaneous Records," in which it is customary in the state to record exceptional instruments offered for record, such as contracts of sale, leases, and various other kinds of property, is constructive notice of the rights of the parties claiming under such deed.[88] The record of an assignment for the benefit of creditors, embracing real property, is not void as to nonconsenting creditors because it was not transcribed by the recorder in the proper book of records, but was transcribed in a book marked "Miscellaneous," and the only question that can arise by reason of the improper record is as to its effect on subsequent purchasers and mortgagees in good faith. As to them the record would seem to be good under a statute providing that an instrument is deemed to be recorded when it is deposited in the recorder's office with the proper officer for record.[89] When it is provided that mortgages shall be recorded in books kept for that purpose separate from other instruments, a mortgage recorded as a deed is not effectual as against subsequent bona fide purchasers or mortgagees even if the mortgage be in form an absolute deed, but intended as security for a loan of money.[90] But it has been held that the record of the mortgage, in form a deed, in the book of deeds gives notice.[91] If a mortgage is not recorded in the mortgage books, and it can not be found by the index to these books, it therefore is not regarded as properly recorded.[92] Such an instrument is of course valid as between the parties,[93] and, though the record is a nullity, it becomes operative in case the mortgagee afterward acquires the equity of redemption.[94] Where the statute provides for the keeping of separate books for the recording of deeds and mortgages, it is held that a lease recorded

[87] Harriman v. Woburn Electric Light Co., 163 Mass. 85, 39 N. E. 1004.

[88] Mee v. Benedict, 98 Mich. 260, 57 N. W. 175, 22 L. R. A. 641, 39 Am. St. 543.

[89] Watkins v. Wilhoit, 104 Cal. 395, 38 Pac. 53.

[90] Colomer v. Morgan, 13 La. Ann. 202; Warner v. Winslow, 1 Sandf. Ch. (N. Y.) 430; Calder v. Chapman, 52 Pa. St. 359, 91 Am. Dec. 163; Knowlton v. Walker, 13 Wis. 264.

[91] Kennard v. Mabry, 78 Tex. 151, 14 S. W. 272.

[92] In re Luch's Appeal, 44 Pa. St. 519.

[93] James v. Morey, 6 Johns. Ch. (N. Y.) 417, 2 Cow. 246, 14 Am. Dec. 475.

[94] Grellet v. Heilshorn, 4 Nev. 526; Parsons v. Lent, 34 N. J. Eq. 67.

in a miscellaneous record and indexed as a deed, was not constructive notice to a subsequent mortgagee of a mortgage clause contained therein.[95]

A subsequent purchaser or mortgagee who has actual notice of the mortgage which is improperly recorded, as an absolute conveyance, of course takes a title subject to such mortgage, just as he would if the mortgage had not been recorded at all. A statute which is merely directory to the recorder in this respect would not invalidate a record of the mortgage not being in the record books specially used for mortgages.[96] Except in states whose statutes require a different construction, the record of a conveyance in the form of an absolute deed, in a book kept for the recording of deeds ought to be held to impart effectual notice of the rights or interests conveyed, although a statute requires mortgages to be recorded in separate books.[97] Where an instrument was copied into a book that had not been in use for recording purposes for many years, it was held that the book was improper for that purpose and that the instrument was not duly recorded.[98]

The filing of a mechanic's lien creates a lien, but where the law provides that it shall be recorded in the "Miscellaneous Record," the "Mechanic's Lien Record" would not be competent record evidence to take the place of the original instrument.[99] Where a recorder records a mechanic's lien in the wrong book, the defect can be cured.[1]

§ 122. **Time of recording.**—In the usual course of recording each instrument deposited with the recording officer is immediately indorsed with an official time stamp or other memorandum of the fact and time of filing, and placed among the accessible files of newly-deposited and untranscribed instruments until it can be copied in the records at length. In due order and course of time, sometimes specified by statute, the recorder enrolls it in the record books. The record is notice from the time of filing the deed for record. It is sometimes provided by statute that a deed shall be deemed to be recorded when it is filed for record, or noted in an entry book or index by the recorder as received. But,

[95] Gordon v. Constantine Hydraulic Co., 117 Mich. 620, 76 N. W. 142.

[96] Smith v. Smith, 13 Ohio St. 532.

[97] Kennard v. Mabry, 78 Tex. 151, 14 S. W. 272.

[98] Sawyer v. Adams, 8 Vt. 172, 30 Am. Dec. 459.

[99] Adams v. Buhler, 131 Ind. 66, 30 N. E. 883.

[1] Wilson v. Logue, 131 Ind. 191, 30 N. E. 1079, 31 Am. St. 426.

aside from any express statutory provision, the judicial interpretation of the effect of the filing is generally the same.[2] The record as notice dates from the moment the instrument was left for record, and was indorsed by the recorder and entered upon the index or entry book, although it was not actually spread upon the record for months, or for any length of time afterward;[3] or be lost and not recorded at all,[4] though according to some authorities the record is constructive notice from the time of filing the instrument for record only in case it is subsequently copied accurately upon the record book.[5] The entry in the index or entry book is constructive notice until the instrument is spread in full upon the record. It may be kept in the office and referred to until it is transcribed, and the original instrument so filed is notice to all the world.[6] When it is spread upon the record, however, it is notice of only what appears upon the record.[7]

As to the time when an instrument was left for record, the certificate of the recorder is conclusive as between the grantee or mortgagee and a subsequent purchaser or creditor who has attached the mortgaged land subsequently to the time stated in the certificate.[8] If the recording officer has failed to note the time of receiving an instrument for record, this may be shown by parol evidence. The requirement that the recording officer shall note

[2] Leslie v. Hinson, 83 Ala. 266, 3 So. 443; Oats v. Walls, 28 Ark. 244; Watkins v. Wilhoit, 104 Cal. 395, 35 Pac. 646; Lewis v. Hinman, 56 Conn. 55, 13 Atl. 143; Haworth v. Taylor, 108 Ill. 275; Kessler v. State, 24 Ind. 313; Lee v. Bermingham, 30 Kans. 312, 1 Pac. 73; Bank of Kentucky v. Haggin, 1 A. K. Marsh. (Ky.) 306; Gillespie v. Rogers, 146 Mass. 610, 16 N. E. 711; Sinclair v. Slawson, 44 Mich. 123, 6 N. W. 207, 38 Am. Rep. 235; Mangold v. Barlow, 61 Miss. 593, 48 Am. Rep. 84; Bishop v. Schneider, 46 Mo. 472, 2 Am. Dec. 533; Perkins v. Strong, 22 Nebr. 725, 36 N. W. 292; Mutual Life Ins. Co. v. Dake, 87 N. Y. 257; Davis v. Whitaker, 113 N. Car. 279, 19 S. E. 699, 41 Am. St. 793; Bercaw v. Cockerill, 20 Ohio St. 163; Glading v. Frick, 88 Pa. St. 460; Woodward v. Boro, 16 Lea (Tenn.) 678; Lignoski v. Crooker, 86 Tex. 324, 24 S. W. 278; Horsley v. Grath, 2 Grat. (Va.) 471, 44 Am. Dec. 393; St. Croix Land & L. Co. v. Ritchie, 73 Wis. 409, 41 N. W. 345.

[3] Kiser v. Heuston, 38 Ill. 252; Sinclair v. Slawson, 44 Mich. 123, 6 N. W. 207, 38 Am. Rep. 235; In re Woods' Appeal, 82 Pa. St. 116; Crews v. Taylor, 56 Tex. 461.

[4] Lee v. Bermingham, 30 Kans. 312, 1 Pac. 73; Perkins v. Strong, 22 Nebr. 725, 36 N. W. 292; Vaughn v. Moore, 89 Va. 925, 17 S. E. 326.

[5] Ritchie v. Griffiths, 1 Wash. St. 429, 25 Pac. 341, 12 L. R. A. 384, 22 Am. St. 155.

[6] Nichols v. Reynolds, 1 R. I. 30, 36 Am. Dec. 238; Bigelow v. Topliff, 25 Vt. 273, 60 Am. Dec. 264.

[7] Potter v. Dooley, 55 Vt. 512.

[8] Hatch v. Haskins, 17 Maine 391; Adams v. Pratt, 109 Mass. 59; Bullock v. Wallingford, 55 N. H. 619; Edwards v. Barwise, 69 Tex. 84, 6 S. W. 677.

the time of recording an instrument is directory merely, when there is no question of rights depending on priority of record. His failure to perform his legal duty does not defeat the effect of the delivery for record.[9] When the time of receiving an instrument for record is entered in the index book and shows upon its face that it was not made at the time of such reception, the presumption of the correctness of the registrar's entry is lost,[10] and parol evidence is admissible to show when the deed was actually received for record. The filing of a mortgage for record affords no notice if the deed be withdrawn before it is recorded.[11]

If the statute is such that no notice is imparted until the conveyance is actually spread upon the record, though when this is done the notice relates back to the time of the deposit of the deed for record, where there is a conflict of dates between the time of the actual record as it appears upon the record book and the constructive record by indorsement made upon the deed when it was deposited, the recorded date prevails over the true date.[12] As between two mortgagees whose mortgages are executed and recorded on the same day, that which was first delivered for record has priority,[13] and parol evidence is admissible to show which was first deposited for record.[14] To ascertain which is prior, the fractional parts of a day are considered.[15] In case no entry is made upon the record of the time of the recording of the mortgage, when the statute required no such entry, and it appears from the record to have been recorded at an early day, it will be presumed that the record was made within the time required by law after the execution of it.[16] Where a statute provides that a mortgage shall take effect from the time of its deposit for record, it has been held that a mortgage which has not been deposited for record with the proper officer before the assignment of the same property by the mortgagor for the benefit of his creditors takes effect, such mortgage is not a valid lien on the property as against the assignee or the creditors, and does not become so by being

[9] Thorn v. Mayer, 12 Misc. 487, 33 N. Y. S. 664, 67 N. Y. St. 389.

[10] Hay v. Hill, 24 Wis. 235.

[11] Lawton v. Gordon, 37 Cal. 202; Worcester Nat. Bank v. Cheeney, 87 Ill. 602; Clarmorgan v. Lane, 9 Mo. 442.

[12] Donald v. Beals, 57 Cal. 399.

[13] Brookfield v. Goodrich, 32 Ill. 363.

[14] Spaulding v. Scanland, 6 B. Mon. (Ky.) 353.

[15] Lemon v. Staats, 1 Cow. (N. Y.) 592.

[16] Hall v. Tunnell, 1 Houst. (Del.) 320.

subsequently recorded.[17] A mortgage may be recorded after the death of the mortgagor, if he has in his lifetime made delivery of it.[18] It has been held that a statute extending the time for recording deeds is valid.[19]

§ 123. Time allowed by statute for recording deeds and other instruments.—The recording acts of the several states provide that deeds and mortgages shall be recorded within a specified time after execution. Thus in Alabama unconditional deeds and mortgages to secure debts, created at the date thereof, are void as to purchasers, mortgagees and judgment creditors without notice, unless recorded within thirty days from date.[20] But under a subsequent statute mortgages to secure debts, created at the date thereof, are made void as to purchasers, mortgagees and judgment creditors, without notice, unless recorded before the accrual of the right of such purchasers, mortgagees or judgment creditors.[21]

In Delaware a mortgage for purchase-money recorded within thirty days after its execution has precedence of any judgment or other lien of prior date. Other deeds and mortgages must be recorded within three months after delivery in order to avail against a subsequent creditor, mortgagee or purchaser for a valuable consideration without notice.[22]

In Georgia, deeds must be recorded within one year and mortgages within thirty days from date, or they will be postponed to other liens or purchases made prior to the record without notice of the unrecorded conveyances. The record of a mortgage not made within the time prescribed is notice from the time of record.[23]

In Indiana, deeds and mortgages not recorded within forty-five days from their execution are fraudulent and void as against subsequent purchasers, lessees, or mortgagees in good faith and a valuable consideration.[24] But under a subsequent statute of that state deeds and mortgages take priority according to the time

[17] Betz v. Snyder, 48 Ohio St. 492, 28 N. E. 234, 13 L. R. A. 235.

[18] Haskell v. Bissell, 11 Conn. 174; Gill v. Pinney, 12 Ohio St. 38.

[19] Spivey v. Rose, 120 N. Car. 163, 26 S. E. 701.

[20] Alabama Code (1896), §§ 1005, 1016.

[21] Alabama Code (1907), § 3383.

[22] Del. Rev. Code (1874), pp. 504, 505, § 21; Del. Laws, 1881, chap. 520; Del. Laws 1883, p. 509.

[23] Ga. Code 1882, §§ 1959, 1960, 2705; Ga. Civ. Code (1910), § 3260.

[24] Ind. Rev. Stat. (1888), §§ 2931, 2932.

of filing for record, and are fraudulent and void as to subsequent purchasers or mortgagees in good faith for a valuable consideration, having their deeds or mortgages first recorded.[25]

In Kentucky, deeds other than deeds of trust and mortgages by residents of the state, sixty days from date; by persons residing out of the state in the United States, four months; by persons out of the United States, twelve months.[26]

In Maryland, deeds and mortgages, within six months from date.[27]

In Oregon, deeds and mortgages must be recorded within five days after execution.[28]

In Pennsylvania, deeds executed within the state must be recorded within six months after execution, but if executed without the state, they must be recorded within twelve months after their execution.[29] But by recent statute, applicable to Philadelphia alone, deeds and other conveyances are valid as against subsequent purchasers only from the date of record.[30]

In South Carolina, deeds, deeds of trust and mortgages, and statutory liens are valid, so as to affect subsequent creditors or purchasers for valuable consideration without notice, only when recorded within forty days from the time of execution.[31] The time for recording such instruments have been limited in a recent statute to ten days.[32]

In Virginia, any conveyance recorded within ten days from the day of its acknowledgment shall, unless it be a mortgage, or a deed of trust not in consideration of marriage, be as valid as to creditors and subsequent purchasers as if recorded on the day of acknowledgment.[33]

With the exception of the above statutes, however, there is a general uniformity to the effect that the registration of deeds and mortgages is effective as constructive notice from the time only when they are filed for record. The tendency is decidedly toward abolishing the provisions giving a specified time to record conveyances. The effect of provisions allowing time for the recording

[25] Ind. Burns' Ann. Stat. (1914), § 3962.
[26] Ky. Gen. Stat. 1888, p. 315, § 14; But see Ky. Stat. (1909), §§ 496, 497.
[27] Md. Ann. Code (1911), art. 21, §§ 13-15.
[28] Ore. Laws (1910), § 7129.
[29] Pa. Purdon's Dig. 1905, p. 1181, § 155.
[30] Purdon's Ann. Dig., p. 2110, § 5.
[31] S. Car. Civ. Code (1902), § 2456.
[32] S. Car. Code (1912), § 3542.
[33] Va. Code (1904), § 2467.

of instruments after execution is not to invalidate the conveyance or mortgage, as between the parties, if not recorded within the time specified. It is admissible in evidence and is an equitable lien, although not so recorded.[34] The failure to comply with this requirement only goes to the effect of the conveyance as to subsequent purchasers. As to purchasers whose conveyances are registered before a deed recorded after the expiration of the limited time, the date is ineffectual.[35] Of two conveyances of equal equity, recorded within the time limited after execution, that which is first recorded has priority.[36] The effect of these provisions is that the record, when made within the prescribed time, relates back to the delivery of the instrument, and gives it priority over an instrument of subsequent date or delivery, although this has already been recorded.[37] But the record will not relate back to the date of the delivery of the instrument if this was not then completely executed, ready to be recorded. It will not so relate back in case the deed was not attested and acknowledged as required by statute to entitle it to be recorded.[38] A record made after the prescribed time operates as notice only from the time of delivery of the instrument for record.[39] As between conveyances neither of which is recorded within the prescribed time, the ordinary rule of priority of record prevails, and preference is given to the instrument first recorded.[40]

The terms of the statute may determine the question of priority between instruments not recorded within the prescribed time. If the second deed is executed after the first deed has been recorded, though not within the time limited, the first deed has priority.[41] If the second deed be made before the first deed is recorded and the second deed be recorded within the time limited,

[34] Charter v. Graham, 56 Ill. 19; Sixth Ward Bldg. Assn. v. Wilson, 41 Md. 506; Plume v. Bone, 13 N. J. L. 63.

[35] Cowan v. Green, 2 Hawks (N. Car.) 384.

[36] Wood v. Lordier, 115 Ind. 519, 18 N. E. 34; Den v. Roberts, 4 N. J. L. 315; Dungan v. American Life Ins. &c. Co., 52 Pa. St. 253.

[37] Clarke v. White, 12 Pet. (U. S.) 178, 9 L. ed. 1046; Betz v. Mullin, 62 Ala. 365; Nichols v. Hampton, 46 Ga. 253; Clairborne v. Holmes, 51 Miss. 146.

[38] White v. Magarahan, 87 Ga. 217, 13 S. E. 509.

[39] DeLane v. Moore, 14 How. (U. S.) 253, 14 L. ed. 409; Adair v. Davis, 71 Ga. 769; Gilchrist v. Gough, 63 Ind. 576, 30 Am. Rep. 250; Harding v. Allen, 70 Md. 395, 17 Atl. 377; McMamee v. Huckabee, 20 S. Car. 190.

[40] Reasoner v. Edmundson, 5 Ind. 393; Fleschner v. Sumpter, 12 Ore. 161, 6 Pac. 506; Collins v. Aaron, 162 Pa. St. 539, 29 Atl. 724.

[41] Adair v. Davis, 71 Ga. 769.

but the first deed be not so recorded, though recorded before the second deed, the second deed has priority by virtue of relation back to the time of its execution.[42] Such a provision is a pernicious one, and is a source of much more unfairness and fraud than it can possibly prevent. It particularly aims to the withdrawal of the protection of the registry law for the period allowed for registration. A purchaser is never sure of his own priority until he has waited for the prescribed time to elapse after the recording of the deed to himself.

§ 124. Place of recording.—The registration of instruments affecting the title to real estate must be made in the registry district within which the land lies, which is generally a county.[43] But in New Hampshire, Rhode Island and Connecticut registration must be made in the town where the land lies. The fact, however, that a deed was not recorded in the county where the land lay is not evidence that the grantor did not intend to convey lands lying therein, as it was not his duty to see to the recording.[44] In some of the new states in which there is territory which is not yet organized into counties, special provision is made for the recording of deeds of lands lying within such unorganized territory, as by providing that the record shall be made in the county in which such unorganized territory is attached for judicial purposes.[45] After the organization of a new county, a deed properly recorded under the law as it existed at the time of the record need not be recorded anew,[46] for the record already made does not cease to be constructive notice;[47] but a deed that had been executed but not recorded at the time of the organization of a new county, should be recorded in that county.[48] An owner, the deed of whose land has once been properly recorded in the county

[42] Leger v. Doyle, 11 Rich. (S. Car.) 109, 70 Am. Dec. 240; McNamee v. Huckabee, 20 S. Car. 190.

[43] Lewis v. Baird, 3 McLean (U. S.) 56, Fed. Cas. No. 8316; Green v. Green, 103 Cal. 108, 37 Pac. 188; Kennedy v. Harden, 92 Ga. 230, 18 S. E. 542; St. John v. Conger, 40 Ill. 535; Geer v. Missouri Lumber &c. Co., 134 Mo. 85, 34 S. W. 1099, 56 Am. St. 489; Jencks v. Smith, 1 N. Y. 90, 3 Denio 592, 4 How. Prac. 183; Stewart v. McSweeney, 14 Wis. 468.

[44] Black v. Skinner Mfg. Co., 53 Fla. 1090, 43 So. 919.

[45] Meagher v. Drury, 89 Iowa 366, 56 N. W. 531.

[46] Lumpkin v. Muncey, 66 Tex. 311, 17 S. W. 732.

[47] Thomas v. Hanson, 59 Minn. 274, 61 N. W. 135.

[48] Astor v. Wells, 4 Wheat (U. S.) 466, 4 L. ed. 616; Garrison v. Haydon, 1 J. J. Marsh. (Ky.) 222, 19 Am. Dec. 70.

where the land lies, need not have it again recorded in a new or different county into which the land subsequently falls.[49]

If the land embraced in the instrument is situated in more than one county, it should be recorded in each county in which any part of the land is situated.[50] Under some statutes a deed conveying land lying partly in two or more counties is allowed to be recorded in that county in which the greater part lies, and make such record full constructive notice.[51]

It is intended that the registry laws shall enable a person interested in the title to land to ascertain from the records of the county, or through the registry district within which the land is situated, what conveyances there are affecting that land. So the recording of a deed in a county other than that in which the land is situated does not operate as constructive notice.[52] Thus where a new county had been created, and a grantee, not being advised of the change, recorded his deed in the old county instead of the new, the registration was regarded as worthless as notice.[53] A subsequent change of the county boundaries by which the land became part of another county does not impose upon the grantee the duty of recording his deed again in such county.[54] But if the county lines have never been established, the grantee must at his peril ascertain in what county the land is situated.[55] If a county is divided into two registry districts, a deed recorded in one district of land situated in the other is not properly recorded and the record is not constructive notice. When a deed already recorded is recorded in another county, a certificate of the recorder of the prior record is not a part of the deed, and need not be copied in the second record.[56] Where, at the time of the execution of a deed, the land conveyed was in a county which was divided be-

[49] Bivings v. Gosnell, 133 N. Car. 574, 45 S. E. 942.

[50] Kennedy v. Harden, 92 Ga. 230, 18 S. E. 542; Woodbury v. Manlove, 14 Ill. 213; Van Meter v. Knight, 32 Minn. 205, 20 N. W. 142; Wells v. Wells, 47 Barb. (N. Y.) 416; In re Oberholtzer's Appeal, 124 Pa. St. 583, 17 Atl. 143.

[51] Shiveley v. Gilpin, 23 Ky. L. 2090, 66 S. W. 763.

[52] Harper v. Tapley, 35 Miss. 506; King v. Portis, 77 N. Car. 25; Hawley v. Bullock, 29 Tex. 216; Adams v. Hayden, 60 Tex. 223; Perrin v. Reed, 35 Vt. 2; Stewart v. McSweeney, 14 Wis. 468.

[53] Astor v. Wells, 4 Wheat. (U. S.) 466, 4 L. ed. 616.

[54] Beaver v. Frick Co., 53 Ark. 18, 13 S. W. 134; Chambers v. Haney, 45 La. Ann. 447, 12 So. 621; Koerper v. St. Paul &c. R. Co., 40 Minn. 132, 41 N. W. 656; Melton v. Turner, 38 81.

[55] Jones v. Powers, 65 Tex. 207.

[56] Stinnett v. House, 1 Posey Unrep. Cas. (Tex.) 484.

fore the deed was recorded, it should be recorded in the county in which the land is situated at the time of recording.[57]

A power of attorney to convey land must be registered in any county in which the grantor may at the time or thereafter have land to convey; but the fact that it is recorded in one county, does not make a deed executed under the power recordable as to land in another county.[58] A deed of assignment embracing lands in a county other than that of the residence of the assignor must be recorded in such county.[59]

§ 125. Effect of a record duly made.—The record of a deed or mortgage is constructive notice to all subsequent purchasers and mortgagees of the same interest or title from the grantor or from one deriving title from him.[60] As to them the instrument takes effect, not because of its prior execution, but by reason of its prior record. Subsequent purchasers are bound conclusively by the record of the deed or other conveyance in the line of their title as much as the mortgagor himself.[61] It is notice only to subsequent purchasers and incumbrancers under the same grantor, or through one who is the common source of title in the line of title to which the recorded deed belongs.[62] The registry of a conveyance of an equitable title is not notice to a purchaser of the legal title from a person who appears by the record to be the real owner.[63] It is not notice to those who have prior rights of record, or even to those whose rights are contemporaneous with those of the grantor, as, for instance, to his cotenants; therefore a mortgage by one tenant in common, though duly recorded, is not notice to his cotenant of its existence, or of the claim of the mortgagor of the exclusive ownership of the land.[64]

A deed or mortgage duly recorded is notice not only of the ex-

[57] Green v. Green, 103 Cal. 108, 37 Pac. 188.

[58] Muldrow v. Robinson, 58 Mo. 331.

[59] Eggleston v. Harrison, 61 Ohio St. 397, 55 N. E. 993.

[60] Hager v. Spect, 52 Cal. 579; Bush v. Golden, 17 Conn. 594; Buchanan v. International Bank, 78 Ill. 500; Chicago, P. & St. L. R. Co. v. Vaughn, 206 Ill. 234, 69 N. E. 113; Blair v. Whitaker, 31 Ind. App. 664, 69 N. E. 182; Ogden v. Walters, 12 Kans. 282; Humphreys v. Newman, 51 Maine 40; Clabaugh v. Byerly, 7 Gill (Md.) 354, 48 Am. Dec. 575; Doyle v. Stevens, 4 Mich. 87; McPherson v. Rollins, 107 N. Y. 316, 14 N. E. 411, 1 Am. St. 826; Souder v. Morrow, 33 Pa. St. 83; Barbour v. Nichols, 3 R. I. 187; Edwards v. Barwise, 69 Tex. 84, 6 S. W. 677; Wells v. Smith, 2 Utah 39.

[61] Tripe v. Marcy, 39 N. H. 439.

[62] McCabe v. Grey, 20 Cal. 509.

[63] Tarbell v. West, 86 N. Y. 280.

[64] Leach v. Beattie, 33 Vt. 195.

istence of the deed or mortgage, but of all its contents, so far as these fall within the line of the chain of title.[65] It is notice, too, of the covenants contained in it.[66] It is notice of any easement or privilege created by the deed or referred to in it.[67] The registry of a deed or mortgage is equivalent to a registry of it to all persons who may subsequently be interested in the property and fully protects the grantee's rights. A mortgage having once obtained priority by record does not lose its place by being held by any one under an unrecorded assignment.[68] The destruction of the record in any manner affects the constructive notice afforded by the recording of the deed.[69] Any one purchasing land in good faith, without notice of an unrecorded mortgage, takes it discharged of the lien;[70] and he can convey a good title to it although the mortgage is recorded before he conveys and his vendee has notice of it.[71]

If one having no title to land conveys it with covenants of warranty, and this is duly recorded, and afterward the grantor acquires title to the land, the estoppel by which he is bound under the covenants is turned into a good estate in interest in the grantee, so that by operation of law the title is considered as vested in him in the same manner as if it had been conveyed to the grantor before he executed the deed.[72] To sustain a deed made before the grantor acquires title is certainly a violation of the spirit of the registry system, under which a record is notice only to subsequent purchasers and incumbrancers in the line of the title to which the recorded deed belongs.[73]

§ 126. The doctrine of notice.—The doctrine of notice as affecting priority is generally adopted both in England and in this country. Subsequent purchasers who have notice of a prior unrecorded deed or mortgage are affected by their knowledge of it in the same way that the prior record of the instrument would

[65] Sowden v. Craig, 26 Iowa 156, 96 Am. Dec. 125; McPherson v. Rollins, 107 N. Y. 316, 14 N. E. 411, 1 Am. St. 826; Grandin v. Anderson, 15 Ohio St. 286.

[66] Morris v. Wadsworth, 17 Wend. (N. Y.) 103.

[67] Bellas v. Lloyd, 2 Watts (Pa.) 401.

[68] Brinckerhoff v. Lansing, 4 Johns. Ch. (N. Y.) 65, 8 Am. Dec. 538.

[69] Paxton v. Brown, 61 Fed. 874, 10 C. C. A. 135.

[70] Neslin v. Wells, 104 U. S. 428, 26 L. ed. 802.

[71] Tarbell v. West, 86 N. Y. 280.

[72] Salisbury Sav. Soc. v. Cutting, 50 Conn. 113.

[73] Ford v. Unity Church Soc., 120 Mo. 498, 25 S. W. 394, 23 L. R. A. 561, 41 Am. St. 711.

affect them.[74] Judgment creditors having such notice stand in a like position.[75] The doctrine is the same under statutes which declare without qualification that an unacknowledged or unrecorded deed shall be void as against purchasers, or as against all persons who are not parties to the conveyance.[76] The record is constructive notice only; but it is notice to all the world that comes after. Any other notice must in the nature of things be limited in the extent of it, but, so far as it goes, its effect is equitable not any less, certainly, than that of the record. Having notice of a deed or mortgage defectively recorded, or not recorded at all, a subsequent purchaser can not claim priority for his own deed.[77] As between him and the prior grantee or mortgagee, it is the same as if the prior deed or mortgage had been duly recorded.[78]

Therefore priority among mortgagees and grantees depends not only upon the date of their deeds and the date of their record, but also upon the knowledge they have of the true state of facts as to the title, and of the rights and equities of those who have not fixed their priority by duly recording their deeds.[79] It has been questioned whether the courts ought ever to have suffered the question of actual notice to be agitated against one whose conveyance is duly registered.[80]

The basis of the doctrine of notice is, that it is unconscientious and fraudulent to permit a junior purchaser to defeat a prior conveyance or incumbrance of which he has knowledge.[81] But it has been doubted whether this doctrine does not give occasion to more fraud than it prevents and whether vigilance in recording the mortgage should not be rewarded as much as vigilance in obtaining it.[82] The recording acts charge subsequent purchasers

[74] Hutchinson v. Hutchinson, 16 Colo. 349, 26 Pac. 814; Thompson v. Maxwell, 16 Fla. 773; Peters v. Ham, 62 Iowa 656, 18 N. W. 296; Short v. Fogle, 42 Kans. 349, 22 Pac. 223; Cook v. French, 96 Mich. 525, 56 N. W. 101; Keith & Perry Coal Co. v. Bingham, 96 Mo. 96, 10 S. W. 32; Hendrickson v. Woolley, 39 N. J. Eq. 307; Dingley v. Bon, 130 N. Y. 607, 29 N. E. 1023; Morrill v. Morrill, 53 Vt. 74, 38 Am. Rep. 659; Rowell v. Williams, 54 Wis. 636, 12 N. W. 86.

[75] Jordan v. Mead, 12 Ala. 247; Manaudas v. Mann, 25 Ore. 597, 37 Pac. 55.

[76] Bullock v. Whipp, 15 R. I. 195, 2 Atl. 309.

[77] Coe v. Winters, 15 Iowa 481; Johnston v. Camby, 29 Md. 211.

[78] Hill v. McNichol, 76 Maine 314; Smallwood v. Lewin, 15 N. J. Eq. 60.

[79] Sheffey v. Bank, 33 Fed. 315.

[80] Donahue v. Mills, 41 Ark. 421; Calumet Canal & Dock Co. v. Russell, 68 Ill. 426; Allen v. Cadwell, 55 Mich. 8, 20 N. W. 692.

[81] Harrington v. Allen, 48 Miss. 492.

[82] Mayham v. Coombs, 14 Ohio 428.

with constructive notice of all instruments of record in the apparent chain of title, and not with notice of all instruments of record by whomsoever made relating to the land in question. When a purchaser searches the records till he finds the deed by which his grantee acquired his title, he is not bound to look for deeds of an antecedent grantor recorded after the deed to his grantor. The record of the deed is constructive notice only to subsequent purchasers under the same grantor.[83]

The rule that the purchaser in good faith is not affected with notice of a prior deed from an antecedent grantor, recorded subsequently to the deed to his grantor, though prior to his own purchase deed, has the support of the better authorities.[84] There are, however, quite a number of decisions to the contrary.[85] As a general rule a purchaser is not bound to search the records for incumbrances as against a title that does not appear of record.[86] Generally, therefore, the record of any mortgage prior to the conveyance by which the mortgagor took his title is no notice of the incumbrance to a subsequent purchaser.[87] Yet the circumstances may be such that a purchaser will be bound to search the records for incumbrances as against a title which does not appear of record; as, for instance, when he has actual notice, prior to the date of the conveyance to himself, of an equitable interest to another in the land by reason of his possession of it under a parol contract of purchase.[88]

§ 127. **Actual notice.**—Actual notice literally means direct personal knowledge.[89] Yet the term is often used in a broader sense as including notice implied from indirect or circumstantial

[83] Carbine v. Pringle, 90 Ill. 302; Hill v. McNichol, 76 Maine 314; Morse v. Curtis, 140 Mass. 112, 2 N. E. 929, 55 Am. Rep. 456; Ford v. Unity Church Soc., 120 Mo. 498, 25 S. W. 394, 23 L. R. A. 561, 41 Am. St. 711; Calder v. Chapman, 52 Pa. St. 359, 91 Am. Dec. 163; Day v. Clark, 25 Vt. 397.

[84] See note 83.

[85] Mahoney v. Middleton, 41 Cal. 41; English v. Waples, 13 Iowa 57; Van Aken v. Gleason, 34 Mich. 477; Woods v. Garnett, 72 Miss. 78, 16 So. 390; Westbrook v. Gleason, 79 N. Y. 23; Erwin v. Lewis, 32 Wis. 276.

[86] Stockwell v. State, 101 Ind. 1; Losey v. Simpson, 11 N. J. Eq. 246; Cook v. Travis, 20 N. Y. 400.

[87] Montgomery v. Keppell, 75 Cal. 128, 19 Pac. 178, 7 Am. St. 125; Tarbell v. West, 86 N. Y. 280; Calder v. Chapman, 52 Pa. St. 359, 91 Am. Dec. 163.

[88] Emeric v. Aldarado, 90 Cal. 444, 27 Pac. 356; Losey v. Simpson, 11 N. J. Eq. 246.

[89] Crassen v. Swoveland, 22 Ind. 427; Baltimore v. Williams, 6 Md. 235; Lamb v. Pierce, 113 Mass. 72; Rogers v. Jones, 8 N. H. 264; Williamson v. Brown, 15 N. Y. 354.

evidence.[90] Whether actual notice exists in any particular case, and whether it is sufficient to charge the party whom it is sought to affect by it, is a question of fact to be considered and determined upon the evidence in each particular case. It is deemed effectual and sufficient when the evidence shows that the matter relating to the prior claim or interest of another, constituting notice of it, was brought distinctly to the knowledge and attention of the person it is sought to affect.[91]

Whether "actual notice" means actual knowledge or includes constructive knowledge, in statutes requiring actual notice to affect a purchaser, is a question upon which the decisions are not in harmony. Some courts have held that, although a purchaser has knowledge that the lands had been sold and purchased by another person, yet if no deed had been recorded, and the purchaser had no knowledge that a deed had been made, he is not charged with actual notice.[92] This construction gives full effect to the registry laws and enables purchasers to rely upon them fully and implicitly without searching the outside world to ascertain the true state of the title. It simply requires of all persons who hold or claim any interest in real estate, that they shall use due care and diligence in placing their rights beyond all danger by obtaining and putting upon record proper title papers. But in states in which there are statutes requiring "actual notice" or "knowledge" to affect a purchaser, a less strict interpretation of the word is adopted, and actual notice does not imply actual knowledge. While actual notice of an unrecorded deed is distinguished from mere notice such as would be imparted from actual, open and visible occupation, whether known to the purchaser or not, yet the words are held to include constructive knowledge imparted from actual, open and visible occupation, where such occupation is in fact known to the purchaser,[93] or from other facts which constructively charge him with notice. Notice is regarded as actual when the purchaser either knows of the adverse claim to title, or is conscious of having the means of such knowledge.[94]

[90] Knapp v. Bailey, 79 Maine 195, 9 Atl. 122, 1 Am. St. 29.

[91] Michigan Mutual Life Ins. Co. v. Conant, 40 Mich. 530.

[92] Lamb v. Pierce, 113 Mass. 72.

[93] Allen v. McCalla, 25 Iowa 464, 96 Am. Dec. 56; Greer v. Higgins, 20 Kans. 420; Knapp v. Bailey, 79 Maine 195, 9 Atl. 122, 1 Am. St. 29; Ringgold v. Bryan, 3 Md. Ch. 488; State Bank v. Frame, 112 Mo. 502, 20 S. W. 620; McKinzie v. Perrill, 15 Ohio St. 162, 45 Am. Dec. 565; Musgrove v. Bonser, 5 Ore. 313, 20 Am. Rep. 737; Brinkman v. Jones, 44 Wis. 498.

[94] Connecitcut Mutual Life Ins. Co. v. Smith, 117 Mo. 261, 22 S. W. 623, 38 Am. St. 656.

Notice implied by circumstances has been called actua_ notice in the second degree.[95] The degrees and kinds of actual notice are without number, ranging from a formal written statement of the lien, giving all its detail, to a mere verbal declaration of the fact of its existence; it may be one given expressly as a notice, or it may have come in an accidental way. But neither the manner of the notice nor the purpose of it is material.[96] A mere remark or supposition that some other person claims an interest in property will not affect a person with notice of such interest.[97]

Of course, formal and technical notice can be given only by the person interested; but a stranger can give information which will affect a purchaser by putting him upon inquiry as to the fact. Information from a person directly interested in the property is entitled to more weight than the statements of a stranger are entitled to; but it may be stated as a general proposition that, if the information be derived from any other source entitled to credit, and it be definite, it will be equally binding as if it came from the party himself.[98] What is sufficient to put a purchaser upon inquiry, and affect him with the facts which the inquiry might lead to, it is difficult to state in the form of a rule universally applicable. In each case it must be determined whether the facts and considerations disclosed are such as to charge the consciousness of the purchaser with the duty of following up the inquiry.[99] In general, a notice of a claim, right, or interest affecting a title is sufficient if it is such a notice as a man of ordinary intelligence would act upon if it affected his ordinary business affairs.[1]

A purchaser knowing of the existence of a debt for unpaid purchase-money is not charged with notice of an unrecorded mortgage securing such purchase-money.[2] But a purchaser with such knowledge is put upon inquiry as to the existence of the vendor's lien, and is chargeable with notice of it, if it exists, in

[95] Wilson v. Miller, 16 Iowa 111; Knapp v. Bailey, 79 Maine 195, 9 Atl. 122, 1 Am. St. 29.

[96] Wailes v. Cooper, 24 Miss. 208.

[97] Lambert v. Newman, 56 Ala. 623; Hall v. Livingston, 3 Del. Ch. 348; Ratteree v. Conley, 74 Ga. 153; Chicago v. Witt, 75 Ill. 211; Weare v. Williams, 85 Iowa 253, 52 N. W. 328; Butlers v. Stevens, 26 Maine 484; Shepard v. Shepard, 36 Mich. 173.

[98] Lawton v. Gordon, 37 Cal. 202; Jaeger v. Hardy, 48 Ohio St. 335, 27 N. E. 863; Mulliken v. Graham, 72 Pa. St. 484; Martel v. Somers, 26 Tex. 551.

[99] Baker v. Bliss, 39 N. Y. 70.

[1] Bradlee v. Whitney, 108 Pa. St. 362.

[2] Pollak v. Davidson, 87 Ala. 551, 6 So. 312.

a state where such a lien is recognized.[3] A purchaser may be charged with notice by the fact that he is paying a very inadequate price for the property.[4] Notice, to supply the place of registry, must be sufficient to make inquiry upon; it must be more than what is barely sufficient to put the party upon inquiry.[5] In general it may be said that the facts disclosed amount to notice when they are such as render it incumbent upon the purchaser or mortgagee to inquire, and at the same time enable him to prosecute the inquiry successfully.[6]

As a general rule a purchaser is not put upon inquiry by notice of a deed not in the line of title under which he claims.[7] The inquiry should be prosecuted by recourse to reliable and disinterested sources of information. It is not safe or sufficient to rely upon the statements of the vendor, or of one who has a motive for misleading the inquirer.[8] If a purchaser put upon inquiry fails to prosecute it with due diligence he is conclusively presumed to have notice of the facts that a due inquiry would have disclosed.[9]

§ 128. Implied notice.—Implied notice arises out of the legal relation of a person who has no notice with another who has notice. Implied notice is a branch of actual notice, and is imputed to a person when he is conscious of having the means of knowledge which he does not use, or that he has such relations with another that the knowledge of the latter, though not communicated, is imputed to him. Thus notice to the principal is implied from notice to his agent. When an agent acquires knowledge of any matters or instruments affecting the title of any lands, about the purchase or mortgage of which he is employed, and this knowledge is such that it is his duty to communicate it to his principal, the law imputes this knowledge to the principal;

[3] Overall v. Taylor, 99 Ala. 12, 11 So. 738.

[4] Durant v. Crowell, 97 N. Car. 367, 2 S. E. 541.

[5] Tompkins v. Henderson, 83 Ala. 391, 3 So. 774; Reed v. Gannon, 50 N. Y. 345.

[6] Tompkins v. Henderson, 83 Ala. 391, 3 So. 774; Thompson v. Pioche, 44 Cal. 508; Boswell v. Goodwin, 31 Conn. 74, 81 Am. Dec. 169; Hunt v. Dunn, 74 Ga. 120; Rock Island & Pac. R. Co. v. Dimick, 144 Ill. 628, 32 N. E. 291, 19 L. R. A. 105; Smith v. Schweigerer, 129 Ind. 363, 28 N. W. 696.

[7] Satterfield v. Malone, 35 Fed. 445, 1 L. R. A. 35.

[8] Overall v. Taylor, 99 Ala. 12, 11 So. 738; Blatchley v. Osborn, 33 Conn. 226.

[9] Foster v. Stallworth, 62 Ala. 547; Gaines v. Saunders, 50 Ark. 322, 7 S. W. 301; Montgomery v. Keppel, 75 Cal. 128, 19 Pac. 178; Mason v. Mullahy, 145 Ill. 383, 34 N. E. 36.

or, in other words, notice to the principal of such matters or instruments is implied.[10] Such notice is sometimes called constructive notice, but it is really implied from the identity of principal and agent, and not imputed by virtue of a construction placed upon their conduct or relation. The line of demarcation between the different kinds of notice is not always observed but this is a matter of very little practical importance, because the effect of notice, whether it be called actual, implied, or constructive, is the same. Notice to an agent, to bind the principal, must be brought home to the agent while engaged in the business and negotiation of the principal, and when it would be a breach of trust in the former not to communicate the knowledge to the latter.[11] Whether the notice must be in the same transaction, or in some transaction in which the principal is concerned, is a question upon which the authorities are not agreed. Some courts hold that notice to the agent binds the principal only when it is given or acquired by him in the transaction in which the principal employs him.[12] Other courts have adhered to the doctrine that the principal is affected by the agent's knowledge of any prior lien, trust, or fraud affecting the property, no matter when acquired.[13] The notice must be of some matter material to the transaction; of something which it is the duty of the agent to make known to the principal.[14] When the same agent or attorney is employed by both parties in the same transaction his knowledge is then the knowledge of both the vendor and vendee, or both the mortgagor and mortgagee.[15] When an agent is guilty of any fraud, for the carrying out of which it is necessary that he should conceal it from his principal, notice of it can not be imputed to the latter.[16]

[10] Smith v. Ayer, 101 U. S. 320, 25 L. ed. 955; Donald v. Beals, 57 Cal. 399; Clark v. Fuller, 39 Conn. 238; Walker v. Schreiber, 47 Iowa 529; Willis v. Vallette, 4 Metc. (Ky.) 186; Allen v. Poole, 54 Miss. 323; Hickman v. Green, 123 Mo. 165, 27 S. W. 440, 29 L. R. A. 39; Coggswell v. Griffith, 23 Nebr. 334, 36 N. W. 538; Hovey v. Blanchard, 13 N. H. 145; Stanley v. Chamberlin, 39 N. J. L. 565; Slatterly v. Schwannecke, 118 N. Y. 543, 23 N. E. 922; Cowan v. Withrow, 111 N. Car. 306, 16 S. E. 397; Bigley v. Jones, 114 Pa. St. 510, 7 Atl. 54.

[11] Rogers v. Palmer, 102 U. S. 263, 26 L. ed. 164; Satterfield v. Malone, 35 Fed. 445, 1 L. R. A. 35.

[12] McCormick v. Wheeler, 36 Ill. 114, 85 Am. Dec. 388; Rand v. Davis (Tex.), 27 S. W. 939; Blumenthal v. Brainard, 38 Vt. 402, 91 Am. Dec. 350.

[13] Arrington v. Arrington, 114 N. Car. 151, 19 S. E. 351; Hart v. Farmers &c. Bank, 33 Vt. 252.

[14] Wyllie v. Pollen, 32 L. J. (N. S.) Ch. 782.

[15] Losey v. Simpson, 11 N. J. Eq. 446.

[16] Dillaway v. Butler, 135 Mass. 479; National Life Ins. Co. v. Minch, 53 N. Y. 144.

Notice is not necessarily implied out of the relationship of husband and wife.[17] But where a husband buys land for his wife, with knowledge of a prior unrecorded deed, the wife is chargeable with such knowledge.[18]

A purchaser from one of two joint owners is chargeable with notice of the interest of the other, when this interest is shown by the conveyance, to which he must look for his vendor's title.[19] If a purchaser has knowledge that the land is partnership property, and he attempts to purchase the individual interest of one partner, he buys subject to the equitable rights of the other partners.[20] Notice, to affect a corporation, must be brought home to the president and directors, or to some officer to whom the matter to which the notice relates has been specially given in charge.[21]

§ 129. **Constructive notice.**—Constructive notice is that which is imputed to a person upon strictly legal inferences of matters which he necessarily ought to know, or which, by the exercise of ordinary diligence, he might know. It excludes actual notice. It can not be controverted.[22] The most familiar instance of constructive notice is that which under the registry laws is afforded by the record of the deed. Every subsequent inquirer is bound to know the existence and contents of such deed, and it is not admissible for him to show that his attorney examined the records and failed to find the deed of record.[23]

But there are various other kinds of constructive notice, and a purchaser or mortgagee is as much bound by the knowledge thus imputed to him of the matters and instruments affecting the title to property, as he would be if he were informed of them by a deed properly recorded. Whether the person charged with such notice actually had knowledge of the facts affecting the property in question, or might have learned them by inquiry, or whether he studiously abstained from inquiry for the very purpose of avoiding notice, he is alike presumed to have had notice. Constructive notice is imputed either upon the ground of fraud or of

[17] Satterfield v. Malone, 35 Fed. 445, 1 L. R. A. 35.

[18] McMaken v. Niles, 91 Iowa 628, 60 N. W. 199.

[19] Campbell v. Roach, 45 Ala. 667.

[20] Tillinghast v. Champlin, 4 R. I. 173, 67 Am. Dec. 510.

[21] Simmons Creek Coal Co. v. Doran, 142 U. S. 417, 12 Sup. Ct. 239, 35 L. ed. 1063.

[22] Simmons Creek Coal Co. v. Doran, 142 U. S. 417, 12 Sup. Ct. 239, 35 L. ed. 1063.

[23] Edwards v. Barwise, 69 Tex. 84, 6 S. W. 677.

negligence. It does not exist without the one or the other. Notice of the existence of an adverse right, title or lien, without the particulars of it, is sufficient.[24] Having notice of the existence of an adverse right, title, or lien, the purchaser is chargeable with constructive notice of all its contents.[25]

When a person claims under a deed which by its recitals leads him to other facts affecting the title to the property, he is presumed to know such facts; or it would be gross negligence in him not to make inquiry as to the facts he is thus put in the way of ascertaining.[26] When a purchaser can not make out his title except through a deed which leads him to the knowledge of another fact, he will be deemed to have knowledge of that fact.[27] A purchaser from one whose title-deed describes him as "trustee" has notice of a trust of some kind, and is put upon inquiry as to the existence and nature of the trust, though the word "trustee" without the name of the beneficiary or any declaration of trust, may be sufficient in itself to create a trust.[28] Persons dealing with a trustee are bound to take notice of the scope of his authority, and even a third person taking a title which comes through a trustee, and having notice of facts which would put him upon inquiry whether the trustee was acting within the scope of his authority, is not protected.[29] One who purchases land by a deed, which expressly recites that the premises are subject to a mortgage, has notice of the mortgage from the recital, and can not claim against it, although it be not recorded.[30] Where there is a

[24] Willink v. Morris &c. Co., 4 N. J. Eq. 377.

[25] Webb v. Robbins, 77 Ala. 6; Martin v. Cauble, 72 Ind. 67.

[26] Corbitt v. Clenny, 52 Ala. 480; Hassey v. Wilke, 55 Cal. 525; Hamilton v. Nutt, 34 Conn. 501; Rosser v. Cheney, 61 Ga. 468; Dean v. Long, 122 Ill. 447, 11 N. E. 34; Cincinnati, I., St. L. & C. &c. R. Co. v. Smith, 127 Ind. 461, 26 N. E. 1009; Clark v. Holland, 72 Iowa 34, 33 N. W. 350, 2 Am. St. 230; Pike v. Collins, 33 Maine 38; Bryan v. Harvey, 18 Md. 113; Sargent v. Hubbard, 102 Mass. 380; Wait v. Baldwin, 60 Mich. 622, 27 N. W. 697, 1 Am. St. 551; Ross v. Worthington, 11 Minn (Gil. 323) 438, 88 Am. Dec. 95; Deason v. Taylor, 53 Miss. 697; Mason v. Black, 87 Mo. 329; Buchanan v. Balkum, 60 N. H. 406; Jennings v. Dixey, 36 N. J. Eq. 490; Acer v. Westcott, 46 N. Y. 384, 7 Am. Rep. 355; Bonner v. Ware, 10 Ohio 465; Parke v. Neeley, 90 Pa. St. 52; Kansas City Land Co. v. Hill, 87 Tenn. 589, 11 S. W. 797; Renick v. Dawson, 55 Tex. 102; Willis v. Adams, 66 Vt. 223, 28 Atl. 1033; Whitlock v. Johnson, 87 Va. 323, 12 S. E. 614; Dailey v. Kastell, 56 Wis. 444, 14 N. W. 635.

[27] Loring v. Groomer, 110 Mo. 632, 19 S. W. 950.

[28] Marbury v. Ehlen, 72 Md. 206, 19 Atl. 648, 20 Am. St. 467; Mercantile Nat. Bank v. Parson, 54 Minn. 56, 55 N. W. 825, 40 Am. St. 299.

[29] Kirsch v. Tozier, 143 N. Y. 390, 38 N. E. 375, 42 Am. St. 729.

[30] Hull v. Sullivan, 63 Ga. 196; Garrett v. Puckett, 15 Ind. 485; Howard v. Chase, 104 Mass. 249; Westervelt v. Wyckoff, 32 N. J. Eq. 188.

recital in a prior deed that the sale was made upon credit, a subsequent purchaser is bound to inquire whether the purchase-money has been paid or whether the vendor has a lien for it; and the mere fact that the time of payment of the purchase-money, as recited in the deed, has elapsed does not authorize him to presume that it was paid.[31] Where the mortgaged premises have been sold in parcels to different persons at different times, in the absence of any intervening equities the several parcels are subject to the mortgage, and are to be resorted to in the inverse order of alienation.[32] A purchaser having actual notice of a mortgage is affected with notice of any other incumbrances which are referred to in that mortgage, or in other deeds to which the deeds first referred to may in turn refer.[33]

A general description of the deed is sufficient to put all parties interested upon inquiry, and to charge them with notice of all facts that could be obtained by the exercise of ordinary diligence and the prosecution of the inquiry in the right direction.[34] The limit of inquiry necessary in any case is that required by the use of reasonable diligence. What is reasonable diligence can not be determined by any general rule, but must vary with the circumstances of each case.

§ 130. **Official tract indexes.**—By statute in some states the recording officer is required to keep, in books suitable for the purpose, a tract index of each instrument of record affecting the title to each particular tract of land in the county or district. From this index the officer furnishes, on demand of any person, and on payment of the fee, if any provided therefor, an abstract of title to any land in such county or district. Where such official tract index is in use the private abstracter is enabled to compile an abstract with less difficulty than he would otherwise experience. As a rule he has, with the general public, free access to this tract index in compiling an abstract for a client, yet in the absence of express statutory permission, he may not copy it into other books for use in his business as an abstracter of titles. Such tract indexes are to be distinguished from other records such as are usually denominated "public records."[35] These official tract

[31] Deason v. Taylor, 53 Miss. 697; Tydings v. Pitcher, 82 Mo. 379.

[32] Iglehart v. Crane, 42 Ill. 261; McKinney v. Miller, 19 Mich. 142.

[33] Howard Ins. Co. v. Halsey, 8 N. Y. 271, 59 Am. Dec. 478.

[34] Seymour v. Darrow, 31 Vt. 122.

[35] Davis v. Abstract Construction Co., 121 Ill. App. 121.

indexes are usually made by so ruling and arranging the paper that opposite to the description of each quarter section, sectional lot, town, city or village lot or other subdivision of land in the county, which a convenient arrangement may require to be noted, there shall be left a blank space of ample proportions in which to enter the letter or numeral indicating each volume, and the class of records of such volume, designating deeds by the letter D, mortgages by the letter M, miscellaneous instruments by the abbreviation Misc., and the register of attachments, sales and notices by the letter R, together with the page of the volume upon which any deed, mortgage or other instrument affecting the title to or mentioning such tract or any part thereof shall heretofore have been or may hereafter be recorded or entered.

§ 131. **General index of records.**—There is no uniform method of indexing public records in use in this country, but some sort of system, more or less perfect, will be found in every state. The official in charge of the records is usually required to keep a general index in which he must enter every instrument or writing received by him for record, under the respective and appropriate heads. The following is illustrative of the form of such general index:

No. of Instrument	Time of Reception	Name of Grantor	Name of Grantee	Description of Land	Name of Instrument	Volume and page where recorded	To whom delivered	Fee received
.....								
.....								

The officer is required to make correct entries in the index of every instrument or writing received by him for record, under the respective and appropriate heads, entering the names of the grantors in alphabetical order. He is required immediately upon the receipt of any such instrument for record to enter in the appropriate column, and in the order of time in which it is received, the day, hour and minute of its reception. He is also required to enter in the appropriate columns of the index a description of the land, the name of the instrument, the volume and page where the instrument is recorded, to whom it was delivered when recorded, and the fee received. The index above described is

usually intended for all instruments of conveyance. The statutes sometimes provide for the keeping of another and additional index in which are shown instruments of a miscellaneous character. In this index the instruments are numbered consecutively, the kind of instrument designated, and where such instrument is recorded or filed. An illustration of the form of such index is as follows:

No. of Instrument	Kind of Instrument	Where Recorded or Filed		
		Volume	Page	Letters of Title
.....				
.....				

Generally an instrument is deemed recorded at the time it is noted in the index, and statutes not infrequently provide that wherever the recording officer has made in any index required by law to be kept in his office, in the index column provided for describing the land affected by the instrument indexed, the words "see record," "see deed," "see mortgage," or other instrument, as the case may be, such entry shall be sufficient reference to the record of such instrument if it be in fact recorded at large in the place so referred to.

§ 132. Whether the index is a part of the record.—Unless otherwise provided by statute the index is generally considered no part of the record, and a mistake in it does not invalidate the notice afforded by a record otherwise properly made.[36] Although a deed be omitted from the index, there is constructive notice of it which affects all subsequent purchasers from the time it was left for record.[37] The general policy of the recording acts is to make

[36] Chatham v. Bradford, 50 Ga. 327, 15 Am. Rep. 692; Gilchrist v. Gough, 63 Ind. 576, 30 Am. Rep. 250; Bishop v. Schneider, 46 Mo. 472, 2 Am. Rep. 533; Lincoln Bldg. & Sav. Assn. v. Hass, 10 Nebr. 581, 7 N. W. 327; Semon v. Terhune, 40 N. J. Eq. 364, 2 Atl. 18; Mutual Life Ins. Co. v. Dake, 87 N. Y. 257; Davis v. Whitaker, 114 N. Car. 279, 19 S. E. 699, 41 Am. St. 793; Green v. Garrington, 16 Ohio St. 548, 91 Am. Dec. 103; Musgrove v. Bonser, 5 Ore. 313, 20 Am. Rep. 734; Stockwell v. McHenry, 107 Pa. St. 237, 52 Am. Rep. 475; Barrett v. Prentiss, 57 Vt. 297; Ely v. Wilcox, 20 Wis. 523, 91 Am. Dec. 436.

[37] Perkins v. Strong, 22 Nebr. 725, 36 N. W. 292; Stockwell v. McHenry, 107 Pa. St. 237, 52 Am. Rep. 475; Throckmorton v. Price, 28 Tex. 605, 91 Am. Dec. 334; Curtis v. Lyman, 24 Vt. 338, 58 Am. Dec. 174.

the filing of a deed duly executed and acknowledged, with the proper recording officer, constructive notice from that time; and although it be provided that the registrar shall make an index for the purpose of effecting a correct and easy reference to the books of reference in his office, the index is designed, not for the protection of the party recording his conveyance but for the convenience of those searching the records; and, instead of being a part of the record, it only shows the way to the record. It is in no way necessary that a conveyance shall be indexed, as well as recorded, in order to make it a valid notice.[38] When a grantee has delivered his deed to the recorder, notice of its contents is imparted from that time, if it is correctly spread upon the record. He has done all the law requires of him for his protection. The purpose of the index is only to point to the record, but constitutes no part of it.[39]

But in Iowa, Washington and Wisconsin, the index is an essential part of the record, and a deed filed but not indexed, or even one copied into the record but not indexed, does not impart constructive notice.[40] In such states the laws require a descriptive index to be kept, and prescribe the requisites of the index, and the index is regarded as an integral part of the complete and valid registration.[41] But the omission of the description in such index is cured by the recording of the deed at length in the proper record.[42] The record, though complete in every other respect except that it is not properly indexed, does not operate as constructive notice.[43]

§ 133. Records of attachment and lis pendens.—In most states recording officers are required to keep a separate book or register divided into two columns with appropriate headings, in which he shall enter an abstract of every writ of attachment or copy thereof and certificate of real estate attached, of every certificate of sale of real estate, and of every notice of the pendency of any action affecting real estate, which may be filed pursuant to law in his office, specifying the day, hour and minute of its

[38] Davis v. Whitaker, 114 N. Car. 279, 19 S. E. 699, 41 Am. St. 793.

[39] Bishop v. Schneider, 46 Mo. 472, 2 Am. Rep. 533.

[40] Whalley v. Small, 25 Iowa 184; Ritchie v. Griffiths, 1 Wash. 429, 25 Pac. 341, 12 L. R. A. 384, 22 Am. St. 155; Oconto Co. v. Jerrard, 46 Wis. 317, 50 N. W. 591.

[41] Barney v. McCarty, 15 Iowa 510, 83 Am. Dec. 427.

[42] Pringle v. Dunn, 37 Wis. 449, 19 Am. Rep. 772.

[43] Howe v. Thayer, 49 Iowa 154.

reception, the names of the several parties mentioned therein, designating separately plaintiffs and defendants; the names of the attorneys of the respective parties; the date when the land was sold; the description of all such real estate mentioned, and the amount of indebtedness claimed in any such writ, and the amount for which any such land was sold. He is usually required to keep an index for such record, showing in alphabetical order, separately, the names of each party plaintiff and each party defendant, and the page on which such name is found.

The force and effect of the recording of a deed or mortgage are limited not only by the actual notice which the grantee may have of prior unrecorded conveyances, but also by constructive notice of rights and claims of other parties, furnished by the pendency of an action in relation to the title of the property, notice of the pendency of which has been filed according to law.[44] But only those persons are charged with notice, or are affected by a lis pendens, who, pending the suit, purchase from a party to the suit,[45] or derive title from one so purchasing.[46]

§ 134. **Index of judgment records.**—As a rule all judgments, decrees and orders rendered or made by any court in cases where the title to land shall have been in controversy or operating to pass title thereto or otherwise affect the title, is required to be recorded in the office of the register of deeds of the county where any part of the lands are situated, in the same manner and with like effect as conveyances. But as judgments and decrees of a court of record are required by law to be recorded in the office of the clerk of the court in order to constitute a lien on the real estate of the defendant, the proper place to look for judgments against a particular person is in the judgment dockets in the clerk's office. Clerks are usually required to keep a judgment index and cross-index arranged in the alphabetical order of the names of the plaintiff and defendant. The requirement that a cross-index shall be kept is not merely directory. It is important and necessary. It is intended to enable any person to learn that there is a docketed judgment in favor of a certain party or parties, and against certain other parties, and where to find it on the docket. The inquirer is not required to look through the whole

[44] Lacassagne v. Chapuis, 144 U. S. 119, 12 Sup. Ct. 659, 36 L. ed. 368.

[45] Green v. Rick, 121 Pa. St. 130, 15 Atl. 497, 2 L. R. A. 48, 6 Am. St. 760.

[46] Norton v. Birge, 35 Conn. 250.

docket to learn if there be a judgment against a particular person. The purpose is that the index shall point to a judgment against the particular person inquired about, if there be a judgment on the docket against him.[47]

It is provided by statute in some states that a judgment is not a lien on the real estate of the judgment debtor as against subsequent bona fide purchasers without notice unless properly indexed.[48] In some states, before a judgment is entered on the judgment docket, the clerk is required to enter it in a judgment book or daily journal, and after such entry he must immediately docket the judgment. The entry on the journal stand in the place of the record, and must always be consulted in making a search for judgments. Both a plaintiff's index and a defendant's index will be found in some offices. The entries in these indexes are usually made upon the filing of a suit, and where no lis pendens has been filed, discovery may be made here of a suit pending. In the absence of a proper index of judgments, recourse must be had to the judgment dockets.

§ 135. **Tax records.**—It will be shown in a subsequent chapter that taxes and assessments are everywhere made liens upon the real estate of the taxpayer, and no examination is complete without a thorough search at the tax offices for delinquent taxes, tax sales, forfeitures and judgments. The indexes to the records in the clerk's or auditor's office are usually sufficient to afford all the information necessary. It has been held that until a tax deed is properly indexed it is not deemed recorded; but the indexing, if done afterwards, will relate back to the record.[49]

Search must also be made for special assessments for local improvements. These are usually found in the records of street, alley and sewer improvement assessments in the treasurer's office, as certified by the proper municipal officer.

§ 136. **Records of vital statistics.**—The scope of the examination of a title is limited to the public records, and the examiner need not extend his search to matters in pais. But it sometimes becomes important to know the facts relating to birth,

[47] Dewey v. Sugg, 109 N. Car. 328, 13 S. E. 923, 14 L. R. A. 393.

[48] Citizens' Bank of Stanton v. Young, 78 Nebr. 312, 110 N. W. 1003.

[49] Lombard v. Culbertson, 59 Wis. 433, 18 N. W. 399.

marriage, or death of a person. In such cases it may become necessary to pursue inquiries outside the record to supply the missing link. Doubtful questions of pedigree may sometimes be cleared up by entries made in church or parish records. These matters may sometimes be shown from the records of vital statistics required to be kept by certain officials. Statutes sometimes provide for local registrars whose duty it is to make and keep a complete and accurate copy of each birth, death, and marriage certificate received by him, and which must be filed and preserved in his office as a record of such birth, death or marriage. These records are accessible to any person desiring such information as may be disclosed thereby.

§ 137. **Abstracter's use of public records.**—The public records are public property, and are kept for the public benefit, and, although their custody and safe keeping are committed by law to designated officials, yet, as a general rule, everyone has the right to examine them, and to make such copies thereof as he may see fit, free of charge. This right need not be declared by statute,[50] but statutes will be found in many states expressly conferring this right. Independent of any statute declaring a right of inspection or requiring such record to be kept, the records of a public officer become such public records as are subject to the free and general inspection by the public.[51] Under a statute providing that every conveyance of real estate, and every instrument of writing setting forth an agreement to convey any real estate, or whereby any real estate may be affected, proved, acknowledged, certified, and recorded in the manner prescribed shall, from the time of filing the same with the recorder for record, impart notice to all persons of the contents thereof, it has been held that a corporation organized for the purpose of furnishing abstracts and guaranteeing titles may, free of charge, through its agents and employes, during regular business hours, inspect and make memoranda and copies of all files and records in the office of the county recorder, in so far as they relate to current transactions in which it is authorized or employed to make searches, furnish abstracts, or guarantee titles by persons having or seeking to acquire, an interest in property; the exam-

[50] Lum v. McCarty, 39 N. J. L. 287.

[51] Brown v. Knapp, 54 Mich. 132, 19 N. W. 778, 52 Am. Rep. 800.

ination to be made at such times and under such circumstances as will not prevent the recorder or his assistants from discharging their duties, nor interfere with the right of other persons to have access to the records.[52] But under such statute, the right to so inspect and copy public records has been denied persons and corporations seeking thereby data from which to compile an independent set of abstract books to be used for profit in their private business.[53] Under a statute which provided that all books and papers required to be kept by the county officers shall be open to the inspection and examination of any person, it has been held that this right of inspection should be exercised only by persons who have an interest in the record, or by someone for them, for the purpose of information, and was not intended to give a right to parties to engage in private speculation in connection with the information there received.[54] But both reason and authority sustain the right of a person or corporation engaged in the business of abstracting, to freely examine all public records, and make reasonable memoranda therefrom, under reasonable rules and regulations.[55]

§ 138. **Loss or destruction of records.**—The destruction of the record in no manner affects the constructive notice afforded by the recording of the deed.[56] Thus where a deed has been once recorded, a subsequent burning or other destruction of the records will not render the same ineffectual as notice to subsequent purchasers.[57] If the deed itself has been preserved, the recorder's certificate of its having been duly recorded is of the highest class of evidence.[58] So, also, the index book in which the deed is described, and its record certified in the proper book, are good evidence of the fact that the deed was recorded.[59] Other

[52] State v. Grimes, 29 Nev. 50, 84 Pac. 1061, 5 L. R. A. (N. S.) 545, 124 Am. St. 883.

[53] Bean v. People, 7 Colo. 200, 2 Pac. 909; Colescott v. King, 154 Ind. 621, 57 N. E. 535.

[54] Brewer v. Watson, 71 Ala. 299, 46 Am. Rep. 318; Bean v. People, 7 Colo. 200, 2 Pac. 909; Cormack v. Wolcott, 37 Kans. 391, 15 Pac. 245.

[55] Randolph v. State, 82 Ala. 527, 2 So. 714, 60 Am. Rep. 761; Boylan v. Warren, 39 Kans. 301, 18 Pac. 174, 7 Am. St. 551; People v. Richards, 99 N. Y. 620, 1 N. E. 258; Newton v. Fisher, 98 N. Car. 20, 3 S. E. 822.

[56] Paxson v. Brown, 61 Fed. 874, 10 C. C. A. 135; Franklin Sav. Bank v. Taylor, 131 Ill. 376, 23 N. E. 397; Hyatt v. Cochran, 69 Ind. 436; Addis v. Graham, 88 Mo. 197; Fitch v. Boyer, 51 Tex. 336.

[57] Cooper v. Flesner, 24 Okla. 47, 103 Pac. 1016, 23 L. R. A. (N. S.) 1180, 20 Ann. Cas. 29.

[58] Alvis v. Morrison, 63 Ill. 181, 14 Am. Rep. 117.

[59] Smith v. Lindsey, 89 Mo. 76, 1 S. W. 88.

secondary evidence may be shown that the deed was filed for record;[60] and when this is the case, the testimony of an attorney of a purchaser, that he examined an abstract of title to the property, which purported to be a full and complete abstract, and did not find a prior deed of trust upon the premises, is not sufficient to show that there was no record of it, as it does not follow that the abstract was what it purported to be.[61]

Where the registry office and its records have been destroyed by fire, evidence of the execution of a mortgage and of its loss, with slight circumstances in regard to the recording of it, have been held enough to sustain a presumption that it was recorded, as against another mortgagee who claims priority on the ground that such mortgage was never recorded.[62]

The legislatures of some states have passed acts providing for the re-recording or restoration of burnt records, and some courts have held that the acts are broad enough to determine and establish a title even as against a party holding or claiming a contingent interest.[63] A restoration of the record may be had, if desired, upon proof of proceedings for foreclosure of a mortgage in a court of general jurisdiction, a decree of sale, a sale under it, and its approval by the court, and the delivery of a certificate of purchase; and the court will thereupon order the execution of a deed to the purchaser, and a surrender of possession to him.[64] A court of equity will not restore a burnt record when such restoration would not show good title in the petitioner but would only cloud the title of the defendant.[65]

[60] Stebbins v. Duncan, 108 U. S. 32, 2 Sup. Ct. 313, 27 L. ed. 641; Cowles v. Hardin, 91 N. Car. 231.

[61] Steele v. Boone, 75 Ill. 457.

[62] Heacock v. Lubuke, 107 Ill. 396; Alston v. Alston, 4 S. Car. 116; Harrison v. McMurray, 71 Tex. 122, 8 S. W. 612.

[63] McCampbell v. Mason, 151 Ill. 500, 38 N. E. 672.

[64] Curyea v. Berry, 84 Ill. 600.

[65] Beattie v. Whipple, 154 Ill. 273, 40 N. E. 340.

CHAPTER VI

ABSTRACTER'S INDEXES AND REFERENCE BOOKS

SEC.
145. Importance of indexes and reference books.
146. The government tract book.
147. Surveyor's field notes.
148. Books of original entries.
149. Instrument number index.
150. The tract index.
151. Index of irregulars.
152. Index of tax sales.
153. Index of judgments.
154. Miscellaneous indexes and reference books.

§ 145. **Importance of indexes and reference books.**—The primitive method of compiling abstracts from the indexes and records of the public depositories is seldom practiced even in the more recent settled parts of the country. Such a method of search is not only tedious and laborious, but where the title is in the least degree intricate or complicated, the search is apt to be incomplete and unreliable. Modern business methods, and the ever increasing number of transactions affecting the title to real estate, have developed a speedier and a more reliable method of conducting the business of compiling abstracts. Every modern abstract office is now equipped with what is commonly called tract indexes, in which the various instruments of record are indexed under the heading or description of the real property affected thereby, and which, when completed and kept up to date, constitute an index to the records by tracts instead of by the names of the parties to such instruments. These tract indexes are now considered indispensable to the convenient and proper transaction of the business of compiling abstracts of title. By their use the abstracter is enabled to quickly produce a perfect chain of recorded title to any tract of land in his county or district. There is a lack of uniformity in the methods of compiling tract indexes, and the number of separate books used, but certain fundamental ideas will be found embodied in every system worth mentioning. Perhaps no system in use is complete and perfect within itself, and it would be impossible to suggest a system that would apply with equal facility in all localities. The time and labor required to complete and keep up a set of tract indexes will depend upon the number of transactions had in reference to the lands involved. In the older and more densely populated counties the task will

be much greater than in the more recently settled counties. In order that the books may be relied upon for what they contain, great care and skill must be exercised in abstracting every instrument of record affecting each and every tract or parcel of land in the county or district intended to be covered, and the data must be so arranged that it may be readily referred to in making up an abstract. In succeeding sections the reader's attention is called to some of the more important matters to be noticed in compiling a set of abstract books.

§ 146. **The government tract book.**—Since the inauguration of our system of disposing of the public lands it has been the duty of each register or receiver of a land district to keep a diagram or plat of each township in his district showing the sections and fractional parts thereof as per the government survey. He was required to note on these plats in connection with each tract disposed of, the form of the entry, the name of the claimant, the character of the entry, the number of the certificate, the date of filing or entry, the price paid, the cancellation and re-entry, if any, and the issuance of the patent, with the date and name of the patentee. Many of the land offices have long since been abolished, but the records made have been preserved by depositing them with some state official, designated by law, in which the land office was located. A copy of any township plat may be obtained upon application made to the proper custodian of the records, but where the land office is still in operation, application for copies must be made to the district register or receiver. It is to the government land office records that the abstracter must look for data that constitutes the foundation of all his indexes. In case these records do not show issuance of a patent application must be made to the General Land Office at Washington. In a great many places township plats containing all the data referred to above will be found in some county office, and the abstracter may use same in compiling his tract indexes.

§ 147. **Surveyor's field notes.**—The plats and surveys made by the United States government can not be contradicted by parol evidence, or by private surveys and plats.[1] Corners

[1] Chapman v. Polack, 70 Cal. 487, 11 Pac. 764; Spawr v. Johnson, 49 Kans. 788, 31 Pac. 664; Brown v. Morrill, 91 Mich. 29, 51 N. W. 700; Arneson v. Spawn, 2 S. Dak. 269, 49 N. W. 1066, 39 Am. St. 783.

shown to have been originally made by government surveyors are conclusive, and must be accepted as true corners, no matter how inaccurately they may have been originally established.[2] Where there is a discrepancy in a government survey between the monuments and distances given in the field-notes, the monuments will control, even though the result be that some of the quarter sections will contain less than their proper number of acres.[3] Calls for monuments in the field-notes of a government survey control in relocating the boundaries to land.[4] Monuments and boundary lines as established by the government survey control the description of lands patented by the United States, and mistakes in surveys can not be corrected by the judicial department of the government.[5] Field notes and plats of the original government survey are competent evidence in ascertaining where monuments are located in case a government corner is destroyed or the point where it was originally placed can not be found, or the location of the original corner is in dispute, but when it is shown by uncontradicted evidence that a section corner was located at a certain point, such location must control.[6] Hence, the importance of having access to the field-notes and plats of the original government surveyor can not be overlooked and no abstract office is complete without a copy of same. Copies may be obtained from the register of the district land office, or where the office has been abolished, from the state officer having custody of same as provided by law.

§ 148. **Books of original entries.**—The modern abstract office must contain a series of books in which to enter the daily transactions in the various record offices of the county. In these books are set forth a brief description of each and every instrument filed of record during the day, and of each and every transaction in any manner affecting the title to any land in the county. The fullness with which the entry is made will be determined by the nature of the instrument or transaction. It should contain no more nor less than is necessary to make a proper posting of the transaction or instrument on the tract index. In counties

[2] Billingsley v. Bates, 30 Ala. 376, 68 Am. Dec. 126; Liberty v. Burns, 114 Mo. 426; 19 S. W. 1107; 21 S. W. 728.

[3] Ogilvie v. Copeland, 145 Ill. 98, 33 N. E. 1085.

[4] Tognazzini v. Morganti, 84 Cal. 159, 23 Pac. 1085.

[5] Cragin v. Powell, 128 U. S. 691, 9 Sup. Ct. 203, 32 L. ed. 566.

[6] Woods v. West, 40 Nebr. 307, 58 N. W. 938.

where a large volume of business is transacted daily in the recording offices it is possible to make only a brief note of each instrument, showing its date, its nature, the parties thereto, and a brief description of the land. But where the volume of daily business is small the notes may be extended to any length desired. The original entry books may be arranged in any manner to suit the convenience of the abstracter, the only requirement being that the daily transactions should appear under heads following the order of time of their appearance on the public records. The following example is submitted:

May 1, 1918

Inst. No.	Grantor	Grantee	Description	Inst.	Date	Remarks

The entries in these books may be made up from the original instruments filed in the recording offices from day to day, or they may be made up from the reception indexes in the recorder's office where such indexes are kept, but in the latter case there is always a possibility that the instrument may be filed, and hence a matter of record, though not indexed, at the time of the search. Where the entry is made from the original instrument on file there is presented an opportunity of discovering an error in transcribing the instrument by the examiner comparing his entry with the record. In sparsely-settled counties the entry is sometimes extended so as to constitute a complete abstract of every instrument filed of record, but this method of entry is impracticable in counties where a large number of instruments are filed each day. The long form of entries has the advantage of enabling the abstracter to compile his abstract without having to go through the records, the abstract being made up from the data in the book of original entries. But this method has the disadvantage of not disclosing errors made by the officer in transcribing the instrument. The abstract is supposed to be a copy of the record and not a copy of the instrument of which the record is intended to be a copy. If the abstract be made up from the original entry it should be com-

pared with the record to ascertain if any mistakes were made in transcribing the instrument on the record. By this precaution any mistakes in making up the original entry will also be discovered.

§ 149. **Instrument number index.**—Every instrument filed for record should be given a number, and this number should be inserted in the proper column of the book of original entries, as well as in the tract book when it is made up. For the purpose of ready reference in compiling an abstract a separate index of instrument numbers should be kept. In the first column of this index should be entered the number given the instrument when the same is filed for record, and on the day the instrument is spread upon the record the book and page of the record should be entered in the index opposite the number of the instrument. This instrument number index may be made up as follows:

Instrument No.	Book	Page

It is optional with the abstracter who makes long form entries to keep an instrument number index, but if it is his practice to compare his entries with the record, the instrument number index will be of great service.

§ 150. **The tract index.**—It is essential to the convenient and proper transaction of the business of compiling abstracts that those engaged in it provide themselves with a set of tract books. In these books are entered the various instruments of record under the heading or description of the real estate affected thereby, and when completed will constitute an index to the records by tracts instead of by the names of the parties. Thus a division or page of the index is set apart to a lot or subdivision of land, and in said division or on said page is entered in consecutive order of record thereof the number of the instrument as given it when filed of record, the names of the parties, a description of the land, the kind of instrument, and the volume and page where the same is recorded. The date of the instrument, the date of recording, and the consideration may also be entered in their proper place. This index should contain all instruments and transactions of

record affecting the title to the division or tract of land described in the caption, unless a separate book is kept for certain instruments, in which case such instruments may be omitted from the tract index. All entries made in the original entry book should be transferred to the tract index under the description of the land affected by the instrument, and should be arranged under the proper heads provided in the outline. When properly made up the tract index should embrace under each particular tract or subdivision of land in the county an epitome of every deed, mortgage, agreement, release, attachment, sale, lis pendens, or other instrument or transaction of record, in any way affecting title to such tract or subdivision, or mentioning same, or any part thereof. Where any part of a section in a particular township and range in the county has been subdivided into blocks and lots, the subdivision is laid out by devoting to each page a limited number of the lots, and everything relating to these lots is posted on the page. Certain pages of the index are devoted to the origin of the titles to the subdivided tracts, and any instrument describing the property as acre property, or describing all interest in the subdivision, or describing inaccurately land covered by the subdivision, is posted under this "origin." All instruments which seem to describe subdivided property in such a manner that it is difficult to determine what lots and blocks are affected by it are also placed in this "origin." The size of the pages to be used for tract books and the number of volumes needed, will be determined by the present and prospective volume of business in the county. At the top of each page should appear the caption, which consists of a description of the tract, subdivision, or lots. The page should be ruled across with light lines, and divided into the required number of columns by heavy vertical lines. At the top of each column should be placed the respective heads. A sample page of a tract index is as follows:

Sec. 1, Tp. 25 N., R. 8 E.

Inst. No.	Grantor	Grantee	Description	Kind of Inst.	Consid-eration	Date of Inst.	Date of Rec.	Entry Book to Page	Record Book and Page	Remarks
....										
....										
....										

§ 151. **Index of irregulars.**—Instruments and transactions will frequently be found on the public records, which from their peculiar nature and character, should not be posted in the tract index proper. Among these may be classed affidavits as to dower, heirship or kindred matters, general powers of attorney, instruments of release and satisfaction, confirmations and assignments, conveyances describing no property or property of indefinite location, and the like. This index consists of two books, one for the names of grantors arranged in alphabetical order, the other for the names of grantees arranged alphabetically. This index is made up from the books of original entries, and is used, in compiling abstracts, in the same manner as the judgment index. It should always be consulted in making up the chain by running through the names of grantors and grantees to find if, during the period covered by the examination, any person has held title to the land in question, or possessed any equities therein. In compiling this index one volume should contain in the first column the names of grantors arranged alphabetically, with the name of the grantee set opposite in the next column. The other volume should contain in the first column the names of the grantees arranged alphabetically, with the name of the grantor set opposite in the next column. In each book opposite the names of the parties, and in an appropriate column, should be entered a brief statement of the subject-matter of the instrument. All other matters, such as the instrument number, the description of the property, if any given, the nature of the instrument, the date of the instrument, the date of record, the book and page where record may be posted in the same manner as in the tract index.

§ 152. **Index of tax sales.**—It is sometimes the practice of abstracters to post in the tract index everything pertaining to taxes except tax sales, and these latter are included in a separate volume kept for the purpose. This is perhaps the better method, as a large majority of the entries of tax sales become dead matter upon redemption, and for this reason the tract index should not be burdened with them. If a separate index of tax sales is kept there should be entered under the description of the tract in the caption, a description of the land sold, the name of the person against whom the tax was assessed, the nature of the tax, as general, special, state, county, municipal, special assessment, etc., the amount of the tax, the year for which it was levied, the date

of sale, and the name of the purchaser. A column on the right hand margin of the page should be left in which to note the fact of redemption. The page of the index should be arranged as follows:

Sec. ——, Tp. ——, R. ——.

Description	Name of Delinquent	Nature of Taxes	Amount Sold for	Year for which levied	Date of Sale	Name of Purchaser	Redemption
.....							
.....							

This index should always be consulted in compiling an abstract, and the entries made therein compared with the tax records. Much labor may be saved by noting all redemptions on the date they are made.

§ 153. **Index of judgments.**—All judgments for money, or such as create a lien on land should be indexed in a separate book kept for that purpose. Decrees and sales in chancery, or proceedings in court of an equitable nature directly involving the title to land, should not be indexed in this judgment index, but should be posted in the tract index.

The index of money judgments is very simple in its arrangement, consisting of an entry in alphabetical order of the names of the judgment debtor in each case as they appear on the court's records from day to day. Opposite the name of the judgment debtor, and in columns provided for their reception should be entered in consecutive order, the name of the judgment creditor, the court in which the judgment is docketed, the number of the case, the nature of the action, the date of the judgment, the amount of the judgment and costs, and the fact of satisfaction. In compiling an abstract this index is used in the same manner as the tax index. A sample page of the index is submitted:

No. of Inst.	Name of Defendant	Name of Plaintiff	Court	No. of Case	Nature of Action	Date of Judgment	Amount of Judgment	Fact of Satisfaction
.....								
.....								

An execution sale under a money judgment should be noted in the general tract index.

§ 154. **Miscellaneous indexes and reference books.**—In addition to the indexes and reference books described in the foregoing sections, many abstracters, especially in large cities and populous counties, keep certain special indexes and supplemental reference books which are deemed advantageous to the proper conduct of their business. Thus, it has become the practice of many abstracters to keep an index of special assessments instead of including them in the tract index or in the index of tax sales. Also, where inheritance taxes are levied on the estates of decedents, an index is sometimes provided for their reception. Special indexes are sometimes kept for probate proceedings, and all matters pertaining to estates of decedents, minors, and other persons under legal disability. Again, some abstracters keep what they term a "vowel index." In this index the names of all grantees are posted in alphabetical order, opposite each of which name is noted the book and page of the record where the name appears and a reference to the book and page of the abstracter's original entry set. By use of this index the interest of any grantee, whether present or past, may be readily ascertained without consulting any book except that of the original entries. Some offices may contain other indexes and reference books not mentioned herein, but it is thought that a sufficient number have been described to enable the reader to provide such as will be necessary to carry on his business with accuracy, and with a minimum of labor.

CHAPTER VII

COMPILATION OF AN ABSTRACT

SEC.
160. Introductory remarks.
161. Scope and extent of the examination.
162. Preliminary sketch of chain.
163. Formal parts of the abstract.
164. The caption.
165. Arrangement of the abstract.
166. Synopsis of instruments and proceedings.
167. Fullness of synopsis.
168. Abstracter's notes.
169. Exhibiting instruments for reference.
170. Showing irregular instruments.
171. Showing mistakes made in transcribing instruments.
172. Abbreviations.
173. Preserving copy of abstract.
174. Abstractor's certificate.

§ 160. **Introductory remarks.**—In the preceding chapter we attempted to describe certain indexes and reference books wherein the abstracter enters the material parts of every instrument or transaction of record affecting the title to each particular tract of land and city or town lot in the county. The purpose of these books, as we have explained, is to afford a ready reference to the public records where such instruments may be found, and to facilitate the work of compiling abstracts therefrom. In the present chapter we propose to call the reader's attention to the manner of using these books, and the public records of which they are a copy, in compiling abstracts, and to offer some suggestions relative to the form of the completed abstract.

When complete the abstract should contain a statement of every fact, and the contents of every instrument or transaction of record, affecting the land covered by the search, so full that no reasonable inquiry shall remain unanswered, so brief that the mind of the reader shall not be distracted by irrelevant details, so methodical that counsel may form an opinion on each instrument as he proceeds in his reading, and so clear that no new arrangement or dissection of the evidence shall be required. The abstract should present a summary of the public records of all grants, patents, conveyances, wills, mortgages, judgments, taxes, assessments, mechanic's liens, attachments, lis pendens notices, judicial orders or decrees affecting the title in any way, and all other liens which may incumber the title. It should contain what-

ever concerns the sources of title and its conditions, whether these tend to confirm the title or to impair it. Every part of a recorded instrument which may have a bearing on the condition of the title should be set out.

§ 161. Scope and extent of the examination.—Mention has already been made of the period for which title should be shown,[1] but in this connection we deem it important to refer to the subject more in detail even at the risk of repetition. In the preparation of an original abstract to land, and the contract of employment places no limitation upon the period for which the search is to be made, it is customary to carry the search back to the time when the title emanated from the government, and to continue it to the date of the certificate, showing not only all conveyances affecting the title for the period, but all liens or incumbrances of record affecting the title, and in the case of titles derived from the judgments or decrees of courts in judicial proceedings, as well as ministerial acts of officers of the government. It should show the essential parts of every instrument in the chain of title for the period, such as the names of the parties, description of the property conveyed or devised, words of grant or devise, and the like. In the older states it is sometimes impossible, owing to the condition of the records, to trace a title from the original patent. In such cases it is said the title should be shown for a period of not less than forty years. The abstracter first finds the patentee from the government, if the records permit him to go back that far. The patentee being found, his name is searched for in the alphabetical list of grantors to find a conveyance from him. When a conveyance from him to another person is found the patentee becomes a stranger to the title, the search being continued in the alphabetical list of grantors from the date of the conveyance to such other person, and so on down to the conveyance by the last grantor in the chain of title. But the examiner is not bound to look for deeds of any person through whom the title passed, before the date of his record title.[2] And where there is an agreement to make a search from and after a certain specified date the examiner is not bound to inquire or state whether the title vested in any grantee during the time covered by the search is affected by any prior mortgage or conveyance, or by any

[1] Chap. 1, § 8.

[2] Dodd v. Williams, 3 Mo. App. 278.

estoppel growing out of any covenants in any such conveyance.[3] A properly prepared tract index will disclose at a glance any conveyance or mortgage from a grantee, recorded within a short time before he obtained title and will give actual notice of any such instrument.

In the absence of instructions to the contrary, an abstracter is bound to examine and certify for judgments against any grantee who has taken title to the land during the period covered by the search. These propositions seem simple and certain. It is in accordance with the principles of good abstract making to diligently search for judgments against every grantee of the title at least back to such time as the statute of limitations would be a bar to their enforcement. A tax or judgment lien may have its inception at a time antedating the period of the search, but attaching during such period, and it would be gross neglect not to show it on the abstract.

§ 162. **Preliminary sketch of chain.**—Before the final draft of the abstract is attempted the various indexes and reference books should be carefully searched and a note made of each instrument or transaction in any way affecting the title to the land under consideration. The tract index will show all conveyances, incumbrances and liens. The index of tax sales will disclose all sales or forfeitures for nonpayment of taxes. Where special indexes are kept for confirmed special assessments such assessments should be found in such index, but if it is the practice to post them in the general tract index, they should be looked for in the latter book. Money judgments which are a lien on the land will be found in the judgment index. Execution sales, and sales made in pursuance of an order or decree of a court of equity are usually posted in the general tract index, but if separate indexes are kept for these they must be looked for in these indexes. The irregular index must be searched for powers of attorney, instruments of release and satisfaction, confirmations and assignments, affidavits as to dower, heirship or kindred matters, and all conveyances describing no property or property of indefinite location. After a brief note has been made of each instrument or transaction found in this search of the indexes the examiner should proceed to verify same with the entries in his

[3] Wakefield v. Chowen, 26 Minn. 379, 4 N. W. 618.

book of original entries and with the records in the registry offices. If the original entries were made in long form the greater portion of the abstract can be made up from this book without consulting the records. This practice, however, is not recommended, as a mistake in transcribing the instrument may be discovered by a comparison of the original entry with the record. When this verification is completed, the examiner has before him a complete abstract of each instrument, proceeding, etc., affecting the title to the property under consideration. These are then numbered and arranged in the order of their appearance on the completed abstract. The abstracter should make his comparisons with the record and not with the index thereof, unless the party employing him agrees that in the making of the abstract the examiner may rely upon the index alone for his information.[4]

§ 163. **Formal parts of the abstract.**—The documents and facts upon which a title is based should not only be methodically stated, but should be assembled in such a manner as to enable counsel in passing upon the sufficiency of the title to perform his work with the least possible confusion. The time of counsel may be saved, and his labor greatly facilitated, if the entries be made in logical and chronological order. Every abstract should be headed with a caption containing a description of the real estate which is the subject-matter of the examination. Thus the mind of the reader is directed at once to the person for whom the search is made, the property it relates to, and when the search was made. The caption does not always mention the person for whom the search was made, or the time when made, but is usually confined to a description of the land. It is the practice of some abstracters to follow the caption with a plat showing the location of the land with reference to the section or addition wherein it is situated. The various searches are next arranged under classified heads and numbered consecutively from the beginning. The abstract closes with a certificate signed by the examiner setting forth the scope and extent of the examination.

§ 164. **The caption.**—We have already said that the office of the caption is to apprise the reader of the subject-matter of the examination, and to accomplish this object a correct description of the property is all that is required. But the custom

[4] Crook v. Chilvers, 99 Nebr. 684, 157 N. W. 617.

generally prevails of stating in connection with the description the time from which the search is made. It was the practice of English abstracters to state in the caption whose title it is, and for what interest, but since it is the duty of counsel to determine, from the examination as a whole, the party in whom the title is vested, and the nature of such title, there no longer exists any reason for such statement. A title is made up of a series of documents and of facts, and it is the duty of the abstracter to set forth in methodical order a statement of the contents of these documents and facts, leaving to counsel the duty of determining in whom the title rests, and to what extent, if any, it is incumbered.

The following form of a caption is submitted:

Abstract Of Title to The Northwest quarter of the Southeast quarter of Section thirty-two (32) in Township one hundred twenty-eight (128) north of Range seventy (70) west of the fifth (5th) principal meridian, in McPherson County, State of South Dakota, and containing forty (40) acres more or less.

The above form of caption is used for an original examination, but should the examination be only a continuation of a former search, the words "Continuation of" should precede the word "Abstract" in the first line of the caption, and the description should be followed by a statement of the time from which the search dates, thus:

This examination commencing Jan. 12, 1896.

If it is desired to state in the caption both the time of beginning and the time of ending the search, as is sometimes the practice, the description should be followed by a statement similar to the following: This examination beginning Jan. 12, 1896, and ending Aug. 26, 1910, inclusive of both dates.

The time covered by the search should always be stated in the certificate of the examiner at the close of the abstract.

Where the search is to extend from the date of a particular conveyance, or where it is to be special, the caption should definitely state the extent and scope of the search, or this should be distinctly set forth in the certificate.

§ 165. **Arrangement of the abstract.**—An abstract may contain every matter of record and every fact in any way affecting the title to a particular tract of land, and yet be very confusing from the mere inattention of the searcher to the details of arrangement. It is the practice of most abstracters to group all the

instruments or transactions of a certain class together and to set them out in chronological order. Thus deeds and grants are usually shown in the order of their appearance on the records. Mortgages and liens are sometimes shown in the same manner. While it is the better practice to show liens and incumbrances under classified heads, mortgage liens are better shown in regular chronological order in the chain. When considered simply as liens, mortgages might, before default or foreclosure, with propriety, be shown with other liens, but after default and foreclosure they constitute muniments of title, and should appear in the chain in regular chronological order. By placing all mere liens, charges, and incumbrances under one classification the symmetry of the title is best preserved, and counsel is enabled to obtain a clearer view of the title than he could possibly obtain were they inserted in the chain in the order of time at which they took effect. When liens or incumbrances are inserted in the chain in chronological order with other instruments, the releases or discharges should appear immediately after them, regardless of the time when such releases or discharges took effect.

The instruments or transactions forming muniments of title constitute the links in the chain, and these links should be placed in the chain in chronological sequence, from the earliest to the latest. Among these may be mentioned, patents, grants, deeds, mortgages after default and foreclosure, decrees, judgments and orders affecting the land, and tax deeds. A sheriff's deed under execution should appear in the order mentioned, and should be immediately preceded by the judgment. Official deeds made in pursuance of a decree or order of court are muniments of title and should be preceded by the proceedings and decrees upon which they are based.

At the end of the chain should be shown under classified heads, judgments against the person, mechanic's liens, taxes and tax sales, mortgages not yet due, and any other liens or incumbrances shown by the public records.

Experience has demonstrated that an abstract arranged in the order suggested above gives the least trouble to counsel in making his analysis of the title. The arrangement shows a permanent chronological record of the title for the time covered by the examination.

§ 166. **Synopsis of instruments and proceedings.**—In this country there is no uniform style or system used in displaying

the various instruments and proceedings on the abstract. Each individual abstracter is at liberty to exercise his own tastes in the matter, and to employ whatever system which seems to him most convenient and practical. A great many abstracters, especially in the older states, still employ, with more or less variation therefrom, the system of English abstracters. What is known as the "New England Abstract" is apparently an offshoot from the English system, which it resembles in many respects. By the New England method the page of the abstract is ruled by vertical lines into four columns. At the top of the page and immediately above these columns is written the name of the grantor and the date from which his title is traced. In the first column on the left is placed the date of execution, date of acknowledgment, date of recording, and the name of the officer taking the acknowledgment. In the next column to the right is noted the book and page of the record. The next column contains the names of the grantees, the consideration, notes referring to dower and homestead, the words of grant, covenants, and notes regarding defects in form. In the last column to the right is inserted the description, the incumbrances, conditions, recitals, etc.

The form of synopsis employed by most abstracters of this country, especially throughout the middle and western states is very simple, and is generally commended by the legal profession. By this method the matter pertaining to a particular transaction forming a muniment of title is headed by a caption, containing the names of the parties thereto, the capacity or office in which the parties act or receive, and whatever else is deemed necessary in the way of explanation or identification. This caption is sometimes written across the page, but more often it is placed at the left hand side of the page and separated from the remainder of the page by a line or bracket. To the right of this line or bracket is inserted the nature of the instrument or transaction, its date, the date of recording, the book and page where recorded, and if a court proceeding, the case number and the name of the court. Following this, and written across the entire page, the recitals are set out. These may be paragraphed as required, but need not be separated otherwise. Notes may be distinguished from other matter by slight indentation. For the convenience of counsel in making notes, a margin one inch or more in width is

usually reserved on the left side of each page. Examples of the form of synopsis we have just described will be shown hereafter. It will be observed that this form of synopsis is not only neat and compact in appearance, but enables the reader to see at a glance any portion of an instrument without having his attention diverted to other parts of the abstract.

§ 167. Fullness of synopsis.—We have said that the purpose of an abstract is to enable one interested in the title to a particular tract of land to determine its sufficiency without having to refer to the original source for information. This would include all the material parts of the records of all grants, patents, conveyances, wills, documents and all judicial proceedings which may affect the title in any way, and of all mortgages, judgments, taxes, assessments, mechanic's liens, lis pendens notices or other liens which may incumber the title. There should be set out every part of an instrument or proceeding, which may have a bearing on the title, and one who has procured an abstract has a right to assume that any part which is not set out has no bearing. The abstracter must decide for himself whether an instrument or any part thereof is required to be transcribed literally, or should be abstracted merely. It is not always an easy matter for the average abstracter to determine what parts of a particular instrument or proceeding are material and what parts are not material. When in doubt about whether he should set out a particular part of an instrument, he should take no chances by omitting it. The tendency is to include too much, rather than not enough. Much time and labor of counsel is saved if all unnecessary verbage and redundant matter is omitted from the abstract. It rarely ever occurs that an instrument may not, with perfect safety, be digested in such a way as to show its pith and substance without impairing its significance.

It must be borne in mind, however, that certain instruments appearing in a chain of title are best presented in the language of the originals. Thus, an abstract of a conveyance containing conditional or strictive clauses should quote these clauses fully, and should not merely state them according to what seems to the abstracter to be their legal effect, and as the construction to be placed on such clauses may depend on other parts of the instrument, a copy of the entire instrument should be set out. Every part of a will, except, perhaps, the preamble and bequests or gifts

of personalty, should be set out literally, in order that counsel may have an opportunity of judging by the context as well as by the particular words, the effect of the devise.

§ 168. **Abstracter's notes.**—It is the practice of many abstracters to insert explanatory notes and comments relative to certain matters contained in the abstract. These are often highly important and useful in clearing up obscure statements, and in assisting counsel in arriving at a proper estimate of the matters to which they relate. The abstracter, by his constant use of the public records and private papers, becomes familiar with the histories of titles and learns of weaknesses and defects, and he is bound to disclose to his employer all pertinent information acquired by him in the course of his investigations. Such information should be appended immediately after the instrument or transaction to which it relates, but should this be impracticable, it may be inserted at the end of the abstract, immediately before the certificate. If it becomes desirable or necessary to insert notes in the abstract, they should be confined to a brief statement of facts, and none should be inserted which do not in some way tend to clarify or explain an ambiguity in the entry to which they relate. Frequent and voluminous note making only serves to confuse and distract the mind of the examining counsel, but when they are pertinent and concise they become a valuable contribution to the examination.

§ 169. **Exhibiting instruments for reference.**—Instruments outside the chain, but which are collaterally connected with the title are frequently exhibited for the purpose of reference in obtaining a clearer view of the title under consideration. Where this is done the instrument should be shown immediately after the deed or other instrument which it affects or explains, and should be preceded by a note stating that it is shown for the purpose of reference only.

§ 170. **Showing irregular instruments.**—A search of the index of irregulars will often disclose certain instruments of an irregular and independent character, which are not muniments of title, but which, from their nature and contents, are required to be shown in order to throw light upon some instrument or transaction claimed as a muniment of title. Thus a certain instrument outside the chain of title being made up may contain an

affidavit of dower, heirship, or kindred matters which may have an important bearing upon the title under consideration, and should be properly set out. The contents of instruments intended primarily to affect lands other than those being abstracted may affect collaterally the lands under consideration.

§ 171. Showing mistakes made in transcribing instruments.—It is the duty of the abstracter to exhibit instruments as they appear on the public records regardless of the fact that they have been incorrectly transcribed. The abstracter's book of original entries is made up from the original instrument when it is filed for record, but in compiling the abstract he compares this entry with the record, and may discover an error in transcribing. After satisfying himself that the recording officer has made a mistake, it becomes the abstracter's duty to note on the abstract the fact of such mistake and make reference to the original document. This note should follow the synopsis of the erroneous document as an appendix thereto.

§ 172. Abbreviations.—The use of abbreviations by the abstracter in preparing his notes and making up his indexes and reference books is a matter wholly within his own choice, but he should be able to interpret them readily. Much time and labor may be saved by abbreviating the names of the points of the compass with the initial letter thereof. In the same manner the different classes of conveyances may be abbreviated. Governmental subdivisions of land are invariably abbreviated in these books and in the abstracter's notes. In compiling the abstract, however, the form found in the record must be used. If a name or word is abbreviated in the record it must appear in the abstract in the same form, and if they are written out in full in the record they must be written out in full in the abstract, and where words are abbreviated in the record their abbreviation in the abstract should be enclosed in quotation marks. This relieves the abstracter of the responsibility of interpreting them. We do not wish to infer that abbreviations may not be made of terms used in the record when they are such as are commonly accepted in compiling legal documents, but we deem it the safer practice to copy into the abstract whatever abbreviations may be found on the record.

§ 173. **Preserving copy of abstract.**—As a matter of self-protection, if for no other reason, the abstracter should make and carefully preserve a copy of each and every abstract compiled by him. This may be readily done by use of a letter press, or preferably by use of the carbon sheet if the typewriter is used. Aside from their use in verifying work delivered to clients, they obviate the necessity of an examination of the records in case the abstracter is called upon to prepare another abstract of the same property or a subdivision thereof. These copies should be arranged in book form and the pages carefully numbered. There should be noted on the tract index opposite the entry of the instrument under consideration the volume and page of the copy book where the duplicate copy may be found.

§ 174. **Abstracter's certificate.**—Immediately at the end of the abstract proper should be written the abstracter's certificate of search. This should briefly show the fact that he has examined the indexes to, and the records of, conveyances, mortgages, judgments, lis pendens, mechanics' liens, tax sales, and confirmed special assessments, and that there are no conveyances, judgments, liens, tax sales, forfeitures and confirmed special assessments for the period covered by the abstract, except as noted in the abstract. The number of pages of the abstract should be given in the certificate. The certificate should be dated as of the date of the examination, and signed by the examiner. Where the entries on the abstract are in all respects true, according to the terms of the certificate, and the abstract and certificate are satisfactory to the person ordering them, the examiner has completed his contract. If he has not performed his work in a thorough and skilled manner, or if he discovers that it is impossible for him to furnish a complete and trustworthy abstract, it becomes his duty to state that fact in his certificate. If he fails in this respect his employer will have a right to rely on the completeness of the abstract.[5] The examiner can not, by a vague and obscure certificate, limit his liability. If he states in his certificate that he finds of record no liens on the property in question, this is equivalent to stating that there are none of record.[6] Where the certificate to an abstract stated that it was a "full, true and com-

[5] Chase v. Heaney, 70 Ill. 268.

[6] Philadelphia v. Anderson, 142 Pa. St. 357, 27 Atl. 976.

plete abstract of the title," this was held to cover suits affecting the title as well as conveyances or incumbrances.[7] We have seen that an abstracter may limit his liability by a certificate that he has examined the records in certain offices only. Thus, where a certificate states that a careful search has been made of the records of the office of the county clerk, the clerk of the district court, the county treasurer, and that there are no liens of record upon the property described except as mentioned in the abstract, it was held that an omission from the abstract of a prior mortgage upon the property, then of record in the office of the register of deeds, it was held that on account of the limitation contained in the certificate, there could be no recovery in a suit upon the bond of the abstracter for loss occasioned by such omission.[8] The contents of the certificate should conform to the agreement between the abstracter and his employer, and should be definite and certain in its statements. If the examination was made from the records this fact should be stated, and where it was made from the examiner's indexes the certificate should so state. The following form of certificate will illustrate the points we have been considering:

Certificate of Abstracter

This is to certify that I have made a careful examination of the records in the Recorder's Office, the General Judgment Dockets of the Marion Circuit, Superior and Probate Courts, the Lis Pendens Records of complaints and attachments, the tax Duplicates and Municipal Assessment Records in the Treasurer's Office, and the Indexes of Tax Sales in the Auditor's Office, all in Marion County, Indiana, as said records and dockets are now entered, and I find that there are no instruments of conveyance or unsatisfied incumbrances of record or on file in any of the offices aforesaid in any manner affecting the title to the real estate described in the caption of this abstract, except such as are shown above and included on pages one to twenty-five of this abstract.

Witness my hand and seal this 12th day of April, 1901.

JOHN JONES, Abstracter.

[7] Thomas v. Schee, 80 Iowa 237, 45 N. W. 539.

[8] Thomas v. Carson, 46 Nebr. 765, 65 N. W. 899.

Where the abstract is a continuation of a former abstract made by the same party the certificate may take the following form:

Certificate of Continuation

I, John Jones, hereby certify that I have made a careful re-examination of the records in the Recorder's Office, the General Judgment Dockets of the Marion Circuit, Superior and Probate Courts, the Lis Pendens Records of complaints and attachments, the Tax Duplicates and Municipal Assessment Records in the Treasurer's Office, and the Indexes of Tax Sales in the Auditor's Office, all in Marion County, Indiana, as said records and dockets are now entered, and that there are no conveyances, judgments, mechanics' liens, unpaid taxes, instruments or liens of any kind, of record or on file in any of the offices aforesaid in any manner affecting the title to the real estate described in the caption to the within abstract, except as shown in this continuation of abstract and included on pages one to five thereof.

Continued from April 12, 1901.

Witness my hand and seal this 1st day of September, 1910.

JOHN JONES, Abstracter.

Where the abstracter is employed to make and furnish an abstract of title to certain land from a date when the title is assumed to be in a given person, the name of such person and the fact that the title is assumed to be in him at the time the examination is to commence should be set out in the certificate.

Where instruments are shown for reference only there is no necessity for following the chain of title to which it properly belongs, but a note should be placed, either immediately after the abstract of the instrument, or in the certificate, explaining the purpose for which the instrument is shown, and reciting the fact that no examination was made for conveyances or judgments against any person connected with such collateral title.

Where the real estate described in the caption is in two or more separate parcels or tracts, and the date of the commencement of the examination is not the same for each tract, the date from which the examination was made for the respective tracts must be mentioned in the certificate.

CHAPTER VIII

BEGINNING OF TITLE

SEC.
180. Inceptive stages of title generally.
181. Source of title shown by complete chain.
182. Methods of transfer under government land laws.
183. Who may acquire title to public lands.
184. Power of congress to dispose of public lands.
185. Disposal of state lands.
186. Direct legislative grants.
187. Form and construction of direct legislative grants.
188. Abstracting legislative grant.
189. Confirmation acts and decrees.
190. Transfer by public sale.
191. Appropriation by private entry.
192. Nature of entryman's title.
193. Lands subject to entry.
194. Statement of the entry.
195. Receipts, certificates, etc., issued by register or receiver.
196. Pre-emption.
197. Pre-emptor's right or title.
198. Contracts and conveyances before entry.
199. Graduation acts.
200. Homestead and free grants.
201. Nature of rights acquired by homesteader.
202. Donations and bounty lands.
203. Land warrants and scrip.
204. Desert land entries.
205. Timber and stone lands.
206. Timber culture claims.
207. Swamp land grants.
208. School and university land grants.
209. Statement where title founded on school land grant.
210. Grants for internal improvement.
211. Initial statement of abstract where title based on grant for internal improvements.
212. Land grants to railroads.
213. Grant for public highway.
214. Private land claims.
215. Town site entry.
216. Initial statement of abstract where title obtained through town site entry.

§ 180. Inceptive stages of title generally. — All lands ceded to the confederation by individual states, as well as those acquired by the present government from foreign powers, was, for the most part, free from any claims of ownership by individuals, and became the exclusive property of the national government, to be disposed of to such persons, at such times, in such modes, and by such titles, as seemed expedient. In admitting new states into the union, this right of disposition of the public lands has been uniformly reserved in the admission act. But by the terms of their charters some of the original colonies which became states reserved the right when the union was formed to hold and dispose of the lands within the boundaries of their re-

spective grants independently of the nation.[1] The ownership of the United States of lands within the limits of the original states is based upon cessions from the states.[2] In acquiring territory from foreign powers by treaties and annexation, the United States agreed that titles held by grant from such foreign powers should be respected and treated as valid. But lands vacant and unappropriated at the date of the treaty or cession became part of the public lands of the United States,[3] and the new states which have been formed out of such territory have no title to vacant and unappropriated lands within their borders,[4] save in so far as such lands have been granted to them by the federal government.[5] "The system adopted for the disposition of public lands embraces the interests of all the states, and proposes the equal participation therein of all the people of all the states. This system is, therefore, peculiarly and exclusively the exercise of a federal power. The theater of its accomplishment is the seat of the federal government. The mode of that accomplishment, the evidences or muniments of right it bestows, are all the work of federal functionaries alone."[6] It is beyond the power of a state or territory, by its law, to interpose and dictate to the federal government, to whom, and in what mode, and by what title, the public lands shall be disposed of. The land laws provide for certain preliminary steps to be taken before title passes from the sovereign to the individual. Such provisions are embodied in the various acts of congress passed from time to time in furtherance of the plan to develop the country, and these steps constitute the initial link in the chain of title when traced from the government. Wherever practicable the abstract should start out with a recital of these preliminary proceedings, but in the older sections of the country where titles originated in colonial or state grants these preliminary steps, of course, do not appear, and the abstract should commence with some other well authenticated fact antedating the period prescribed by statute for the bringing of an action to recover land.

[1] People v. Livingston, 8 Barb. (N. Y.) 253; Pollard v. Hagan, 3 How. (U. S.) 212, 11 L. ed. 565.

[2] Pollard v. Hagan, 3 How. (U. S.) 212, 11 L. ed. 565.

[3] People v. Folsom, 5 Cal. 373; Territory v. Lee, 2 Mont. 124; State v. Kennard, 57 Nebr. 711, 78 N. W. 282; United States v. Berrigan, 2 Alaska 442.

[4] Stoner v. Royar, 200 Mo. 444, 98 S. W. 601.

[5] Ward v. Mulford, 32 Cal. 365.

[6] Irvine v. Marshall, 20 How. (U. S.) 558, 15 L. ed. 994.

As one of the results of the Revolutionary War, title to the territory occupied by the thirteen colonies, and of the so-called "Northwest Territory," passed to the colonies and states. Individual claims, however, based upon grants from the crown or colonial governments, were made to portions of this territory, and such claims have been respected and confirmed by special acts of congress or in conformity to general laws on the subject.[7]

§ 181. Source of title shown by complete chain.—The practical question to be determined by the examiner is the source of title, whether it appear in the abstract or not. In most communities these general sources are understood, and there is generally some conceded starting-point, as the patent, a deed from a canal trustee, etc. A complete chain of title, especially of the states of Ohio, Indiana, Michigan, Illinois and Wisconsin, comprising the Northwest Territory, will show: (1) The proclamation of discovery; (2) the grant by the king of Great Britain and his council to the original Virginia patentees; (3) the treaty of peace, whereby the colonists were confirmed in their rights; (4) the Act of Virginia of 1783, authorizing the Virginia delegates to cede the Northwest Territory; (5) the Ordinance of 1787; (6) the treaties of the United States with the Indians whereby they vacated; (7) the government survey which defined the boundaries; (8) the act of congress which placed the land on the market; (9) the certificate of the receiver of the land office; and (10) the patent from the government. It is seldom practicable, or even necessary to include these inceptive measures in the abstract, as nothing passes a perfect title to public lands but a patent; the sole exception being a direct grant by act of congress.

§ 182. Methods of transfer under government land laws.—Title to the public lands is vested in the United States,[8] and congress has the sole power of disposition thereof and of making all needful rules and regulations with respect to the public domain,[9] and has the absolute right to prescribe the times, the conditions, and the modes of disposing of any part of it.[10]

[7] United States v. King, 3 How. (U. S.) 773, 11 L. ed. 824; McMicken v. United States, 97 U. S. 204, 24 L. ed. 947.

[8] Union Mill and Mining Co. v. Ferris, 2 Sawy. (U. S.) 176, 24 Fed. Cas. No. 14371.

[9] Gibson v. Chouteau, 13 Wall. (U. S.) 92, 20 L. ed. 534.

[10] Gibson v. Chouteau, 13 Wall. (U. S.) 92, 20 L. ed. 534.

Only a brief mention can be here made of the different methods employed from time to time by the federal government in disposing of public lands. For details of these methods the reader is referred to the United States Revised Statutes and the Statutes at Large.[11] Under these laws may be included: (1) Public and private sales; (2) appropriation by private entry; (3) transfer by pre-emption; (4) homestead and free grants; (5) desert land entries; (6) timber culture claims; (7) bounty land claims; (8) swamp land grants; (9) school land grants; (10) grants for internal improvement; (11) railroad grants; (12) mineral land grants, and (13) grants for public highways. The jurisdiction of the land department over public lands continues so long as the legal title remains in the United States. The issuance of a patent, or such other act as passes the legal title from the government, is the final act and the expression and entry of the final judgment, of the officers of the land department, and marks the termination of the jurisdiction of these officers.[12] While the various measures passed for the disposal of the public domain create vested interests or give rise to equitable rights, the legal title remains in the government until the issuance of the patent or the performance of such other act as passes the title of the government.[13] The mere right to acquire public lands, even if it be preferential, is not property in the lands.[14]

§ 183. **Who may acquire title to public lands.**—The various acts of congress providing for the disposal of public lands prescribe the qualifications necessary to entitle persons to acquire title thereunder. Such acts usually provide that the applicant shall be the head of a family,[15] a widow,[16] or a person over the age of twenty-one years,[17] and shall be a citizen of the United States,[18] or has declared his intention to become such at the time of his entry.[19] An entry by an alien, however, has been held voidable but not void, his rights in this respect being subject only

[11] U. S. Rev. Stat., §§ 2207-2490.

[12] Peyton v. Desmond, 129 Fed. 1, 63 C. C. A. 651.

[13] Northern Lumber Co. v. O'Brien, 124 Fed. 819; Sims v. Morrison, 92 Minn. 341, 100 N. W. 88.

[14] Seattle & L. W. Waterway Co. v. Seattle Dock Co., 35 Wash. 503, 77 Pac. 845.

[15] Ely v. Ellinton, 7 Mo. 302.

[16] Page v. Hobbs, 27 Cal. 483.

[17] Tatro v. French, 33 Kans. 49, 5 Pac. 426.

[18] Bogan v. Edinburgh American Land Mtg. Co., 63 Fed. 192, 11 C. C. A. 128.

[19] Merriam v. Bachioni, 112 Cal. 191, 44 Pac. 481.

to such limitations as the particular states may prescribe.[20] Thus it has been held that a person of foreign birth who is otherwise duly qualified, is entitled under the pre-emption laws, after having in due form declared his intention of becoming a citizen, and before becoming fully naturalized, to file and maintain a pre-emption claim.[21] The statutes sometimes exclude persons who are, at the time of entry, seised in fee simple of a designated number of acres of land in any state or territory.[22] Under the terms of the statutes corporations are not entitled to acquire public lands,[23] and entry made by an individual acting on behalf of a corporation to which he conveys the land, is invalid.[24] Officers, clerks and employes of the general land office are prohibited from directly or indirectly purchasing or becoming interested in the purchase of any of the public lands.[25] Under the pre-emption laws one person can not enter public lands for the use and benefit of another.[26] Also a pre-emption for a partnership can not be made by one member of the firm.[27]

§ 184. Power of congress to dispose of public lands.—The United States being the primary source of title to all public lands, congress has full power to dispose of it[28] whether it is within the limits of a state or a territory.[29] The power to designate the persons or classes of persons to whom conveyances of the public land may be made is vested in congress.[30] The land department has no arbitrary, unlimited or discretionary power to sell or grant public lands,[31] but the federal government or its officers may make such regulations for their use and disposal as are authorized by law.[32] A grant to a state to be disposed of by the latter may be made subject to conditions for such disposal.[33] The question, whether a title to a portion of the public domain has passed from the United States, must depend exclusively upon the laws of the

[20] 10 U. S. Stat. at L., § 649.
[21] Boyce v. Danz, 29 Mich. 146.
[22] Gourley v. Countryman, 18 Okla. 220, 90 Pac. 427.
[23] Salina Stock Co. v. United States, 85 Fed. 339, 29 C. C. A. 181.
[24] Pacific Live Stock Co. v. Gentry, 38 Ore. 275, 61 Pac. 422, 65 Pac. 597.
[25] U. S. Comp. Stat. 1901, p. 257.
[26] Robinson v. Jones, 31 Nebr. 20, 47 N. W. 480.
[27] In re Groome, 94 Cal. 69, 29 Pac. 487.
[28] United States v. Ashton, 170 Fed. 509.
[29] Union Pac. R. Co. v. Karges, 169 Fed. 459.
[30] Gibson v. Chouteau, 13 Wall. (U. S.) 92, 20 L. ed. 534; United States v. Shannon, 151 Fed. 863.
[31] Hoyt v. Weyerhauser, 161 Fed. 324.
[32] Stewart v. United States, 206 U. S. 185, 27 Sup. Ct. 631, 51 L. ed. 1017.
[33] Brigham City v. Rich, 34 Utah 130, 97 Pac. 220.

United States, and when it has so passed it then becomes subject to state laws.[34]

§ 185. Disposal of state lands.—The legislature of a state has the sole power of disposition of lands belonging to it within its boundaries,[35] and, as in the case of the federal government, it has the power to designate the persons or class of persons to whom conveyance may be made.[36] This right of disposition may be by direct legislative grant,[37] or by patent issued under statutory authority.[38]

The state may impose conditions for the disposal of its lands, compliance with which is necessary to vest title.[39] It may make special agreements of sale,[40] and, so far as its own rights are concerned, may validate what has been irregularly done.[41] The title to state lands may be transferred by special act,[42] or by patent issued in conformity with law.[43]

There is a lack of uniformity among the states in the modes of disposing of public lands, and it would be beyond the scope of this work to describe them. In most of them a patent is effectual to pass the title, although the issuance of a patent is not necessary where there has been a direct legislative grant.[44] It is not necessary, however, to the passing of a complete title that a patent should be delivered, or even accepted by the grantee.[45] The patent operates merely as a quitclaim of the state's interest in the land.[46] No valid title to state lands can be acquired until all the statutory requirements have been complied with.[47]

Like a certificate of sale of federal lands, a certificate of sale issued of state lands does not pass a fee simple title; but such

[34] Wilcox v. Jackson, 13 Pet. (U. S.) 498, 10 L. ed. 264.

[35] Chisholm v. Caines, 67 Fed. 285; Patterson v. Trabue, 3 J. J. Marsh. (Ky.) 598; State v. Lanier, 47 La. Ann. 568, 17 So. 130; Weiler v. Monroe County, 76 Miss. 492, 25 So. 352; Wyman v. Taylor, 124 N. Car. 426, 32 S. E. 740.

[36] State v. Nashville University, 4 Humph. (Tenn.) 157.

[37] Hall v. Jarvis, 65 Ill. 302; Cary v. Whitney, 48 Maine 516.

[38] Chinoweth v. Haskell, 3 Pet. (U. S.) 92, 7 L. ed. 614; Lovin v. Carter, 150 N. Car. 710, 64 S. E. 775.

[39] State v. Cross Lake &c. Fishing Club, 123 La. 208, 48 So. 891.

[40] Ellerd v. Cox, 52 Tex. Civ. App. 60, 114 S. W. 410.

[41] Steele v. Bryant, 132 Ky. 569, 116 S. W. 755.

[42] Hall v. Jarvis, 65 Ill. 302; Cary v. Whitney, 48 Maine 516.

[43] Lovin v. Carver, 150 N. Car. 710, 64 S. E. 775; Miller v. Moss, 65 Tex. 179.

[44] Hall v. Jarvis, 65 Ill. 302; Cary v. Whitney, 48 Maine 516.

[45] Shearer v. Clay, 1 Litt. (Ky.) 260.

[46] Innes v. Crawford, 2 Bibb. (Ky.) 412.

[47] Dunn v. Ketchum, 38 Cal. 93.

certificate entitles the purchaser to the beneficial interest in the land, and clothes him with the right of possession, enjoyment, descent, devise and alienation. But the state does not surrender the dominion and control of the land until the issuance of the patent.[48] The certificate of sale of state lands must be issued by the duly authorized officer. It should describe the land sold, the amount of the purchase-price, the amount paid, and the amount remaining due, if any, and the time, place and terms of payment of such remainder.

§ 186. Direct legislative grants.—Congress has power to convey public lands to individuals, states or corporations by direct legislative act without the issuance of a patent to the grantee.[49] Large areas of the public domain have been disposed of in this manner, especially during the early days of the republic. For example, direct grants have been made to a number of the newer states for school and university purposes. Also to railroads as aids in their construction.

A direct grant of public land by congress to a state or an individual vests in the grantee the most substantial title known to our law.[50] Where the act contains words of present grant the grantee obtains a perfect and irrevocable title.[51] Where the act at once divests the government of all property in the land, the individual or state, as the case may be, becomes the absolute owner thereof in fee simple, and the subsequent issuance of a patent only furnishes documentary evidence of such title.[52] A grant of public lands to be selected within a larger area does not pass title to any particular tract until the selection has been made and approved.[53]

§ 187. Form and construction of direct legislative grants.—No particular terms need be used in a legislative grant of public lands, but it will be sufficient to pass title if the words used show an intention on the part of congress or the legislature that certain lands shall be separated from the mass of federal or state lands and set apart and appropriated to the grantee.[54] The form

[48] Hart v. Gibbons, 14 Tex. 213.

[49] Morrow v. Whitney, 95 U. S. 551, 24 L. ed. 456; Hall v. Jarvis, 65 Ill. 302; Republican River Bridge Co. v. Kansas Pac. R. Co., 12 Kans. 409.

[50] Dousman v. Hove, 3 Wis. 466.

[51] Strother v. Lucas, 12 Pet. (U. S.) 454, 9 L. ed. 1137; Swann v. Lindsey, 70 Ala. 507, Dean v. Bittner, 77 Mo. 101.

[52] Morrow v. Whitney, 95 U. S. 551, 24 L. ed. 456.

[53] Shaw v. Kellogg, 170 U. S. 312, 18 Sup. Ct. 632, 42 L. ed. 1050.

[54] Republican River Bridge Co. v. Kansas Pac. R. Co., 12 Kans. 409.

must necessarily vary with the exigencies of each particular case, but the act must contain apt words.[55] If there is any ambiguity or uncertainty in a legislative grant, that interpretation is put upon it which is most favorable to the state; that the words of the grant, being attributable to the party procuring the legislation, will receive a strict construction as against the grantee.[56] A grant of land from the state must describe the land so that it can be certainly identified,[57] although it need not be strictly accurate in all respects.[58]

§ 188. **Abstracting legislative grant.**—Where the title to land has its inception in a direct legislative grant the initial statement of the abstract should contain a brief recital of the act. It should contain the title of the act, the date of its enactment, the words of grant used in the act, and the conditions or restrictions, if any, annexed to the grant. If the grant be from the federal government to the state for a specified purpose, the statement should show an acceptance on the part of the state authorities and a compliance with the conditions imposed by the granting act. The statement should contain: (1) A description of the land by the proper number of the section or part thereof, as the case may be, and the township and range; (2) a brief synopsis of the act constituting the original grant; (3) selection of the land by the proper authorities from a larger area included in the grant; and (4) approval of selection by the president. The form of the statement is not important, nor is it advisable to set out more than will disclose the fact that the grant was by direct act of congress, or the legislature, and that all the conditions necessary to complete the grant have been complied with. The following example is submitted:

United States
to
Southern Pacific Railroad Company of California.

Act of Congress.
Dated March 3, 1871.
Filed May 4, 1896.
Recorded in Book M, page 45.

An act, entitled, "An act granting lands to the Southern Pacific Railroad Company of

[55] Foley v. Harrison, 15 How. (U. S.) 433, 14 L. ed. 461.

[56] Oakland v. Oakland Water Front Co., 118 Cal. 160, 50 Pac. 277; Creech v. Johnson, 116 Ky. 441, 25 Ky. L. 657, 76 S. W. 185.

[57] Merritt v. Bunting, 107 Va. 174, 57 S. E. 567.

[58] Kidd v. Central Trust &c. Co., 23 Ky. L. 1402, 65 S. W. 355.

California for the purpose of aiding in the construction of a railroad." Enacts that there be, and hereby is, granted to the Southern Pacific Railroad Company of California, for the purpose of aiding in the construction of said railroad, every alternate section of public land, not mineral, designated by odd numbers, whenever, on the line thereof, the United States having full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims of right, at the time the line of said road is designated by a plat thereof, filed in the office of the commissioner of the general land office.

Plat of line of said railroad filed with the commissioner of the general land office September 12, 1878.

§ 189. **Confirmation acts and decrees.**—It has always been the policy of the United States to respect the rights of private property in territory ceded to it, but at the same time it has maintained the right to provide reasonable means for determining the validity of titles within such territory. It may require all persons having claims to lands within such territory to present them for recognition, and to decree that all claims which are not thus presented shall be considered abandoned.[59] Undoubtedly private rights of property within territory ceded to the United States were not affected by the change of sovereignty and jurisdiction, and were entitled to protection, whether the claimant had the full and absolute ownership of the land, or merely an equitable interest therein, which required some further act of the government to vest in him a perfect title. But the duty of providing the mode of securing these rights and of fulfilling the obligations imposed upon the United States by the treaties, belonged to the political department of the government; and congress might either itself discharge that duty or delegate it to the judicial department.[60] In many of the western and southwestern states titles often rest upon confirmed claims of inchoate rights derived from the governments of Spain and Mexico. These rights have been confirmed by special commissions appointed for that purpose, or by the federal courts.

Where the title to be abstracted has its inception in grants from some foreign nation which owned the land prior to its acquisition by the United States, the proceedings leading up to the issuance

[59] Barker v. Harvey, 181 U. S. 481, 21 Sup. Ct. 690, 45 L. ed. 963.

[60] De la Croix v. Chamberlain, 12 Wheat, (U. S.) 599, 6 L. ed. 741.

of the patent by the United States should form the initial statement of the abstract. So, whenever practicable, the statement should include the decree of confirmation, or at least a reference to it, together with a note of the survey and approval. If the government has confirmed the title it becomes absolute, and the subsequent issuance of a patent is of value only as record evidence of ownership by the patentee.[61]

§ 190. **Transfer by public sale.**—Under the early system of land laws in this country it was the custom to offer land, as soon as surveyed, at public sale, in pursuance of a proclamation issued by the president, and at a minimum price.[62] The land was sold to the highest bidder, provided the highest bid was not below one dollar and twenty-five cents per acre, except in cases where the land to be sold lay along a railroad, within the limits granted by act of congress, in which case the minimum price at which it could be sold was two dollars and fifty cents an acre. Sales under the Act of 1796 were made partly on credit, but the Act of 1820 required full cash payments. The amount sold to any one purchaser ranged from forty to six hundred and forty acres, and even in larger tracts if the same were found vacant. The sale was required to be advertised for from three to six months, and a period of two weeks was adopted for receiving bids. Upon payment of the purchase-price a receipt was issued to the purchaser by the receiver of the local land office, and an entry of the sale was thereupon made in the tract book kept by such officer. The issue of the patent was the final act of transfer to the purchaser. Owing to the injustice to actual settlers by depriving them of valuable improvements made on the land prior to the sale, this method of disposition gradually fell into disuse, and is now abolished as to practically all the public lands.[63]

§ 191. **Appropriation by private entry.**—The term "entry" was borrowed by congress from the land laws of Virginia. It is the first step of a purchaser, except in sales at public auction, for acquiring public lands, and consists of filing an application for a definite portion of the public domain which has been previously surveyed. It covers a homestead and townsite entry, as well as

[61] Ryan v. Carter, 93 U. S. 78, 23 L. ed. 807.

[62] See Rev. Stat. U. S. §§ 2353, 2357-2360.

[63] 26 U. S. Stat. 1099, §§ 9, 10.

a private entry made by a settler after the close of the public sales.[64] As generally understood, however, the term "entry" applies to the act by which an individual acquires an inceptive right to purchase at private sale a designated portion of the public domain.[65]

A person desiring to obtain public land by entry presents to the register of the local land office a memorandum in writing describing the tract desired by the proper number of the section or part thereof, as the case may be, and the township and range, subscribing his name thereto, to which memorandum the register attaches his certificate, reciting the fact that the particular tract is subject to private entry and specifying the price per acre. This memorandum and certificate is then taken to the receiver, and upon payment to him of the purchase-price he issues duplicate receipts therefor, one of which is delivered to the applicant, to be surrendered on receiving his patent, and the other, together with the original memorandum, is delivered to the register, who enters the memorandum on file and issues his certificate of purchase of the land. The memorandum, together with the register's certificate of purchase, is then sent to the general land office for official sanction.[66]

The land department has authority at any time before issue of patent to inquire whether an entry was made in conformity with law, and to correct or annul the same, but it can not arbitrarily destroy the equitable title acquired by the entryman and held by him or his assignee. The certificate of purchase issued to the purchaser, or the receiver's final receipt of payment entitles the lawful holder to a patent, but it does not convey the title.[67] After the lapse of twenty years there is a presumption that a patent has been issued to the holder of the certificate.[68]

§ 192. Nature of entryman's title.—As a general rule the issuance of a patent in the name of the United States is necessary to pass the title in public lands to a private owner.[69] By the is-

[64] Denny v. Dodson, 32 Fed. 899, 13 Sawy. 68.

[65] Chotard v. Pope, 12 Wheat. (U. S.) 586, 6 L. ed. 737.

[66] Rev. Stat. U. S., § 2245.

[67] Bowne v. Wolcott, 1 N. Dak. 415, 48 N. W. 336.

[68] Culbertson v. Coleman, 47 Wis. 193, 2 N. W. 124.

[69] Hagan v. Ellis, 39 Fla. 463, 22 So. 727, 63 Am. St. 167; Knapp v. Alexander-Edgar Lumber Co., 145 Wis. 528, 130 N. W. 504, 140 Am. St. 1091. Niles v. Cedar Point Club, 175 U. S. 300, 20 Sup. Ct. 124, 44 L. ed. 171.

suance of the patent the title relates back to the date of the entry,[70] and takes character from that date.[71] If an entryman die before the patent is issued, title passes directly to his heirs, who take by purchase and not by descent.[72] Where the right to a patent is vested in the purchaser, the government holds a naked legal title in trust for him.[73] A certificate of purchase issued to a purchaser, or the land receiver's final receipt of payment for the land does not of itself convey the title,[74] but it gives the holder an equitable title, and is binding upon the government.[75] The acceptance and approval of an application to purchase public land vests in the applicant an equitable title, though the purchase-price has not been paid, which is perfected as of the date of the application by the subsequent payment of the purchase-price and the issuance of the patent.[76] Some cases hold, however, that it gives the holder a sufficient legal title to enable him to maintain ejectment.[77] An entryman who has obtained a receiver's receipt for the purchase-price has sufficient title upon which to maintain or defend a suit concerning the land.[78] By statute in many states a person who has acquired a complete right to a patent for public lands is deemed to have the complete legal title, or that the land office certificate of final payment shall be evidence of the legal title in the holder.[79]

As soon as an entryman becomes entitled to a patent, he may sell or convey the land as though the patent had been issued.[80] A substantial right accrues when payment is made and certificate or receipt received.[81] The transfer of such certificate passes to the transferee the equitable title to the land,[82] or, if transferred as collateral security, creates an equitable lien.[83] If the assignment of the certificate of entry is filed in the general land office the

[70] Boise City v. Wilkinson, 16 Idaho 150, 102 Pac. 148.

[71] Creamer v. Briscoe, 101 Tex. 490, 109 S. W. 911.

[72] Brann v. Mathieson, 139 Iowa 409, 116 N. W. 789.

[73] McClung v. Steen, 32 Fed. 373.

[74] Bowne v. Wolcott, 1 N. Dak. 415, 48 N. W. 336.

[75] American Mtg. Co. v. Hopper, 56 Fed. 67; Fulton v. Doe, 5 How. (Miss.) 751.

[76] Nicholson v. Congdon, 95 Minn. 188, 103 N. W. 1034.

[77] Bates v. Herron, 35 Ala. 117; Moore v. Coulter, 31 Ga. 278; Carman v. Johnson, 29 Mo. 84.

[78] Thompson v. Basler, 148 Cal. 646, 84 Pac. 161, 113 Am. St. 321.

[79] Knabe v. Burden, 88 Ala. 436, 7 So. 92; Combs v. Jolly, 28 Cal. 498; Matthews v. Goodrich, 102 Ind. 557, 1 N. E. 175; Tidd v. Rines, 26 Minn. 201, 2 N. W. 497.

[80] Dale v. Griffith, 93 Miss. 573, 46 So. 543.

[81] Budd v. Gallier, 50 Ore. 42, 89 Pac. 638.

[82] Sillyman v. King, 36 Iowa 207; Burdick v. Wentworth, 42 Iowa 440.

[83] Wallace v. Wilson, 30 Mo. 335.

patent will be issued to the assignee,[84] but in case it is issued to the entryman he will take and hold the title in trust for the benefit of the assignee.[85] Title by patent from the United States is title by record, and delivery of the instrument to the patentee is not essential.[86]

§ 193. Lands subject to entry.—It has been the practice of the land department of the government not to allow private entries until the land has been previously offered for sale at public auction.[87] There is no presumption that lands are open to entry.[88] They are not thus open until provision is made for issuing grants thereto,[89] and in disposing of them the legislature acts in subordination to the constitution.[90] The area of land open for entry by a particular proclamation of the president depends on the construction to be given such proclamation.[91] Public lands heavily covered with timber may be entered under the timber land act, though after removal of the timber they will be arable.[92] When lands have once been sold by the United States and the purchase-money paid, the lands so sold are segregated from the public domain and are no longer subject to entry. A subsequent sale and grant of the same lands would be absolutely null and void so long as the first sale continued.[93] Lands already patented, granted, confirmed to the grantee, or otherwise reserved, are not subject to entry.[94] Where a portion of the public domain has been appropriated to public or other special purposes, it is usually expressly excepted from the operation of all general legislative grants and land laws, but even without being thus excepted no such grant or law will be construed to embrace them or to operate upon them.[95] Where public lands have been thrown open to entry and sale, but subsequently withdrawn until private rights claimed

[84] Clark v. Hall, 19 Mich. 356.
[85] Magruder v. Esmay, 35 Ohio St. 221.
[86] Rogers v. Clark Iron Co., 104 Minn. 198, 116 N. W. 739.
[87] Chotard v. Pope, 12 Wheat. (U. S.) 587, 6 L. ed. 737; United States v. Railroad Bridge Co., 6 McLean (U. S.) 517, Fed. Cas. No. 16114.
[88] Bowser v. Westcott, 145 N. Car. 56, 58 S. E. 748.
[89] Ware v. Hager, 31 Ky. L. 728, 103 S. W. 283.
[90] Montana v. Rice, 204 U. S. 291, 27 Sup. Ct. 281, 51 L. ed. 490.
[91] Saylor v. Frantz, 17 Okla. 37, 86 Pac. 432.
[92] Thayer v. Spratt, 189 U. S. 346, 23 Sup. Ct. 576, 47 L. ed. 845,
[93] Simmons v. Wagner, 101 U. S. 260 25 L. ed. 910.
[94] Linebeck v. Vos, 160 Fed. 540; Call v. Los Angeles-Pacific Co., 162 Fed. 926; Sullivan v. Solis, 52 Tex. Civ. App. 464, 114 S. W. 456.
[95] Wilcox v. Jackson, 13 Pet. (U. S.) 498, 16 L. ed. 264.

therein have been adjudicated, such withdrawal has the same effect as a reversion, and the land is thereby withdrawn from the market.[96] Surveyed public lands which have not been offered for sale may be obtained under the provisions of the pre-emption law.[97] Mineral lands are not subject to private entry, but are disposed of in accordance with special acts.

§ 194. **Statement of the entry.**—An abstract should include a concise statement of what appears upon the public records affecting the title to the property in question, whether it shows an equitable title, a legal title, or no title.[98] In most of the states not included in the original thirteen, where all public grants of land to individuals are comparatively recent, it is customary to carry the title back to its emanation from the government. It sometimes becomes important to extend the examination back to the time when the government parted with the equitable title, although a patent from the government usually constitutes the first link in the chain of title. If, for any reason, it is deemed necessary to state the inceptive steps leading up to the patent, the abstracter must confine his inquiry to the particular method employed by the government in making disposition of lands of which the tract to be abstracted is a part. In a former section we detailed the procedure for acquiring public land by private entry. Certain instruments of writing in respect to the particular tract of public land sought to be obtained from the government resulted from this procedure. The first of these was the applicant's written memorandum. This was followed by the register's certificate reciting the fact that the tract was subject to private entry at a certain price. Then comes the receiver's receipt in duplicate of payment. And lastly the register's certificate of purchase. The register of the local land office was the proper custodian of all these instruments except one of the receipts of payment and the certificate of purchase, the receipt going to the applicant and the certificate to the general land office. It was upon presentation of the receipt of payment and the approval of the certificate of purchase that the patent was issued to the applicant. All the acts leading up to the issuance of the patent

[96] Wisconsin Central R. Co. v. Forsythe, 159 U. S. 46, 15 Sup. Ct. 1020, 40 L. ed. 70.

[97] Meyers v. Croft, 13 Wall. (U. S.) 291, 20 L. ed. 562.

[98] Smith v. Taylor, 82 Cal. 533, 23 Pac. 217; Heinsen v. Lamb, 117 Ill. 549, 7 N. E. 75; Union Safe Deposit Co. v. Chisholm, 33 Ill. App. 647.

constitute the entry, and a brief recital of such entry should form the first statement of the abstract of every title having its origin in private entry, and, whenever practicable, this statement should be followed by a copy of the receiver's duplicate certificate of purchase. The order of the statement should be: (1) A description of the land by the proper number of the section or part thereof, as the case may be, and the township and range; (2) the name of the entryman; (3) the date of the entry; (4) the location of the local land office where entry was made, and (5) the number of the certificate of purchase. In case there has been a cancellation of the original entry and a re-entry made, the statement should include the fact of such cancellation and the date of the re-entry together with the number of the certificate of re-entry. In making the entry the statute under which it is made should be followed, and if the entryman has complied with all the requirements for making a valid entry he is entitled to a certificate of purchase, and has an equitable interest in the land, though a patent has not been issued therefor.[99] This entry gives the claimant color of title which may be the foundation for acquiring title by advance possession. If it is deemed proper to show the entry a brief note of the facts is all that is necessary, thus:

The North West quarter of Section ten, Township twenty-five, North of Range eight East, in Grant County, Indiana, was entered by Franklin Thompson, March 25th, 1836, at the United States Land Office at Ft. Wayne, Indiana. Certificate No. 640.

§ 195. Receipts, certificates, etc., issued by register or receiver.—A receipt from the receiver of the local land office, showing the payment of the purchase-price of lands, is evidence of an equitable title in the holder thereof,[1] and in many cases it has been accorded a dignity and effect equal to that of a patent. While the latter instrument passes the legal title to the land, the receipt has the effect to prevent the government from making a subsequent valid sale of the land. This receipt is prima facie evidence that the law has been complied with in making the entry,[2] and has been held to give a title good as against all the world ex-

[99] Wilson v. Byers, 77 Ill. 76.

[1] Godding v. Deker, 3 Colo. App. 198, 32 Pac. 832; Doe v. Stephenson, 9 Ind. 144; Newport v. Cooper, 10 La. 155; Bigelow v. Blake, 18 Wis. 520.

[2] Whittaker v. Pendola, 78 Cal. 296, 20 Pac. 680.

cept the United States.[3] Upon the question as to the effect of the certificate of purchase or the receipt of payment of the purchase-price, there is a conflict in the cases. The state courts generally hold that the instrument gives the holder a sufficient legal title to enable him to maintain ejectment;[4] while the United States Supreme Court has held that a patent is necessary to pass the title.[5] The receiver's final receipt is an acknowledgment by the government that it has received full pay for the land and that it holds the legal title in trust for the entryman.[6] When the entryman has paid for the land and taken the receiver's receipt, he thereby became the equitable owner of the land, and thereafter the government has no right or power to sell it or to hold it open to pre-emption by another.[7] The absence of any record in the local land office showing payment, does not overcome the evidence of title afforded by the register's receipt.[8] The initial statement of the abstract should show to whom the receipt was issued, its number, date of issue, place where recorded, volume and page of record, together with the fact of the receiver's acknowledgment of payment of a specified sum of money for a tract of land located in a designated land district. The receiver's receipt may be shown as follows:

United States to John Lippert.	Receiver's Receipt No. 7886. Dated Aug. 30th, 1886. Filed Sept. 10th, 1886, at 1 P. M. Recorded in Book 3 Deeds, page 193. Consideration, $200.00.

Covering the N. W. quarter of Sec. 32, Tp. 128, Range 70 West of the 5th Principal Meridian in Kingsbury County, South Dakota.

The proper location for the above statement is immediately after the note of entry.

§ 196. **Pre-emption.**—We have discussed the mode of disposing of public lands during the early stages of our land sys-

[3] Cox v. Easter, 1 Port. (Ala.) 130.
[4] Bates v. Herron, 35 Ala. 117; Moore v. Coulter, 31 Ga. 278; Carman v. Johnson, 29 Mo. 84.
[5] Niles v. Cedar Point Club, 175 U. S. 300, 20 Sup. Ct. 124, 44 L. ed. 171.
[6] Caldwell v. Bush, 6 Wyo. 342, 45 Pac. 488.
[7] Cornelius v. Kissel, 128 U. S. 457, 9 Sup. Ct. 122, 32 L. ed. 482.
[8] Witcher v. Conklin, 84 Cal. 499, 24 Pac. 302.

tem, and referred to the injustice to actual settlers resulting from sales at public auction and private entry. It was to correct this evil that the government early adopted the mode of disposition known as "pre-emption." By this mode persons possessed of particular qualifications, who have settled on and improved public lands, were given the right to a pre-emption or preference[9] in purchasing the same when they are offered for sale by the government. Under the provisions of the pre-emption laws large portions of the public domain have been taken up.[10] To create a right of pre-emption it was necessary that there be settlement, inhabitation and improvement by the pre-emptor—conditions which can not be met when the land is in the occupation of another.[11] The law required a residence both continuous and personal. The settler was excused for temporary absence caused by well-founded apprehensions of violence, by sickness, by the presence of an epidemic, by judicial compulsion, or by an engagement in the military or naval service.[12]

The pre-emption laws provided that any adult citizen of the United States, or a head of a family, might gain the first right to purchase one hundred and sixty acres or less, by actually settling thereon, and inhabiting and improving it, and erecting on it a dwelling-house. He was required to make his entry, his declaration entered on the books of the land commissioner of his intent to purchase, within thirty days after commencing such occupation, and his payment of the purchase-price within twelve months thereafter. He was also required to establish his right to pre-emption, proving, among other things, that he did not own more than one-half section of land in any other state or territory and had not abandoned any other home in the state or territory where the pre-empted land lay. Having done these things, and obtained a certificate thereof from the land commissioner, he was deemed to hold a personal right to acquire the legal title to the land.[13]

The term "bona fide," as applied to a pre-emption claimant,

[9] Shields v. Walker, 2 Overt. (Tenn.) 118n.

[10] Meyers v. Croft, 13 Wall. (U. S.) 291, 20 L. ed. 562.

[11] Hosmer v. Wallace, 97 U. S. 575, 24 L. ed. 1130.

[12] Bohall v. Dilla, 114 U. S. 47, 5 Sup. Ct. 782, 29 L. ed. 61.

[13] U. S. Rev. Stat. §§ 2257-2288; Whitney v. Taylor, 158 U. S. 85, 15 Sup. Ct. 796, 39 L. ed. 906; Tarpey v. Madsen, 178 U. S. 215, 20 Sup. Ct. 849, 44 L. ed. 1042; Bogan v. Edinburg American Land Mfg. Co., 63 Fed. 192, 11 C. C. A. 128.

was intended to designate one who had settled upon land subject to pre-emption, with the intention to acquire the title thereto, and had complied, or was proceeding to comply, in good faith, with the requirements of the law to perfect his right to it.[14] He is then entitled to a certificate of entry from the local land officer, and, ultimately, to a patent to the lands from the government.[15] A settlement made on the land by another person, who cultivated it for the proprietor, was sufficient to constitute "an actual settlement," though the proprietor did not reside in person on the estate or within the territory.[16] But no right of pre-emption could be established by settlement and improvement on public lands, where the claimant forcibly intruded upon the possession of one who had already settled upon, improved and enclosed the same land.[17] Such an intrusion, although made under the pretense of pre-empting the land, was deemed a naked, unlawful trespass, and could not initiate a right of pre-emption.[18]

The basis of the pre-emptor's right consisted in his settlement upon, cultivation, and improvement of the land, and this gave him the first opportunity of purchasing the tract at the minimum price fixed by the government, when it became subject to sale.[19]

The early pre-emption acts applied only to the lands that had been surveyed, but the later acts permitted pre-emption of unsurveyed lands.[20] By the Act of Congress of March 3, 1891, all the then existing pre-emption laws were repealed, except a few sections.[21]

Where the title to a particular tract has its inception under the pre-emption laws, the various steps taken before entry are unimportant, and shed no light on the title after issue of the certificate. Hence the abstract should begin with a brief note of the entry, as shown in a previous section.

§ 197. **Pre-emptor's right or title.**—The pre-emptor for-

[14] Hosmer v. Wallace, 97 U. S. 575, 24 L. ed. 1130.

[15] Hutchings v. Low, 15 Wall. (U. S.) 77, 21 L. ed. 82.

[16] Hickie v. Starke, 1 Pet. (U. S.) 94, 7 L. ed. 67.

[17] Trenouth v. San Francisco, 100 U. S. 251, 25 L. ed. 626.

[18] Atherton v. Fowler, 96 U. S. 513, 24 L. ed. 732.

[19] Doe v. Beck, 108 Ala. 71, 19 So. 802; Megerle v. Ashe, 33 Cal. 74; Byrne v. Morehouse, 22 Ill. 611; Bowers v. Keesecker, 14 Iowa 301; Emslie v. Young, 24 Kans. 732; Camp v. Smith, 2 Minn. (Gil. 131) 155; Franklin v. Kelley, 2 Nebr. 79; Garcia v. Callender, 125 N. Y. 307, 26 N. E. 283; Dillingham v. Fisher, 5 Wis. 475.

[20] 12 Stat. at L. § 457.

[21] 26 U. S. Stat. at L. § 1097.

merly had no transferable right prior to the issuing of the patent.[22] The right thus acquired by the settler was not a title[23] nor a common-law estate,[24] nor was it an interest in the land or the legal title thereto.[25] It was not even an option to purchase the land, for the government was under no obligation to sell to the settler at any time.[26] It was merely a right of occupancy with preference as to purchasing when the government should elect to sell.[27] The legal title could be obtained thereafter by means of a patent.

Where a party obtains a certificate of entry at a public land office, he obtains an imperfect title, but upon which, it has been held, he can maintain an action of ejectment against any person not having a better title.[28] A pre-emptive right descended to the heirs of the settler; but could not be assigned against the government, nor reached on execution.[29] But the holder of a pre-emption certificate which has been issued by the United States, entered, and paid for by him, has, previous to a patent, such an equitable estate in the land as will subject it to sale under execution by the statutes of Iowa.[30]

§ 198. Contracts and conveyances before entry.—By the Act of 1834 the pre-emption rights of settlers on public lands were permitted to be assigned, and the assignment passed an equitable title.[31] But by the Act of 1841 the sale of pre-emptive rights to public lands acquired by settlement and improvement were forbidden.[32] It was the policy of congress in enacting the pre-emption laws to confine the benefits of those laws to actual settlers upon the public lands and to prohibit all contracts and understandings entered into prior to the issuing of the final certificates of entry, by which the benefit of the entry would inure directly or indirectly to any third party. All assignments and transfers of the pre-emption right are declared to be null and void, and it is provided that any person claiming the benefit of such pre-

[22] Arbour v. Nettles, 12 La. Ann. 217; Glenn v. Thistle, 23 Miss. 42; Paulding v. Grimsley, 10 Mo. 210.

[23] Grand Gulf R &c. Co. v. Bryan, 8 Smed. & M. (Miss.) 234.

[24] Wittenbrock v. Wheadon, 128 Cal. 150, 60 Pac. 664, 79 Am. St. 32.

[25] Delaunay v. Burnett, 9 Ill. 454.

[26] Doe v. Beck, 108 Ala. 71, 19 So. 802.

[27] Brown v. Throckmorton, 11 Ill. 529.

[28] Callahan v. Davis, 90 Mo. 78, 2 S. W. 216.

[29] Myers v. Croft, 13 Wall. (U. S.) 291, 20 L. ed. 562; Bernier v. Bernier, 147 U. S. 243, 13 Sup. Ct. 244, 37 L. ed. 152.

[30] Levi v. Thompson, 4 How. (U. S.) 17, 11 L. ed. 856.

[31] Marks v. Dickson 20 How. (U. S.) 501, 15 L. ed. 1002,

[32] Quinby v. Conlan, 104 U. S. 420, 26 L. ed. 800.

emption, before he shall be allowed to enter the lands pre-empted, shall make oath before the registrar or receiver of the land district in which the land is situated, stating, among other things, that he has not settled upon and improved such land to sell the same on speculation, but in good faith to appropriate it to his own exclusive use, and that he has not directly or indirectly made any agreement or contract in any way or manner with any person whatever, by which the title which he may acquire from the government of the United States shall inure, in whole or in part, to the benefit of any person other than himself.[33] But this did not prevent the pre-emptor from selling his land after the entry.[34] The provision of the Act of 1841, rendering null and void all assignments and transfers of pre-emption rights, has been held to apply only to the preference right to purchase at a minimum price,[35] and did not preclude the pre-emptor from selling or otherwise disposing of the land after the entry had been made.[36] So under the act last referred to, pre-emptors, who have proved up their claims, stand in the same relation to the government as other purchasers,[37] and their grantees become beneficiaries under the patent though issued to the pre-emptors.[38] But contracts made by actual settlers of the public lands, concerning their possessory rights and the title to be acquired in future from the United States, are valid as between the parties to the contract, except in cases where congress has imposed restrictions on such contracts.[39] In this connection it must be borne in mind that the government has the power to annul all entries of public lands at any time before patent issues, and a purchaser from a pre-emption entryman assumes the risk attendant upon an exercise of this power.[40]

§ 199. **Graduation acts.**—In 1854 congress passed an act providing for a scale of prices for public lands which had been on the market for ten years and upward.[41] From the time of the enactment of this statute until its repeal in 1862 large quantities

[33] U. S. Rev. Stat. §§ 2262, 2263; Close v. Stuyvesant, 132 Ill. 607, 24 N. E. 868, 3 L. R. A. 161.

[34] Myers v. Croft, 13 Wall. (U. S.) 291, 20 L. ed. 562.

[35] Meyers v. Croft, 13 Wall. (U. S.) 291, 20 L. ed. 562.

[36] Robbins v. Bunn, 54 Ill. 48, 5 Am. Rep. 75.

[37] Cady v. Eaghmey, 54 Iowa 615, 7 N. W. 102.

[38] Camp v. Smith, 2 Minn. (Gil. 131) 155.

[39] Davenport v. Lamb. 13 Wall. (U. S.) 418, 20 L. ed. 655.

[40] Taylor v. Weston, 77 Cal. 534, 20 Pac. 62; Guidry v. Woods, 19 La. 334, 36 Am. Dec. 677.

[41] 10 U. S. Stat. at L. § 574.

of land were disposed of under its provisions. The purpose of the act was to aid the pre-emption law which it closely resembled in its essential features. The price of public lands under the provisions of this act ranged from twelve and one-half cents to one dollar per acre, which could be paid in cash. The rights conferred by this act were strictly personal, and were based on actual settlement and cultivation, made or to be made. The rights acquired were not assignable, and the patents were issued to the original purchaser only. The procedure for acquiring title under this act was substantially the same as that for acquiring title under the pre-emption laws, differing only in minor details. Where patents have not been issued on entries made under this act owing to the lack of the required proof of settlement and cultivation, the confirmatory Act of 1857 permits the delivery of patents on application therefor, without such proof, where the entry was allowed prior to the passage of the latter act. In the preparation of an abstract for land acquired under this act it is neither customary nor necessary to incorporate the proceedings prior to entry which is the first material stage.

§ 200. Homestead and free grants.—The principal mode by which individuals now obtain title to public lands is under homestead laws, the first of which was enacted in 1862.[42] The provisions of the federal statutes with regard to homesteads are in many respects similar to those in regard to pre-emption. In obtaining title to public land under these laws a settler who possesses certain qualifications, goes through certain formalities, occupies and improves a particular tract of public land for a specific time, and at the expiration of such time a patent for the land issues from the government to the settler without any charge save the payment of certain fees to the land officers. A homestead entry is the initial step taken in the land office toward acquiring ownership under the homestead law, and precedes the performance on the part of a homestead claimant of the conditions of residence upon and improvement of land which constitutes the real consideration for the transfer of the title and which are conditions precedent to the vesting of title in the homestead settler.[43] Under the homestead laws three things must be done in order to constitute an entry on the land: (1) The applicant must make

[42] 12 U. S. Stat. at L. § 392.

[43] McCune v. Essig, 118 Fed. 273.

affidavit setting forth the facts which entitle him to make such entry; (2) he must make formal application; and (3) he must make payment of the money required. When these three requisites are complied with, and the certificate of entry is executed and delivered to him, the entry is complete; the land is entered. If either one of these integral parts of an entry is defective, the register and receiver are justified in rejecting the application.[44] The homestead laws authorize a citizen of the United States, or one who has declared his intention of becoming a citizen, who is an adult or the head of a family, or being under age has served in the army or navy of the United States in case of war for not less than fourteen days, and who does not own as much as one hundred and sixty acres of land in any state or territory, and who has not previously exercised a homestead right under the federal law, to take possession of not more than one hundred and sixty acres, and in good faith to occupy and cultivate it for five years, and thereby to obtain a right to acquire it from the government without any payment other than the fees of the land office.[45]

To acquire a valid right under the homestead law, the settler must actually occupy the land in absolute good faith with the intention of permanently residing thereon.[46] Such occupation must be evidenced by those things which are essential to its beneficial use.[47] A physical presence of the settler on public lands at all times is, however, not necessary to constitute legal possession,[48] nor need the settler himself construct the improvements required by law.[49] A valid right to public lands can be initiated only by persons qualified[50] after compliance with all legal requirements.[51] A homestead right may be initiated by actual bona fide settlement on the land or by entry at the local land office,[52] and a homestead entry, valid on its face, segregates land from the public domain until canceled or forfeited.[53] Where the title has its inception under the homestead laws the abstract should contain a statement of

[44] Hastings & D. R. Co. v. Whitney, 132 U. S. 357, 10 Sup. Ct. 112, 33 L. ed. 363.

[45] U. S. Rev. Stat. §§ 2289, 2302.

[46] Whaley v. Northern Pacific R. Co., 167 Fed. 664.

[47] Gordon v. Ross-Higgins Co., 162 Fed. 637.

[48] Neal v. Kayser, 12 Ariz. 118, 100 Pac. 439.

[49] Trodick v. Northern Pac. R. Co., 164 Fed. 913.

[50] Call v. Los Angeles Pac. Co., 162 Fed. 926.

[51] Ayres v. United States, 42 Ct. Cl. (U. S.) 385.

[52] Holt v. Classen, 19 Okla. 131, 91 Pac. 866.

[53] McMichael v. Murphy, 12 Okla. 155, 70 Pac. 189.

all proceedings had during the interval between entry and issue of the certificate. The data for such statement can be procured from a transcript of the register's tract book.

§ 201. **Nature of rights acquired by homesteader.**—When the preliminary entry is made the right of possession is conferred on the entryman,[54] although the legal title does not pass from the government until the issuance of a patent.[55] The receiver's receipt issued to a homestead entryman in possession gives such title to the entryman as to enable him to maintain or defeat a suit concerning the land.[56] But the holder of a certificate of entry in possession of the land can not defend against ejectment brought by the grantee in fee of the government, whether such grantee's patent was issued before or after the issuance of the certificate.[57] No right can be acquired by one person who enters upon land for the purpose of taking it as a homestead, while it is in the actual possession of another, during the latter's temporary absence.[58] A person entering a homestead under the laws of the United States acquires a vested right therein at the expiration of five years from entry, but no estate in the land vests in him until he has complied with the required conditions.[59] A settler who has entered public land, has, from such entry, an inchoate title, which is, in a legal sense, property and subject to be defeated only by his failure to comply with the conditions imposed by law.[60] A homestead entry, so long as it remains a subsisting entry, precludes a subsequent entry.[61] The mere application for a homestead entry on government land vests no right in such applicant when such application is denied.[62]

§ 202. **Donations and bounty lands.**—Congress has from time to time passed what are known as "Donation Acts," which were designed to induce settlements on isolated portions of the

[54] Stearns v. United States, 152 Fed. 900, 82 C. C. A. 48; Tiernan v. Miller, 69 Nebr. 764, 96 N. W. 661.

[55] Thompson v. Basler, 148 Cal. 646, 84 Pac. 161, 113 Am. St. 321.

[56] Case v. Edgeworth, 87 Ala. 203, 5 So. 783.

[57] Lowery v. Baker, 141 Ala. 600, 37 So. 637.

[58] Rourke v. McNally, 98 Cal. 291, 33 Pac. 62.

[59] Thrift v. Delaney, 69 Cal. 188, 10 Pac. 475; Lovell v. Wall, 31 Fla. 73 12 So. 659; Newkirk v. Marshall, 35 Kans. 77, 10 Pac. 571; Coleman v. McCormick, 37 Mo. 179, 33 N. W. 556.

[60] Culbertson Irr. & Water Power Co. v. Olander, 51 Nebr. 539, 71 N. W. 298.

[61] Holt v. Murphy, 15 Okla. 12, 79 Pac. 275.

[62] Baldwin v. Keith, 13 Okla. 624, 75 Pac. 1124.

public domain. Such acts were local in character as well as limited in duration. Among the first of these acts was one passed in 1842, which applied to certain public lands in the peninsula of Florida.[63] By the provisions of this act any person, able to bear arms, was given a quarter section of such land if he became an actual settler thereon.

The act known as the "Oregon Donation Act," passed in 1850, gave to every white settler upon public land within a specified district a half section if a single man, and an entire section if married.[64] This act embraced all the public lands of the territory of Oregon lying east and west of the Cascade mountains, and in 1853 the terms of the act were extended so as to include the public lands of the territory of Washington. The early decisions of the courts of Oregon and the inferior federal courts held that the act was a grant in praesenti and vested in the settler an estate in fee from the filing of his notification, subject to be defeated by his failure to comply with the conditions of the act.[65] But the Supreme Court of the United States held that the grant did not take effect so as to pass anything more than a possessory right in the land occupied until the completion of the four years' residence and cultivation and full compliance with all the other requirements of the act.[66] The act required for the completion of the settler's right to a patent not only that he should reside upon the land and cultivate it for four years but that he should give notice to the surveyor-general of the precise land claimed; such notice was, by the Amendatory Act of 1853, required to be given in advance of the public survey.[67] Upon full compliance by the settler with the conditions of the act, his right became vested and passed beyond the control of congress.[68] A married woman was entitled to take under this act, not as a settler, but on account of her wifeship,[69] but her share of land under the act was not a separate estate in her, for, by the existing laws of Oregon, her estate in the premises for their joint lives was cast upon the husband.[70] The act contained a provision rendering void all contracts for the sale of conveyance of the land before

[63] 5 U. S. Stat. at L. § 502.
[64] 9 U. S. Stat. at L. § 496.
[65] Adams v. Burke, 3 Sawy. (U. S.) 415, Fed. Cas. No. 49; Love v. Love, 8 Ore. 23.
[66] Hall v. Russell, 101 U. S. 503, 25 L. ed. 829.
[67] Brazee v. Schofield, 124 U. S. 495, 8 Sup. Ct. 604, 31 L. ed. 484.
[68] Stark v. Starrs, 6 Wall. (U. S.) 413, 18 L. ed. 925.
[69] Ford v. Kennedy, 1 Ore. 166.
[70] Wythe v. Smith, 4 Sawy. (U. S.) 17, Fed. Cas. No. 18122.

the settler obtained a patent therefor, but this provision was repealed by the Act of 1855 permitting the settler to make sale after he had resided for four years upon the land.[71]

In 1854 congress passed an act similar to the one just discussed, but applying to public lands in the territory of New Mexico.[72] Only male persons then residing in the territory, or who should remove there prior to 1858, could obtain land under this act.

In 1815 congress passed the New Madrid Act which provided for the relief of landowners in New Madrid County, Mo., whose lands had been injured by earthquakes. By its provisions such persons were authorized to locate a like quantity of land on any of the public domain of said territory in lieu of the injured lands.[73] This act was not a direct grant of land, but merely an offer on the part of the government to exchange its land for that which had been injured,[74] and when the exchange was effected the injured lands reverted to the federal government. Such exchange was effected by the recorder of land titles issuing to the claimant upon proof of his ownership of injured land a certificate showing his right to locate; whereupon the deputy-surveyor made a location of the land applied for, and returned to the recorder a plat of the survey and a notice in writing, designating the tract located and the name of the claimant. This return was recorded by the recorder, who transmitted to the general land office a report of the claims allowed, and issued to the claimant a certificate showing his right to a patent, the certificate on being surrendered to the commissioner of the general land office entitled the claimant to take the patent.[75] The locator acquired no vested interest in the land located until the survey of the land was returned and recorded in the recorder's office, at which time the locator acquired equitable title to the land, the legal title remaining in the government until issue of the patents.[76]

In 1784 Virginia ceded to the United States her territory northwest of the Ohio river, reserving the right to supply deficiencies in grants to officers and soldiers of the war of the Revolution. By an act passed in 1804 such officers and soldiers en-

[71] Barney v. Dolph, 97 U. S. 652, 24 L. ed. 1063.
[72] 10 U. S. Stat. at L. § 308.
[73] 3 U. S. Stat. at L. 211, Ch. 45.
[74] Holme v. Strautman, 35 Mo. 293.
[75] Hot Springs Cases, 92 U. S. 698, 23 L. ed. 690, 11 Ct. Cl. 238.
[76] Fenn v. Holme, 21 How. (U. S.) 481, 16 L. ed. 198.

titled to bounty lands in Ohio were required to complete their locations within three years and to make a return of their surveys to the secretary of war within five years after the passage of the act.[77]

In 1782 congress passed what has been called "North Carolina Grants," providing for the officers and soldiers of that state who served in the war of the Revolution. The additional homestead granted to Union soldiers by the federal laws is not in the nature of an application under the homestead laws, but is in the nature of a bounty extended by the government to its soldiers in the war of the Rebellion.[78]

§ 203. **Land warrants and scrip.**—Some important transfers of title to public lands from the federal government to individuals have taken place, in compensation for services in the army or navy. These were obtained, as prescribed by the statutes, by "warrants for bounty lands;" and have been held by soldiers and sailors of the United States, or their families, by virtue of such grants.[79] These warrants might be located on the public lands of the United States and were receivable at the rate of one dollar and twenty-five cents per acre in full or part payment for such land as the case might be.[80] The holder of such warrants had an absolute right to locate land under them, and to receive a patent for the land located.[81] Such warrants were not canceled nor did the title thereto pass from the locator until they were accepted in payment for land by the government.[82] Entry under a bounty land warrant gave to the entryman an equitable title to the land, the legal title remaining in the government until the issue of the patent.[83] But the legal as well as the equitable title passes from the federal government without issuance of patent, if the congressional grants provide that the title shall pass on selection.[84] Bounty land warrants were regarded as lands, and on the death of the owner, passed to his heirs.[85] Previous to the cession of the Northwest Territory to the United States by the state of Virginia, that state had issued to its Revolutionary

[77] 2 U. S. Stat. at L. 274 § 2.
[78] United States v. Lair, 118 Fed. 98.
[79] U. S. Rev. Stat. §§ 2414, 2446.
[80] Saunders v. Niswanger, 11 Ohio St. 298.
[81] Merrill v. Hartwell, 11 Mich. 200.
[82] Johnson v. Gilfillan, 8 Minn. 395.
[83] Gray v. Jones, 14 Fed. 83, 4 McCrary (U. S.) 515; Swisher v. Sensenderfer, 84 Mo. 104.
[84] Price v. Dennis, 159 Ala. 625, 49 So. 248.
[85] Atwood v. Beck, 21 Ala. 590.

veterans land warrants receivable in payment of any land owned by the state, and the United States took this property chargeable with the obligation to satisfy the holders of such warrants under acts of congress.

There has also been issued a species of location certificates known as "Indian or half-breed scrip." This form of scrip is not transferrable and can be located only in the name of the person to whom issued. No receipt or certificate of purchase is issued to the holder, the scrip and application being the muniments of title which are returned to the general land office, and the certificate of the commissioner showing the location of the scrip by the proper party is competent evidence to show title from the government.[86] Likewise the states have enacted laws under which land warrants or scrip have been issued, entitling the holders to locate them upon the public lands of the state and to receive patents for such lands. Such warrants or scrip have been held to be assignable either in whole or in part.[87] Such assignment may be made by indorsement on the warrant or upon a separate paper.[88] The owner of such warrants or scrip after their location may convey his interest in the land so located before a patent is issued.[89]

§ 204. Desert land entries.—In 1877 congress passed what is known as the "Desert Land Act," which gives to any citizen of the United States, or any person of requisite age who may be entitled to become a citizen, and has filed his declaration to become such, upon payment of twenty-five cents per acre, to file a declaration under oath with the register and receiver of the land district in which any desert land is situated that he intends to reclaim a tract of desert land not exceeding one section, by conducting water upon the same, within the period of three years thereafter.[90] At any time within the designated period of three years after filing said declaration, and upon making satisfactory proof to the register and receiver of the reclamation of the tract, and upon the payment of an additional sum of one dollar per acre, the claimant becomes entitled to a patent.[91] Upon entry

[86] Wilcox v. Jackson, 109 Ill. 261.

[87] Miller v. Texas &c. R. Co., 132 U. S. 662, 10 Sup. Ct. 206, 33 L. ed. 487.

[88] McArthur v. Gallaher, 8 Ohio 512.

[89] Vowles v. Craig, 8 Cranch (U. S.) 371, 3 L. ed. 593; Bludworth v. Lake, 35 Cal. 255; Peevy v. Hurt, 32 Tex. 146.

[90] U. S. Comp. Stat. 1901, p. 1548.

[91] United States v. Healy, 160 U. S. 136, 16 Sup. Ct. 247, 40 L. ed. 369.

and the payment of twenty-five cents per acre the entryman becomes entitled to possession of the land entered for three years from the date of his entry.[92]

The occasion on which the desert character of the land is to be ascertained is at the time of filing the declaration. It is a sufficient reclamation to entitle the entryman to a patent that he has acquired the right to sufficient water to irrigate the land, and has constructed main ditches sufficient to carry it over the accessible parts of the tract, for purposes of cultivation in the ordinary manner though he has not actually used or cultivated the land.[93] Upon compliance with all conditions and requirements of the act the entryman became vested with such title to the land as passed to his heirs and devisees in case of his death before the issuance of the patent.[94] The Act of 1877, fixing the price of desert lands at one dollar and twenty-five cents per acre, has been held not to embrace the alternate sections reserved by congress in a railroad land grant, but their price is fixed at two dollars and fifty cents per acre by the proviso of the U. S. Rev. Stat. § 2357, and land entered under the act of 1877, when the price was two dollars and fifty cents per acre, can not be patented, after the passage of the act of 1891, upon paying only one dollar and twenty-five cents per acre.[95]

§ 205. **Timber and stone lands.**—In 1878 congress passed an act providing that any citizen of the United States may purchase, under certain conditions, lands of the United States which are valuable chiefly for stone or timber and are unfit for cultivation, to an amount not exceeding one hundred and sixty acres.[96] By the provisions of this statute the applicant must file with the register of the proper district a written statement in duplicate, one of which is transmitted to the general land office, designating by legal subdivisions the particular tract of land he desires to purchase, setting forth that the same is unfit for cultivation, and chiefly valuable for its timber or stone; that the tract is uninhabitated; that he has made no other application under the act; that he does not intend to purchase the same for speculation, but in good faith to appropriate it to his own exclusive use and

[92] Sallee v. Corder, 67 Cal. 174, 7 Pac. 455.

[93] United States v. Mackintosh, 85 Fed. 333, 29 C. C. A. 176.

[94] Phillips v. Carter, 135 Cal. 604, 67 Pac. 1031, 87 Am. St. 152.

[95] United States v. Healy, 160 U. S. 136, 16 Sup. Ct. 247, 40 L. ed. 369.

[96] U. S. Comp. Stat. 1901, p. 1545.

benefit; and that he has not directly or indirectly made any agreement or contract in any way or manner with any person or persons whatsoever, by which the title which he might acquire from the government should inure, in whole or in part, to the benefit of any other person except himself; which statement must be verified by the oath of the applicant before the register or receiver of the land office within the district where the land is situated.[97] It will be observed that the statute does not limit the dominion which the purchaser has over the land after it is purchased from the government or restrict in the slightest his power of alienation; but that it only prohibits his entering the land under an agreement whereby he was acting for another; that he might make a valid entry of the land though with the view of disposing of the same after he had completed the purchase, provided that at or before the time of such purchase he had not entered into an agreement with another, whereby such other should receive any of the benefit of such purchase.[98] The act included land which had not been offered at public sale according to law.[99] Persons entitled to purchase under this act must be citizens of the United States or persons who have declared their intention to become such.[1] The minimum price for which such land could be sold was two dollars and fifty cents per acre.

The filing of an application to purchase under this act may initiate a right to purchase as against a subsequent applicant for the same privilege but the mere filing of such application confers upon the applicant no right as against the United States, and that, until the applicant has acquired a vested right in the land, it is within the power of the government to withdraw it from sale or make any other disposition of it.[2] But upon payment by the applicant of the purchase-price, and the delivery of the certificate or receipt therefor, it becomes the duty of the land commissioner, on receiving the papers and testimony in the case from the local land office, to cause a patent to issue to the purchaser.[3]

§ 206. **Timber culture claims.**—In 1878 congress passed an act giving to every person over twenty-one years of age, or

[97] Olson v. United States, 133 Fed. 849, 67 C. C. A. 21.
[98] United States v. Budd, 144 U. S. 154, 12 Sup. Ct. 575, 36 L. ed. 384.
[99] United States v. Budd, 43 Fed. 630.
[1] Lewis v. Shaw, 70 Fed. 289.
[2] United States v. Braddock, 50 Fed. 669.
[3] Montgomery v. United States, 36 Fed. 4, 13 Sawy. 383.

the head of a family, and who was a citizen of the United States, or had declared his intention to become such, the right to receive a patent for public land to be acquired by the planting and culture of timber thereon.[4] The applicant was required to make affidavit before the register or receiver, or the clerk of some court of record, or officer authorized to administer oaths in the district where the land was situated, that the tract of land which he desires to enter is composed exclusively of prairie lands, or other lands devoid of timber; that the filing an entry is made for the cultivation of timber, and for his own exclusive use and benefit; that he has made the application in good faith, and not for the purpose of speculation, or directly or indirectly for the use or benefit of any other person or persons; that he intends to hold and cultivate the land, and to fully comply with the provisions of the act; and that he has not previously made an entry under the act.[5] Before the entryman's right to a patent accrued he had the same right of possession as any other entryman,[6] and was the owner of the trees standing on the land,[7] but prior to the time when his right to a patent accrued the entryman had no vested right in the land, and the right passed, upon his death, to his heirs as grantees from the government.[8]

The applicant for land under this act was not required to reside on the land, or make any improvements thereon except the planting and cultivation of timber in the manner prescribed in the act. At the expiration of eight years from the date of entry a patent may issue upon final proof that the conditions of the act have been fully complied with. It would seem that the act does not prevent a claimant, who has made his entry in good faith, from contracting to sell his claim prior to the final proof.[9]

§ 207. Swamp land grants.—In 1850 congress passed what is known as the "Swamp Land Act."[10] By that act it was provided that "to enable the state of Arkansas to construct the necessary levees and drains to reclaim the swamp and overflowed lands therein, the whole of these swamps and overflowed lands,

[4] U. S. Rev. Stat. 1878, §§ 2464, 2468.

[5] Watkins Land Co. v. Creps, 72 Kans. 333, 83 Pac. 969.

[6] Braum v. Mathieson, 139 Iowa 409, 116 N. W. 789.

[7] Carner v. Chicago &c. R. Co., 43 Minn. 375, 45 N. W. 713.

[8] Cooper v. Wilder, 111 Cal. 191, 43 Pac. 591, 52 Am. St. 163.

[9] Church v. Adams, 37 Ore. 355, 61 Pac. 639.

[10] U. S. Rev. Stat. 1878, § 2479.

made unfit thereby for cultivation, which shall remain unsold at the passage of this act, shall be and are hereby granted to said state." The fourth section declared that the provisions of the act should be extended to, and their benefits conferred on each of the other states of the Union in which such swamp or overflowed lands might be situated. All such lands selected and reported to the general land office prior to March 3rd, 1857, so far as the same remained vacant and unappropriated, and not interfered with by actual settlement under other federal land laws, were confirmed to the respective states by a subsequent act.[11] The land department could not set aside these selections, because they were confirmed by this act, and the United States could convey no title after this to any of these lands unless they came within the exceptions of the act last referred to.[12] The Act of 1850 appropriated as a grant in praesenti to the states then in existence, of all the swamp lands in their respective jurisdictions; but the title to the swamp lands within a territory did not pass out of the United States by that act.[13] By this act the title to all lands determined by the general land department to be swamp lands passed to the state as of the date the act took effect.[14] The act being a grant in praesenti, the title to such lands passed at once to the state in which they lay,[15] but the determination and identity of what lands were and what lands were not swamp lands was left to the secretary of the interior.[16] It would seem that the correct rule is that the legal title passed to the state only upon issuance of patent,[17] although it has been frequently asserted that the Swamp Land Act followed by an identification of the land had the effect to pass title without the necessity of a patent.[18] Where the grant to the state is on condition, a purchaser from the state takes the land subject to such condition.[19] Swamp land

[11] U. S. Rev. Stat. 1878, § 2484.

[12] Martin v. Marks, 97 U. S. 345, 24 L. ed. 940.

[13] Rice v. Sioux City &c. R. Co., 110 U. S. 695, 4 Sup. Ct. 177, 28 L. ed. 289.

[14] Diana Shooting Club v. Lamoreux, 114 Wis. 44, 89 N. W. 880, 91 Am. St. 898.

[15] Kelly v. Cotton Belt Lumber Co., 74 Ark. 400, 86 S. W. 436; People v. Warner, 116 Mich. 228, 74 N. W. 705; Simpson v. Stoddard Co., 173 Mo. 421, 73 S. W. 700.

[16] Tubbs v. Wilhoit, 73 Cal. 61, 14 Pac. 361; State v. Portsmouth Sav. Bank, 106 Ind. 435, 7 N. E. 379.

[17] Brown v. Hitchcock, 173 U. S. 473, 19 Sup. Ct. 485, 43 L. ed. 772; Henry v. Brannan, 149 Ala. 323, 42 So. 995; Schlosser v. Hemphill, 118 Iowa 452, 90 N. W. 842.

[18] Kernan v. Griffith, 27 Cal. 87; Tolleston Club v. State, 141 Ind. 197, 38 N. E. 214, 40 N. E. 690.

[19] Reclamation District No. 70 v. Sherman, 11 Cal. App. 399, 105 Pac. 277.

grants whereto the state has completed the title may be sold, but if set aside for or granted to a particular incompatible public purpose they are withdrawn from settlement.[20] A survey is ordinarily necessary before a grant to swamp land can be made.[21] A patent issued to a state is conclusive against collateral attack,[22] and can not be impeached in an action at law by showing that the land is not in fact swamp land.[23]

Where the United States has sold lands which would be included under the Swamp Land Act of 1850, such sales have been held invalid,[24] but a state has authority to ratify and confirm a sale thus made by the federal government.[25]

§ 208. School and university land grants.—The federal government has always maintained a generous policy in respect to grants for educational purposes,[26] and in pursuance of that policy congress has from time to time granted lands to the states for such purposes. Such grants have usually been of section sixteen, or sections sixteen and thirty-six in each township.[27] In addition to this, grants have been made to the states and territories of seventy-two sections of land in each for the support of the state university.[28] All of such grants have been held to be in praesenti,[29] and absolute for the purpose therein specified, and not upon a condition subsequent.[30] These grants constitute a solemn compact between the federal government and the state, whereby the latter becomes the purchaser of the school sections for a valuable consideration, with full power to sell or lease the same for the use of schools,[31] and after the state has accepted the grant it can not be withdrawn.[32] Upon the completion of the grant the title to such lands vests in the state,[33] but under some

[20] West v. Roberts, 135 Fed. 350, 68 C. C. A. 58.

[21] Schlosser v. Hemphill, 118 Iowa 452, 90 N. W. 842.

[22] French v. Fyan, 93 U. S. 169, 23 L. ed. 812.

[23] Warner Valley Stock Co. v. Calderwood, 36 Ore. 228, 59 Pac. 115.

[24] Ringo v. Rotan, 29 Ark. 56.

[25] Bruce v. Patton, 54 Ark. 455, 16 S. W. 195.

[26] Johanson v. Washington, 190 U. S. 179, 23 Sup. Ct. 825, 47 L. ed. 1008.

[27] Dickens v. Mahana, 21 How. (U. S.) 276, 16 L. ed. 158; State v. Newton, 5 Blackf. (Ind.) 455; State v. Stringfellow, 2 Kans. 263; State v. Blasdell, 4 Nev. 241.

[28] U. S. Comp. Stat. 1901, p. 1384.

[29] Sprayberry v. State, 62 Ala. 459; Hermocilla v. Hubbell, 89 Cal. 5, 26 Pac. 611; State v. Jennings, 47 Fla. 302, 35 So. 986.

[30] Schneider v. Hutchinson, 35 Ore. 253, 57 Pac. 324, 76 Am. St. 474.

[31] Morgan County School v. Schroll, 120 Ill. 509, 12 N. E. 243, 60 Am. Rep. 575.

[32] Daggett v. Bonewitz, 107 Ind. 276, 7 N. E. 900.

[33] Long v. Brown, 4 Ala. 622.

grants the state holds the title to the land in trust for the use and benefit of the schools of the respective townships in which the lands are situated.[34] Where such lands are unsurveyed at the time of grant title does not vest in the state until the survey is completed,[35] whereupon the title passes from the government to the state without the issuance of a patent.[36] But under an act of congress reserving land for school purposes it was held that such reservation did not amount to an absolute grant of the lands to the territory, and even after their survey, they were under the domination, protection and control of the United States government.[37] Where a state is authorized by act of congress to make a selection from the public lands for the benefit of the county schools and the selection is duly made and noted on the records of the Interior Department, the fee to the lands so selected is vested ipso facto in the state.[38] Where lands included in sections granted to states for school purposes have been previously disposed of by the government to individuals, the rights or titles of such individuals are not affected by such school land grants.[39]

§ 209. Statement where title founded on school land grant.—We have seen that a grant of public lands to a state for the use of schools is an absolute grant, and such grant and its acceptance by the state constitute a solemn compact between the state and the United States whereby the state becomes the purchaser of the school sections with full power to sell same. The legal title to such lands is in the state,[40] in trust for the support of the schools of the respective townships in which the lands lie.[41] The title usually vests in the state at once, but where the lands are unsurveyed title does not vest until the survey is completed and the grant is accepted by the state. It frequently happens that

[34] Widner v. State, 49 Ark. 172, 4 S. W. 657; State v. Springfield Tp., 6 Ind. 83; State v. Stark, 111 La. 594, 35 So. 760; Edwards v. Butler, 89 Miss. 179, 42 So. 381; State v. Cunningham, 88 Wis. 81, 57 N. W. 1119, 59 N. W. 503.

[35] Sherman v. Buick, 45 Cal. 656; State v. Jennings, 47 Fla. 307, 35 So. 986.

[36] State v. Jennings, 47 Fla. 307, 35 So. 986.

[37] United States v. Elliott, 12 Utah 119, 41 Pac. 720.

[38] State v. Tanner, 73 Nebr. 104, 102 N. W. 235.

[39] Mullan v. United States, 118 U. S. 271, 6 Sup. Ct. 1041, 30 L. ed. 170; Bullock v. Rouse, 81 Cal. 590, 22 Pac. 919.

[40] Daggett v. Bonewitz, 107 Ind. 276, 7 N. E. 900.

[41] Long v. Brown, 4 Ala. 622; Widner v. State, 49 Ark. 172, 4 S. W. 657; State v. Stark, 111 La. 594, 35 So. 760.

the state does not acquire title to these particular sections on account of their previous disposition by the government. In such case the law of indemnity gives the state the right to select other lands contiguous thereto in lieu of such sections. The selection of these lieu lands must be certified and approved by the secretary of the interior, and noted on the records of the department. When all the requirements of the selection have been complied with, the title vests in the state as of the date of the selection. So, where the title to be abstracted had its inception in a donation by the government to the state for school purposes, the beginning statement will include: (1) The donative act, (2) acceptance of the grant by the state, (3) the act of the state legislature providing for the sale of the land, and (4) the deed of the proper officer authorized by law to convey the land. And if the land is a part of lands selected in lieu of section sixteen or thirty-six the statement should contain: (1) The fact of such selection, (2) the act authorizing the selection, (3) the grant to the state of lands for school purposes, and (4) acceptance by the state.

§ 210. Grants for internal improvement.—Congress has from time to time granted public lands to states to aid in the building of roads, bridges, canals, and other internal improvements. Some of these grants have been for such improvements generally, while other grants designate the kind of improvements which they are intended to aid. Whether or not such grants are in praesenti depends upon the intention of congress as expressed in the words of the grant.[42] Also whether the conditions expressed in the grant are conditions precedent or subsequent is a matter to be determined by the wording of the grant.[43] Where a grant of public lands to a state to aid in the construction of a military road excepted therefrom all lands theretofore "reserved to the United States or otherwise appropriated by act of congress or other competent authority," lands within the limits of the grant which was at the time excepted by a settlement under a preemption or homestead claim duly filed, was land "appropriated" and within the exception, and did not pass to the state under the grant for the construction of the road.[44] Grants for internal improvement are frequently of certain amounts of land to be selected

[42] Van Valkenburg v. McCloud, 21 Cal. 330.

[43] Wheeler v. Chicago, 68 Fed. 526.

[44] Eastern Oregon Land Co. v. Brosnan, 147, Fed. 807.

by the state, or by the land officers,[45] and until such selection has been made and approved by the land department the grant does not attach to any particular lands. But when such selection has been made and approved by the land department the title at once vests in the state.[46] A patent to the state under a grant in aid of internal improvements takes effect as of the date of the location and selection of the land.[47]

Instead of granting the land to states in aid of internal improvements congress has seen fit in some cases to grant in aid of such improvements a certain percentage of the net proceeds of public lands lying within the state to be subsequently sold by the United States;[48] but under such a grant the state is not entitled to a percentage on the value of lands disposed of by the federal government in satisfaction of military land warrants.[49]

§ 211. Initial statement of abstract where title based on grant for internal improvements.—What we said in a previous section of this chapter with reference to direct legislative grants will apply to grants to states for internal improvements. If the title to the land to be abstracted had its inception in a grant to the state for the purpose of constructing a canal the initial statement should show: (1) The act of congress making the grant, (2) location and selection of the land by proper authority, and (3) act of state legislature providing for trustees to make sale.

If the original grant was to the state for the purpose of building a railroad the statement should contain: (1) The act of congress making the grant, (2) the act of the state legislature providing for commissioners, and (3) the determination of the character of the railroad lands. But where the grant is made directly to the railroad company, the statement should show a compliance with the conditions of the grant; such as the location of the road, the filing of a map of such location, acceptance and approval by the secretary of the interior, fixing of the general route of the road or any other condition of the grant the performance of which is necessary to pass title.

[45] Koch v. Streuter, 232 Ill. 594, 83 N. W. 1072.

[46] Godwin v. Davis, 74 Miss. 742, 21 So. 764.

[47] Patterson v. Tatum, 3 Sawy. (U. S.) 164, Fed. Cas. No. 10830.

[48] Indiana v. United States, 148 U. S. 148, 13 Sup. Ct. 564, 37 L. ed. 401.

[49] Iowa v. McFarland, 110 U. S. 471, 4 Sup. Ct. 210, 27 L. ed. 198.

§ 212. **Land grants to railroads.**—Aid has been given to railroads in many instances by a direct grant of land by the federal government, and in other cases the grant is made to a state for the benefit of the railroad company. In the latter instance the position of the state is that of a trustee for the company.[50] A congressional land grant has the effect of a legislative enactment, and the intention of the legislature is to be sought and enforced.[51] The statute making the grant abrogates common-law rules so far as they conflict with its provisions.[52] Congressional grants are usually construed to pass the land at once, but to convey it upon condition subsequent, although, of course, a grant may be upon condition precedent.[53] Whether the grant is upon condition precedent or condition subsequent must, it is obvious, be determined from the statute making the grant.[54] In other words, the grant is usually regarded as conveying a title upon condition subsequent. Under acts granting a right of way over all government lands along certain routes, the railroad has been held to acquire a right of way over sections numbered sixteen and thirty-six, although such sections have been, before the grants were made, designated generally as school sections, but have not been definitely disposed of.[55] Grants to railroads by congress can not be construed to include routes not contemplated by the charters of the companies at the time of the grant.[56]

Where a grant of land to a railroad company becomes effective it relates back to the time of the enactment of the statute.[57] The general rule as to the time such grants become effective is that they take effect when the route is located and the sections thereby identified,[58] that is, they are usually grants in praesenti, which, when maps of definite location are filed and approved, take effect by relation as of the date of the act.[59] It is generally held that

[50] Rice v. Minnesota &c. R. Co., 1 Black (U. S.) 358, 17 L. ed. 147; Kansas City, L. & S. K. R. Co. v. Attorney-General, 118 U. S. 682, 7 Sup. Ct. 66, 30 L. ed. 281.

[51] Winona & St. P. R. Co. v. Barney, 113 U. S. 618, 5 Sup. Ct. 606, 28 L. ed. 1109.

[52] St. Paul M. & M. R. Co. v. Greenhalgh, 26 Fed. 563.

[53] United States v. Southern Pac. R. Co., 39 Fed. 132.

[54] State v. Rusk, 55 Wis. 465, 13 N. W. 452.

[55] Coleman v. St. Paul &c. R. Co., 38 Minn. 260, 36 N. W. 638.

[56] Jackson v. Dines, 13 Colo. 90, 21 Pac. 918.

[57] Winona & St. P. R. Co. v. Barney, 113 U. S. 618, 5 Sup. Ct. 606, 28 L. ed. 1109.

[58] St. Paul & P. R. Co. v. Northern Pac. R. Co., 139 U. S. 1, 11 Sup. Ct. 389, 35 L. ed. 77.

[59] Southern Pac. R. Co. v. Lipman, 148 Cal. 480, 83 Pac. 445.

congress, by a grant of land to a railroad to aid in its construction, confers a present title to the designated sections along this route, with such restrictions upon their use and disposal as to secure them for the purpose of the grant, subject to be defeated, however, on noncompliance with the terms of the grant.[60]

It is not necessary that a patent should be issued to the company,[61] since the effect of a patent to lands granted by such an act is not to vest title to them, but to afford record evidence thereof.[62] By operation of the act itself, or the conditions having been fully complied with as to a portion of the road, the railroad company's title to lands given along that portion becomes perfect and indefeasible.[63] A general rule is that, until a survey and definite location of the road have been made, and a map of the proposed route has been filed, the railroad acquires no rights adverse to those of others taking claims under general laws.[64] A grant of land by the federal congress does not operate upon lands theretofore reserved.[65] Lands withdrawn from sale are reserved.[66] By a federal grant a railroad company does not acquire a vested interest in particular lands, within or without place limits, merely by filing a map of the general route and having same approved by the secretary of the interior, although the definite location of its line of road, and the filing and acceptance of a map thereof in the office of the commissioner of the general land office lands within primary or place limits not theretofore reserved, sold, granted, or otherwise disposed of, and free from pre-emption or other claims of right, become segregated from the public domination, and no rights in such place lands will attach in favor of a settler or occupant who becomes such after definite location. Also that no rights to lands within indeterminate limits will attach in favor of a railroad company until after selections made by it with the approval of the secretary of the interior.[67]

In some of the grants provision is made that, in the event that

[60] Wisconsin C. R. Co. v. Price County, 133 U. S. 496, 10 Sup. Ct. 341, 33 L. ed. 687.

[61] Whitehead v. Plummer, 76 Iowa 181, 40 N. W. 709.

[62] Pengra v. Munz, 29 Fed. 830.

[63] United States v. Northern Pac. R. Co., 41 Fed. 842.

[64] Sioux City & I. F. Town Lot & Land Co. v. Griffey, 72 Iowa 505, 34 N. W. 304.

[65] Northern Pacific R. Co. v. Musser &c. Co., 68 Fed. 993, 16 C. C. A. 97.

[66] Wisconsin Cent. R. Co. v. Forsythe, 40 L. ed. 70, 159 U. S. 46, 15 Sup. Ct. 1020.

[67] Sjoli v. Dreschel, 199 U. S. 564, 26 Sup. Ct. 154, 50 L. ed. 311.

a certain part of the road is completed within a certain time, title to a specified quantity of land shall vest in the company, and another designated part shall vest when another or other parts of the road is completed, and under such grants it is held that, upon the completion of a part of the road entitling it to a designated quantity of land, title to that quantity will vest although the other part of the road may not be completed within the time limited.[68]

§ 213. Grant for public highway.—In 1866 congress passed an act granting the right to construct highways over government lands not reserved for public use.[69] This grant, like all other grants of the public domain made by congress, did not affect the rights of those on the lands in advance of the grant. The act was not intended to operate upon persons who had taken possession under a bona fide claim or color of title, even though the settlement was made in advance of the public survey. The act does not make any distinction as to the methods recognized by law for the establishment of a highway. It is an unequivocal grant of a right of way for public highways over public lands, without any limitation as to the method for their establishment.[70] The right of the public to a strip needed for a highway under the act dates only from the time the initiatory steps are taken which ripen into a completed title. In this respect it resembles the Oregon Donation Act, the Pre-emption Act, and the Homestead Act, and is subject to the same rules governing these acts.[71]

It is always to be borne in mind in construing a congressional grant that the act by which it is made is a law as well as a conveyance, and that such effect must be given to it as will carry out the intent of congress. There can not be a grant unless there is a grantee, and consequently there can be no present grant unless there is a present grantee. So the act under discussion is a grant which remains in abeyance until the highway is established under some public law authorizing its establishment and takes effect as a grant from that time. It is held that under this act and an act of a territory declaring all section lines public roads, that persons filing on public lands take the same subject to the

[68] Courtright v. Cedar Rapids &c. R. Co., 35 Iowa 386.

[69] U. S. Rev. Stat. 1878, § 2477.

[70] Okanogan County v. Cheetham, 37 Wash. 682, 80 Pac. 262, 70 L. R. A. 1027.

[71] McAllister v. Okanogan County, 51 Wash. 647, 100 Pac. 146, 24 L. R. A. (N. S.) 764.

right of way along the section lines for highways and are not entitled to compensation.[72]

The rule seems to be well settled that a highway may be established by prescription over government lands within the purview of this grant.[73] But it is held that there must at least be such a use and for such a period as is required to establish highways under the law of the state where the state statute fixes it at less than the common-law period of twenty years.[74]

§ 214. **Private land claims.**—Large areas of the present territory of the United States were, prior to the formation of our government, under the sovereignty of various foreign nations. These nations had made numerous grants of lands to individuals prior to the time when the various territorial acquisitions to the United States occurred. The titles claimed under these grants are termed "Private Land Claims," and numerous questions concerning such titles have from time to time arisen out of these grants.[75] Titles in the original thirteen colonies begin with the grant from some foreign power. Many titles in Florida, Texas and California date back to original Spanish grants. Others embraced in the Territory of the Louisiana Purchase begin with a grant from the French crown, but all these have been confirmed by the United States government.

During the colonial period the various colonies were either royal or proprietary. In the royal provinces the crown exercised the right of granting lands, while in the proprietary governments the proprietors had the power to dispose of lands. Matters relating to the modes of disposition at that time are now of no practical importance. The only questions with reference to such grants which are of interest to us are those relating to their construction and effect, as to which it may be stated that the general rules of construction are the same as those relating to original conveyances.[76] But the grants from Spain, Mexico and France have been the subject of much litigation from time to time, especially when such grants were overlaid by the claims of the first

[72] Keen v. Board, 8 S. Dak. 558, 67 N. W. 623.

[73] Township of Walcott v. Skauge, 6 N. Dak. 382, 71 N. W. 544; Smith v. Mitchell, 21 Wash. 536, 58 Pac. 667.

[74] Vogler v. Anderson, 46 Wash. 202, 89 Pac. 551.

[75] United States v. Ducros, 15 How. (U. S.) 38, 14 L. ed. 591; United States v. Pena, 175 U. S. 500, 20 Sup. Ct. 165, 44 L. ed. 251; Brown v. O'Connor, 1 Cal. 419.

[76] Attorney-General v. Delaware &c. R. Co., 27 N. J. Eq. 631.

settlers. These grants from other countries have usually been expressly protected by provisions in the treaties executed at the time of the accession.[77] The claims based upon grants from Mexico and Spain were confirmed by treaties with Mexico in 1848, and also in 1853.[78] Likewise claims based upon grants from France were protected in a Treaty of 1803 with France.[79] Regardless, however, of treaties, the law of nations protects the inhabitants of a ceded territory in their proprietary rights.[80] Moreover, congress has, by express legislation recognized and confirmed the claims of persons to land and territory ceded to the United States.[81] Before an alleged grant under a former government will be recognized by the United States, it must appear to have emanated from a public official having power to make it,[82] and acting under the authority of such former government.[83] In order to derive title to a land grant under Spanish authority, such grant must be shown to have been perfect and complete;[84] and complete grants are to be presumed from long continued possession.[85] Spanish and Mexican grants to be valid must be capable of identification,[86] and if identifiable may be confirmed,[87] and when legally confirmed, the title is valid.[88]

Under the Mexican law, when a grant of land is made by the government, a formal delivery of possession to the grantee by a magistrate of the vicinage is essential to the complete investiture of title. This proceeding, called in the language of the country, the delivery of juridical possession, involves the establishment of the boundaries of the land granted when there is any uncertainty with respect to them. A record of the proceeding is preserved by the magistrate, and a copy delivered to the grantee.[89] The absence of documents evidencing ancient Spanish grants may be

[77] Ward v. Mulford, 32 Cal. 365; Magee v. Doe, 9 Fla. 382.

[78] U. S. Comp. Stat. 1901, § 767.

[79] Les Bois v. Bramell, 4 How. (U. S.) 449, 11 L. ed. 1051.

[80] Barker v. Harvey, 181 U. S. 481, 21 Sup. Ct. 690, 45 L. ed. 963.

[81] United States v. Morant, 123 U. S. 335, 8 Sup. Ct. 189, 31 L. ed. 171.

[82] Woodworth v. Fulton, 1 Cal. 295.

[83] Faxon v. United States, 171 U. S. 244, 18 Sup. Ct. 849, 42 L. ed. 151.

[84] Sena v. American Turquoise Co., 14 N. Mex. 511, 98 Pac. 170.

[85] Carino v. Insular Government, 212 U. S. 449, 29 Sup. Ct. 334, 53 L. ed. 594.

[86] Gwin v. Calegaris, 139 Cal. 384, 73 Pac. 851.

[87] Mobile Transportation Co. v. Mobile, 187 U. S. 479, 23 Sup. Ct. 170, 47 L. ed. 266.

[88] Catron v. Laughlin, 11 N. Mex. 604, 72 Pac. 26.

[89] Van Reynegan v. Bolton, 5 Otto (U. S.) 33, 24 L. ed. 351.

explained by showing a reasonable probability that they may have been lost or destroyed.[90]

§ 215. Town site entry.—The purpose of town site laws is to enable persons who have settled upon portions of the public domain, and who desire to lay out and establish a town or city, to procure title to unoccupied public lands from the United States at a minimum price, and to enable other persons desiring to purchase lots within an established city or town, upon the public lands, to procure a valid title thereto.[91] In enacting these laws, congress had in view the interests of the individual settlers rather than a benefit to municipalities.[92] The statutes provide that the corporate authorities of the town, if it is incorporated, or the judge of the county court, if the town is not incorporated, shall file at the local land office the claim to the land for town site purposes.[93] This constitutes the entry, and when payment is made the title to the land vests in the official making such entry, but only as trustee, however, for the occupants according to their shares.[94] But this trust terminates when all the land in the tract included in a town site has been disposed of.[95] The occupants obtain their title through such trustee by deed,[96] but such deed need not recite that the trustee had power to execute same.[97] The deed from the trustee is valid although no patent has issued to him, since the patent, when issued takes effect as of the date of the entry.[98] The disposition of the lots in the town and the application of the proceeds of the sale thereof is regulated by the legislative authority of the state or territory in which the town is situated.[99]

It is a prerequisite to an entry under the town site law that the land be actually settled upon and occupied as a town site, and the mere platting of the land as a town is not sufficient.[1]

Lands dedicated by the government to use for homesteads is

[90] State v. Oritz, 99 Tex. 475, 90 S. W. 1084.

[91] Pascoe v. Green, 18 Colo. 326, 32 Pac. 824.

[92] Jones v. Petaluma, 38 Cal. 397.

[93] Rev. Stat. (U. S.) § 2387; Newhouse v. Simino, 3 Wash. 648, 29 Pac. 263.

[94] Martin v. Hoff, 7 Ariz. 247, 64 Pac. 445; Buffalo v. Harling, 50 Minn. 551, 52 N. W. 931; Goldberg v. Kidd, 5 S. Dak. 169, 58 N. W. 574.

[95] Aspen v. Rucker, 10 Colo. 184, 15 Pac. 791.

[96] Sherry v. Sampson, 11 Kans. 611.

[97] Green v. Barker, 47 Nebr. 934, 66 N. W. 1032.

[98] Taylor v. Winona &c. R. Co., 45 Minn. 66, 47 N. W. 453.

[99] Clark v. Titus, 2 Ariz. 147, 11 Pac. 312.

[1] Carson v. Smith, 12 Minn. 543.

not subject to town site entry.[2] Town site entries may be made on mineral lands, but no title is thereby acquired if the lands were known to be mineral lands at the time of the entry.[3] All the interest which an occupant has in the land prior to the entry of the town site is an inchoate right to the benefit of the town site law in case the property shall be purchased from the United States by the corporate authorities or the county judge under the provisions of that law.[4]

§ 216. Initial statement of abstract where title obtained through town site entry.—In the cities and towns of many of the western states the title to real estate passed from the government under town site acts. We discussed this method of acquiring title in the preceding section, and it only remains for us to call attention to what should be included in the initial statement of the abstract in case the title passed from the government by this method. It is important to remember that the method of acquiring title under the Acts of 1864 and 1865 is somewhat different from the method prescribed by the Act of 1867. By the former method a purchase on sale or preemption at minimum figures is permitted, provided certain preliminary conditions are complied with. These conditions consist of the filing with the recorder a plat or map of the town in conformity with the lots and blocks and coinciding with the rights of occupants. When the public surveys have been made the exterior boundary lines should conform to the lines of such surveys. The map must further show the name of the town or city, the streets, alleys, parks and various other subdivisions, their area and measurements. The plat or map must be sworn to by the proper municipal officer, and, when the town or city is within the limits of an organized land district, a copy of the plat or map must be filed with the local officer of such district, and a copy forwarded to the general land office within one month from the filing with the recorder. By the Act of 1867 the inhabitants of cities and towns on the public lands are given the privilege of entering lands occupied as town sites at a minimum price of one dollar and twenty-five cents per acre. The entry is made by the

[2] Long-Bell Lumber Co. v. Martin, 11 Okla. 192, 66 Pac. 328.

[3] Tombstone Town Site Cases, 2 Ariz. 272, 15 Pac. 26.

[4] Stringfellow v. Cain, 99 U. S. 610, 25 L. ed. 421.

corporate authorities of the town, if it is incorporated, or, if it is not incorporated, the judge of the county court of the county in which the town is situated, may enter the land as trustee for the occupants of the town. By whichever of these methods the title was acquired, the initial statement of the abstract should show a compliance with the conditions of the particular act under which title was acquired. If the proceedure was under the Act of 1864 and the supplemental Act of 1865, a plat of so much of the town as is necessary to show the property in question should be included, and in addition thereto all the necessary steps preliminary to the issuance of the patent should be shown. But where the proceedure was under the Act of 1867, the statement should not be materially different from a case of ordinary entry.

CHAPTER IX

FEDERAL AND STATE PATENTS

SEC.
220. Patents in general.
221. Necessity of patent to pass title.
222. Form and requisites of patents.
223. Delivery, acceptance and recording of patents.
224. Validity of patents.
225. Patents issued after death of claimant.
226. Operation and effect of patents.
227. Construction of patents.
228. Conclusiveness of patents.
229. Rescission, cancelation and correction of patents.
230. Abstracting patents.

§ 220. **Patents in general.**—A patent is an instrument issued by the state or federal government to one to whom it has transferred or agreed to transfer land, in order to vest in the transferee the complete legal title. It is the deed of the government, state or federal, by which it passes title to its lands.[1] It is the last official act of the government in its procedure to divest itself of title to public lands. Until its execution in proper form the fee remains in the government, and the power of the land department over the land continues.[2] The federal patent is said to be the highest and best deed known to the law.[3] Where the government previously had the title, the patent becomes the highest evidence of title in the person to whom it is issued.[4] The issuance of a patent by the government affords prima facie evidence that all prerequisites of the law necessary to its issuance have been complied with.[5]

§ 221. **Necessity of patent to pass title.**—Except in cases where the legislative branch of the government has made a grant taking effect in praesenti a patent is necessary to pass a perfect title to public land.[6] Consequently, when there has been no such

[1] United States v. Mullan, 10 Fed. 785, 7 Sawy. 466; Stinson v. Call, 163 Mo. 323, 63 S. W. 729.

[2] Stimson Land Co. v. Rawson, 62 Fed. 426.

[3] Texas & P. R. Co. v. Smith, 159 U. S. 66, 15 Sup. Ct. 994, 40 L. ed. 77; Wisconsin Cent. R. Co. v. Forsythe, 159 U. S. 46, 15 Sup. Ct. 1020, 40 L. ed. 71.

[4] Bagnell v. Broderick, 13 Pet. (U. S.) 436, 10 L. ed. 235; Irvine v. Tarbat, 105 Cal. 237, 38 Pac. 896.

[5] Bradshaw v. Edelen, 194 Mo. 640, 92 S. W. 691.

[6] Wilcox v. Jackson, 13 Pet. (U. S.) 498, 10 L. ed. 264; Carter v. Ruddy, 166 U. S. 493, 17 Sup. Ct. 640, 41 L. ed. 1090.

previous grant, the patent is necessary for the transfer of the legal title.[7] Even where there has been a direct legislative grant, a patent will generally issue, not for the purpose of passing the title, however, but to furnish evidence of the transfer, or to show compliance with the conditions of the grant, obviating the necessity of other proof in case of any legal controversy over the title.[8] A patent may issue upon the confirmation of a title by legislative act of a claim of a previously existing title, in which case it is documentary evidence, having the dignity of a record of the existence of that title, or of such equities respecting the claim as to justify its recognition and confirmation.[9] Thus a patent issued to a confirmee of a Spanish or Mexican grant is, in its operation, like the deed of any other grantor, and passes only such interest as the United States possessed. It is a record of the government of its action and judgment with respect to the title of the patentee existing at the date of the cession of the territory to the United States.[10]

§ 222. Form and requisites of patents.—The federal statutes prescribe the form and requisites of a valid patent to public lands of the United States. Such patents must, of course, conform in all their features to the requirements of law. State laws respecting the issuance of patents for state lands differ to such an extent in the several states that it would be impracticable to indicate here every particular in which a state patent may be upon its face defective. Federal patents are issued in the name of the United States, and are required to be signed by the president, or in the name of the president by his secretary, or by an executive clerk, and countersigned by the recorder of the general land office.[11] It must be sealed by the great seal of the land office.[12] But neither the president nor any officer of the government has any power to sign or cause the seal of the United States to be

[7] Langdon v. Sherwood, 124 U. S. 74, 8 Sup. Ct. 429, 31 L. ed. 344; Roads v. Symmes, 1 Ohio 281, 13 Am. Dec. 621; Brownsville v. Basse, 36 Tex. 461.

[8] Morrow v. Whitney, 95 U. S. 551; 24 L. ed. 456; Wright v. Roseberry, 121 U. S. 488, 7 Sup Ct. 985, 30 L. ed. 1039.

[9] Langdeau v. Hanes, 88 U. S. 521, 22 L. ed. 606; Wright v. Roseberry, 121 U. S. 488, 7 Sup. Ct. 985, 30 L. ed. 1039; Miller v. Tobin, 16 Ore. 540, 16 Pac. 161.

[10] Leese v. Clark, 20 Cal. 387.

[11] Rev. Stat. § 458 (U. S.) Comp. St. 1901, p. 259.

[12] McGarrahan v. New Idria Mining Co., 96 U. S. 316, 24 L. ed. 630; Duluth, & I. R. R. Co. v. Roy, 173 U. S. 587, 19 Sup. Ct. 549, 43 L. ed. 820.

affixed to a patent, except such as is conferred by a federal statute.[13] The validity of the patent depends upon a strict compliance with the provisions of the statute respecting its signing, sealing, and recording.[14] Each and every one of the integral parts of the execution is essential to the perfection of the patent, and until all of the requirements have been complied with the government has not executed a patent for a grant of land.[15]

A patent issued by the state must usually be signed by the governor, and sealed with the seal of the state.[16] Recitals in patents are governed by the same rules that govern recitals in deeds, and a person who traces his title to a patent is charged with notice of the facts contained in its recitals.[17]

§ 223. Delivery, acceptance and recording of patents.— Title by patent from the United States is title by record, and the delivery of the instrument to the patentee is not, as in a conveyance by a private person, essential to pass the title. While it is customary to deliver a patent to the claimant, as in the case of deeds, yet delivery of it is not necessary.[18]

Acceptance of the patent on the part of the patentee is necessary to the taking effect of the patent,[19] but acceptance will be presumed from the efforts of the patentee to procure the patent,[20] or from the benefit he is to derive therefrom.[21]

The patent is required to be recorded in the general land office, in books kept for that purpose,[22] but is not required to be recorded in the county where the land is located.[23] The acts of congress provide for the record of all patents for land in an office, and in books kept for that purpose. An officer called the "recorder" is appointed to make and keep these records. He is required to record every patent before it is issued, and countersign the instru-

[13] McGarrahan v. New Idria Min. Co., 49 Cal. 331, (affd. in 96 U. S. 316, 24 L. ed. 630.)

[14] McGarrahan v. New Idria Mining Co., 96 U. S. 316, 24 L. ed. 630.

[15] McGarrahan v. New Idria Mining Co., 96 U. S. 316, 24 L. ed. 630.

[16] State v. Morgan, 52 Ark. 150, 12 S. W. 243; Hulick v. Scovil, 9 Ill. 159; Exum v. Brister, 35 Miss. 391; Jarrett v. Stevens, 36 W. Va. 445, 15 S. E. 177.

[17] Bonner v. Ware, 10 Ohio 465.

[18] Eltzroth v. Ryan, 89 Cal. 135, 26 Pac. 647; Rogers v. Clark Iron Co., 104 Minn. 198, 116 N. W. 739; Sayward v. Thompson, 11 Wash. 706, 40 Pac. 379.

[19] Le Roy v. Jamison, 3 Sawy. (U. S.) 369, Fed. Cas. No. 8271.

[20] United States v. Schurz, 102 U. S. 378, 26 L. ed. 167.

[21] Wood v. Pittman, 113 Ala. 207, 20 So. 972.

[22] United States v. Schurz, 102 U. S. 378, 26 L. ed. 167.

[23] Lomax v. Pickering, 173 U. S. 26, 19 Sup. Ct. 416, 43 L. ed. 601.

ment to be delivered to the grantee. This, then is the final record of the transaction,—the legally prescribed act which completes the "title by record," and when this is done the grantee is vested with that title.[24]

The state statutes in regard to the recording of conveyances do not apply to patents issued by the state to its lands. Such instruments may be recorded, and generally are, but their effect as vesting title and affording notice is not dependent upon their being recorded. A statute authorizing the recording of such conveyances without acknowledgment is permissive only.[25] Upon the due execution and recording of the patent the grantee is entitled to the possession thereof.[26]

§ 224. Validity of patents.—Officers of the government, in issuing patents, act ministerially, and can rightfully act only in pursuance of some express provision of law. They are presumed to do their duty, and courts of law accord the presumption of validity to all proceedings necessary to uphold the patent executed by them.[27] Thus if the patent is regular on its face it is of itself prima facie evidence that the preliminary steps required by law for its issuance had been regularly taken before it was issued,[28] that the patent was regularly issued, is valid, and passes the legal title.[29] And a valid patent can not be invalidated by subsequent legislation.[30]

A patent from the state, not void on its face, can not be collaterally attacked.[31] But a court of law will always treat as void a patent which appears on its face to have been issued without authority of law,[32] and a court of equity will afford relief as against others than a bona fide purchaser for value, where there

[24] United States v. Schurz, 102 U. S. 378, 26 L. ed. 167; Marbury v. Madison, 1 Cranch (U. S.) 137, 2 L. ed. 60.

[25] Patterson v. Langston, 69 Miss. 400, 11 So. 932.

[26] United States v. Schurz, 102 U. S. 378, 26 L. ed. 167.

[27] Ledbetter v. Borland, 128 Ala. 418, 29 So. 579.

[28] Hooper v. Young, 140 Cal. 274, 74 Pac. 140, 98 Am. St. 50; Smith v. Pipe, 3 Colo. 187; Combs v. Dodd, 4 Rob. (La.) 58; Webber v. Pere Marquette Boom Com., 62 Mich. 626, 30 N. W. 469; Rogers v. Clark Iron Co., 104 Minn. 198, 116 N. W. 739.

[29] Jenkins v. Trager, 40 Fed. 726; Steeple v. Downing, 60 Ind. 478; Hill v. Miller, 36 Mo. 182.

[30] Kidd v. Central Trust &c. Co., 23 Ky. L. 1402, 65 S. W. 355.

[31] Frellsen v. Crandell, 217 U. S. 71, 30 Sup. Ct. 490, 54 L. ed. 670; Hill v. Miller, 36 Mo. 182; New York, C. & H. R. R. R. Co. v. Aldridge, 135 N. Y. 83, 32 N. E. 50, 17 L. R. A. 516; Steiner v. Coxe, 4 Pa. St. 13.

[32] Ledbetter v. Borland, 128 Ala. 418, 29 So. 579.

has been fraud in its procurement or mistake in its issuance, even though the patent is valid on its face.[33]

Where a patent has been issued to a person other than the one entitled thereto, the latter may procure a decree establishing a constructive trust in his favor, and requiring the patentee to make a conveyance to him.[34] A patent for lands which have been reserved by the government authorities from disposal, is void.[35] Also a patent to land previously patented passes no title.[36] A patent issued to a person not in existence is a nullity, but where it is issued to a person under an assumed name it is valid, and a conveyance by such person under his assumed name passes the title to the grantee.[37] Every purchaser under a patent is charged with notice of any defect appearing upon its face.[38]

§ 225. Patents issued after death of claimant.—Statutes usually provide that when a person, entitled to claim the benefits of a settler or entryman, dies before obtaining a patent, the patent is generally issued to his widow or heirs.[39] In such case the heirs do not take the title by descent from their ancestor, but the land is conveyed to them directly from the government by virtue of the privilege of purchase given to them expressly by the provisions of the statute.[40] The laws of descent of the state in which the land is situated governs in determining who are the grantees in such a patent.[41] A patent issued to the heirs of a deceased entryman passes title directly to them as substituted beneficiaries, who take by purchase and not by descent, and the title vests in such heirs by the grant, and not as successors to the interest of the deceased entryman.[42] If the patent is issued in the name of the holder of the certificate after his death, it takes effect for the benefit of his heirs or devises.[43] Where a patent is issued to a man's

[33] St. Louis Smelting & Refining Co., v. Kemp, 104 U. S. 636, 26 L. ed. 875; Sparks v. Pierce, 115 U. S. 408, 6 Sup. Ct. 102, 29 L. ed. 428; Sanford v. Sanford, 139 U. S. 642, 11 Sup. Ct. 666, 35 L. ed. 290; Gibson v. Chouteau, 39 Mo. 536.

[34] Widdicombe v. Childers, 124 U. S. 400, 8 Sup. Ct. 517, 31 L. ed. 427.

[35] Klauber v. Higgins, 117 Cal. 451, 49 Pac. 466.

[36] Hamilton v. Steele (Ky.), 117 S. W. 378; Stone v. Perkins, 217 Mo. 586, 117 S. W. 717.

[37] Thomas v. Wyatt, 31 Mo. 188, 77 Am. Dec. 640.

[38] Bell v. Duncan, 11 Ohio 192.

[39] Wittenbrock v. Wheadon, 128 Cal. 150, 60 Pac. 664, 79 Am. St. 32.

[40] Caldwell v. Miller, 44 Kans. 12, 23 Pac. 946; Dawson v. Mayall, 45 Minn. 408, 48 N. W. 12.

[41] Braun v. Mathieson, 139 Iowa 409, 116 N. W. 789.

[42] Braun v. Mathieson, 139 Iowa 409, 116 N. W. 789.

[43] Schedda v. Sawyer, 4 McLean (U. S.) 181, Fed. Cas. No. 12443; Stubblefield v. Boggs, 2 Ohio St. 216.

"legal representative", or to his "heirs", it is held to be the intention of the land department to leave the question open to inquiry in the proper court as to the party to whom the patent shall inure.[44] Where a patent was issued to the heirs of a deceased pre-emptor dying without having consummated his claim, it was held that their title was superior to that of a grantee of the pre-emptor holding under a conveyance executed after final proof.[45]

§ 226. **Operation and effect of patents.**—While the naked legal title to public lands is in the government until the issuance of a patent therefor, the beneficial ownership or equitable title is vested in an entryman from the time he receives a certificate of purchase from the land office, showing full payment therefor. A patent from the government, issued in pursuance of, and based solely and exclusively upon, a prior entry accompanied by full payment of the purchase-price, does not convey to the entryman a new and independent title disconnected with his equitable title derived from such entry and final payment, but converts the imperfect or equitable title into a perfect legal title.[46] The patent carries the legal title in fee simple,[47] and divests the land department of all authority over and control of the land.[48] The government may, however, revoke the patent because of an irregularity pertaining to its issue.[49]

When the patent is issued, it dates back, as against intervening claimants, to the time when the equitable title vested in the patentee by payment of the purchase-price, or otherwise.[50] But a patent for lands which have been reserved by the government from disposal, is void, and conveys no title to the patentee.[51]

§ 227. **Construction of patents.**—Government patents or grants must be construed liberally as to the government and

[44] Cooper v. Wilder (Cal.), 41 Pac. 26.

[45] Tennessee Coal I. & R. Co. v. Tutwiler, 108 Ala. 483, 18 So. 668.

[46] Hagan v. Ellis, 39 Fla. 463, 22 So. 727, 63 Am. St. 167.

[47] Niles v. Cedar Paint Club, 175 U. S. 300, 20 Sup. Ct. 124, 44 L. ed. 171; Fordyce v. Woman's Christian Nat. Library Assn. 79 Ark. 550, 96 S. W. 155, 7 L. R. A. (N. S.) 485; Wiggins v. Lusk, 12 Ill. 132; Verden v. Coleman, 4 Ind. 457.

[48] Bicknell v. Comstock, 113 U. S. 149, 5 Sup. Ct. 399, 28 L. ed. 962; Hagan v. Ellis, 39 Fla. 463, 22 So. 727, 63 Am. St. 167; Johnson v. Pacific Coast Steamship Co., 2 Alaska 224.

[49] Smith v. Crandall, 118 La. 1052, 43 So. 699.

[50] Gibson v. Chouteau, 13 Wall. (U. S.) 92, 20 L. ed. 534; Hussman v. Durham, 165 U. S. 114, 17 Sup. Ct. 253, 41 L. ed. 664; Waters v. Bush, 42 Iowa 255.

[51] Klauber v. Higgins, 117 Cal. 451, 49 Pac. 466.

strictly as to the grantee or patentee, and nothing will be taken to pass by implication.[52] The reason for this rule is that the state or government is entitled to be protected against the encroachments of private interests upon its sovereign rights and against the greed of monopolistic corporations.[53] It has been held, however, that the rule does not apply in its full extent to public grants made upon adequate consideration.[54] So, where the grant is gratuitous, it will be construed strictly as against the grantee.[55] But a grant which is made in fulfilment of a pre-existing obligation on the part of the government toward the grantee is not deemed gratuitous and will be construed favorably for the grantee.[56] Public grants are not to be destroyed or be held ineffectual for uncertainty if by any reasonable means the intention of the parties can be shown, and these means are not to be confined to what appears on the face of the instrument.[57] Where there is ambiguity in the descriptive words of a grant respecting the quantity, character, or duration of the estate conveyed, evidence of the intention of the parties at the time the instrument was executed is admissible in interpreting it.[58] If the description indicates the boundaries of the land granted, such boundaries will control a recital as to the quantity of land included in the grant.[59] When the government grants land for a consideration, and does not reserve any rights or interests that would ordinarily pass by the rules of law, and does no act which indicates an intention to make such reservation, the grant includes all that would pass by it if it were a private grant.[60]

§ 228. **Conclusiveness of patents.**—The issuance of a patent to lands over which the land department has jurisdiction as a quasi judicial tribunal is both a judgment and a conveyance,[61]

[52] United States v. Arredondo, 6 Pet. (U. S.) 691, 8 L. ed. 547; Swann v. Jenkins, 82 Ala. 478, 2 So. 136; Oakland v. Oakland Water Front Co., 118 Cal. 160, 50 Pac. 277; Wilcoxon v. McGhee, 12 Ill. 381, 54 Am. Dec. 409; St. Paul &c. R. Co. v. Brown, 24 Minn. 517.

[53] DeWitt v. Elmira Transfer Co., 134 N. Y. 495, 32 N. E. 42.

[54] Charles River Bridge v. Warren Bridge, 7 Pick. (Mass.) 346; Langdon v. New York, 93 N. Y. 129.

[55] Globe Mill Co. v. Bellingham Bay Imp. Co., 10 Wash. 458, 38 Pac. 1112.

[56] Forsythe v. Ballance, 6 McLean (U. S.) 562, 9 Fed. Cas. No. 4, 951; Hodge v. Donald, 55 Tex. 344.

[57] People ex rel Underhill v. Saxton, 15 App. Div. 263, 44 N. Y. S. 211.

[58] Mulford v. Le Franc, 26 Cal. 88; Adams v. Frothingham, 3 Mass. 352, 3 Am. Dec. 151; Kanne v. Otty, 25 Ore. 531, 36 Pac. 537.

[59] Stein v. Ashby, 24 Ala. 521.

[60] Johnson v. Johnson, 14 Idaho 561, 95 Pac. 499.

[61] Le Marchel v. Teagarden, 152 Fed. 662; Paterson v. Ogden, 114 Cal. 43, 74 Pac. 443, 99 Am. St. 31.

and is impervious to collateral attack.[62] The patent is conclusive in a court of law[63] as to the character of the land conveyed,[64] as to the description of the land,[65] and the extent of the right passing under the grant.[66] The recitals in a patent are evidence against all persons claiming under it or by title arising or originating subsequent to it.[67] But the judgment and conveyance of the department do not conclude the rights of the claimants to the land. Such rights rest on established principles of law and fixed rules of procedure, which condition their initiation and prosecution, the application of which to the facts of each case determine its right decision; and, if the officers of the land department are induced to issue a patent to the wrong party by an erroneous view of the law, or by a gross or fraudulent mistake of the facts, the rightful claimant is not remediless.[68] The courts will exercise their equitable powers to control and limit the operation of a patent as between adverse claimants whenever it has been made to appear that by a mistaken application of the law to the facts of the case by the officers of the land department the patent has been issued to the wrong person, or when the holder of the legal title under it has obtained it by fraud upon the rights of one who is entitled to it.[69] The general rule of law, which accords the presumption of validity to all proceedings necessary to uphold a patent issued by the federal government, does not prevent the court from treating as void a patent which appears on its face to have been issued without authority, and proof extrinsic of the instrument itself is admissible to ascertain whether it was issued without authority.[70] When the officers of the land department grant lands according to an actual survey of the United States, and when there is a conflict between the quantity expressed in the patent and that shown by the actual survey established, the survey will control.[71]

[62] Le Marchel v. Teagarden, 152 Fed. 662; Chauvin v. Louisiana Oyster Commission, 121 La. 10, 46 So. 38.

[63] Knabe v. Burden, 88 Ala. 436, 7 So. 92.

[64] Paterson v. Ogden, 141 Cal. 43, 74 Pac. 443, 99 Am. St. 31.

[65] Miller v. Grunsky, 141 Cal. 441, 66 Pac. 858, 75 Pac. 48.

[66] Barringer v. Davis (Iowa), 112 N. W. 208.

[67] Bachop v. Critchlow, 142 Pa. St. 518, 21 Atl. 984.

[68] James v. Germania Iron Co., 107 Fed. 597, 46 C. C. A. 476.

[69] Murray v. Montana &c. Mfg. Co., 25 Mont. 14, 63 Pac. 719.

[70] Ledbetter v. Borland, 128 Ala. 418, 29 So. 579.

[71] Stonewall Phosphate Co. v. Peyton, 39 Fla. 726, 23 So. 440.

§ 229. **Rescission, cancelation and correction of patents.** —We have seen that the issuance, recording and acceptance of a patent divests the government of all title to the land granted and control over same, and neither the executive nor the land department has any power to recall, cancel, annul or rescind the patent for any cause whatsoever. But the only way in which a patent improperly issued can be annulled is by decree of court in a suit instituted by the government for that purpose.[72] In bringing such suit the government does not act in its capacity as a sovereign, but as a litigant bound by the same rules as a private citizen.[73]

Equity may relieve against a patent fraudulently obtained either by cancelation of the patent or by declaring the patentee a trustee for the benefit of complainant, but the latter relief may be granted only where the fraud complained of operated to prevent the complainant from establishing, in the proceedings before the officers of the land department, his own right to a patent.[74] It has been held, however, that a patent will not be canceled on the ground that it was procured by the fraud of the patentee where the land has passed into the hands of a bona fide purchaser for value and without notice of the fraud, even though such purchase was made before such patent was issued and while the patentee had only an equitable title.[75] If a patent has been erroneously issued, through fraud, mistake or wrong views of the law, to one party, when another was legally entitled to it, it may be canceled at the suit of the government,[76] provided the rights of an innocent purchaser has not intervened.[77] A patent issued by mistake which is recalled and canceled before any acceptance does not pass any title from the government.[78] But the land department has no power to cancel an entry for fraud or because the lands entered were not subject to entry without giving the entryman notice and a hearing.[79]

The rule is well settled that where an attempt is made to annul

[72] In re Emblen, 161 U. S. 52, 16 Sup. Ct. 487, 40 L. ed. 613; Gilmore v. Sapp. 100 Ill. 297; Bradley v. Dells Lumber Co., 105 Wis. 245, 81 N. W. 394.

[73] Lynch v. United States, 13 Okla. 142, 73 Pac. 1095.

[74] Jameson v. James, 155 Cal. 275, 100 Pac. 700.

[75] Colorado Coal & Iron Co. v. United States, 123 U. S. 307, 8 Sup. Ct. 131, 31 L. ed. 182; People v. Swift, 96 Cal. 165, 31 Pac. 16.

[76] Janes v. Wilkinson, 2 Kans. App. 361, 42 Pac. 735.

[77] United States v. Burlington &c. R. Co., 98 U. S. 334, 25 L. ed. 198.

[78] Wood v. Pittman, 113 Ala. 207, 20 So. 972.

[79] Delles v. Second Nat. Bank, 7 Wyo. 66, 65 Pac. 190, 75 Am. St. 875.

or avoid grants, patents or other solemn evidences of title, emanating from the government under its official seal, the great importance and necessity of the stability of titles demands that the effort to set them aside, annul or avoid them, or to correct mistakes in them, shall only be successful when the evidence is clear, strong and satisfactory.[80]

§ 230. Abstracting patents.—The initial step, in all ordinary cases being the patent from the United States, the abstract begins with that document. If the patent can not be found recorded in the office of the recorder or registrar of deeds in the county in which the land is situated, an office copy may be procured from the general land office at Washington, upon filing there the affidavit of the owner stating his ownership and occupation of the land, and the purpose for which the copy is wanted.

The points to be noticed in the abstract are, the date of the issue, the name of the person to whom it was issued, the words of inheritance, the recital of the payment of the purchase-money, the person by whom the payment was made, the recital of any assignment by the certificate holder, his representatives or assigns, the signing, sealing and volume and page of the record at Washington and in the county where the land lies.

The following is deemed a sufficient showing of a patent from the United States government:

United States
to
Samuel Hawkins.

Patent.
Certificate No. 9887.
Date of Certificate, January 15, 1885.
Certificate recorded February 17, 1886.
Certificate recorded in Book 98, page 74.
Date of patent, May 15, 1890.
Patent recorded August 17, 1890.
Patent recorded in Book 99, page 635.

Consideration, $200.00, paid by patentee. Grants, the Southwest quarter of Section No. 31,

[80] Maxwell Land-Grant Case, 121 U. S. 325, 7 Sup. Ct. 1015, 30 L. ed. 949; United States v. Budd, 144 U. S. 161, 12 Sup. Ct. 575, 36 L. ed. 384.

Township No. 25, North of Range 8 East, containing 160 acres, to said Samuel Hawkins.

Where the patent has issued it is customary to omit all reference to the certificate or receipt except the number thereof.

Where the patent shown consists of a copy recently received from the General Land Office record, the commissioner's certificate should follow immediately after the abstract of the patent; or, as is now generally the practice, an abstract of the entry, showing the issuance and date of the receiver's receipt and certificate, its number, and the book and page where recorded, should immediately precede the abstract of the patent.

The formal execution of a state patent must conform to the statute in force at the time of its issue. The legislative act under which the grant was issued must be abstracted, showing the date of the passage of the act, and for what purpose the grant was made. All matters showing a compliance with the conditions of the grant must appear. The patent or grant must show the signature of the public officer thereto, must be sealed with the official state seal, must be dated and recorded. Every step required by law to divest the state of its title must be shown.

CHAPTER X

SURVEYS, PLATS AND SUBDIVISIONS

SEC.
235. Historical view of government land survey.
236. Laying off the land into townships.
237. Laying off the townships into sections.
238. Subdividing the sections.
239. Plats and subdivisions.
240. Maps and plats as evidence.
241. Effect of reference in descriptions to maps or plats.
242. Abstracting plat and subdivision.
243. Vacation of plat.
244. Dedication by maps or plats.

§ 235. **Historical view of government land survey.**—In order to prepare public lands for sale and settlement, it became necessary to survey it into suitable tracts. Accordingly, in 1784, the Continental Congress appointed a committee to devise a system of land measurement. The first plan, which has been used to some extent in Virginia, was to take a square tract of land, which was called "hundreds," as the unit of measurement. This tract was ten miles each way, and the sections were numbered from one to one hundred, beginning at the northwest corner and numbering to the east and back again. In 1785 the plan was amended at the suggestion of Thomas Jefferson, chairman of the committee, by reducing the unit of measurement to six miles each way. This unit was called a "township," and the sections thereof were numbered from one to thirty-six, beginning at the southeast corner, and thence alternately west and east. Finally, in 1805, the present complete system of survey was adopted. This system was first applied to the survey of the Northwest Territory, and the system has been employed in surveying the lands of the states of Mississippi, Alabama, Florida and all the states north of the Ohio and west of the Mississippi river, except Texas. A map of the United States, published by the General Land Office, shows every meridian, base line and township that has been surveyed by this method in the different states.

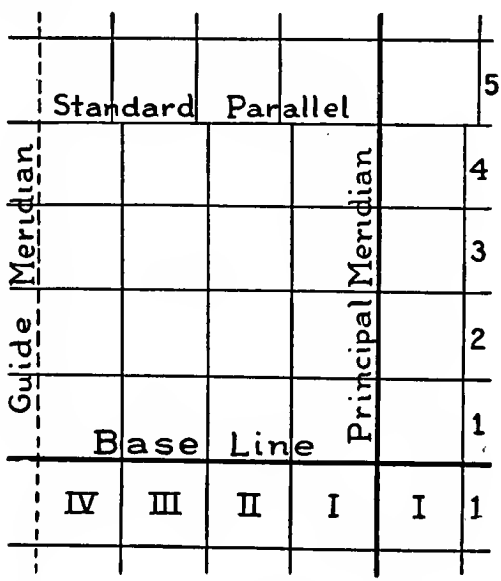
The work of surveying the public lands is now a part of the work of the General Land Office, one division of the department of the interior, and is under the control of the Commissioner of the General Land Office, who is subject to the direction of the

President. Prior to March 3, 1849, it had been a part of the duties assigned to the Secretary of State, next to the Secretary of War and then to the Secretary of the Treasury.

§ 236. Laying off the lands into townships.—In making a survey of lands by the existing rectangular system it is necessary to have some substantial point from whence a start may be made. Such a point is selected as can readily be referred to, usually the mouth of some river, and from such point a line is run due north to the north line of the state or district to be surveyed. This first line is called the prime meridian. To illustrate: The first prime meridian is a line running north from the mouth of the Great Miami River in Ohio, and forms the western boundary of that state; the second is a line running north from the Little Blue Creek in Indiana; the third is a line running north from the mouth of the Ohio River; the fourth is a line running north from the mouth of the Illinois River; and the fifth is a line running north from the mouth of the Arkansas River. In the same manner other prime meridians are drawn farther west, there being twenty-four in all, and where the sectional system of survey is employed these prime meridians are first established. Lines are next run north and south parallel with the principal meridians six miles apart, beginning at the principal meridians. These lines mark the country off into strips six miles wide, and each strip is called a range. These ranges are numbered, beginning with one, east and west of the principal meridian. Owing to the curvature of the earth's surface these range lines get nearer together as they are extended toward the magnetic pole. In order to keep the ranges as near as possible to the prescribed width of six miles, at every twenty-four miles north from the base line a stop is made and the survey is moved over again so that the lines will be six miles apart again. Where a survey west from one meridian meets a survey east from another, the last row of townships or range surveyed may not be of the regulation width of six miles. After the range lines are run, the east and west lines are established. The first one drawn is designated the base line, and all cross the meridian lines at right angles. Other lines drawn parallel with the base lines and six miles apart cut the ranges into squares forming the congressional townships. These townships are numbered, beginning with one, north and south from the base line.

The accompanying diagram is designed to show the first work

of a government survey, which is to divide the tract into townships. The ranges, which are numbered at the lower part of the diagram, are six miles wide at the base. The lines running east and west are six miles apart and are called parallels; every fourth one is called a standard parallel, or correction line for the reason that distances, lessened by convergency, as above explained, are corrected on these lines and made the same as at the base line. The range lines and parallels divide the surveyed territory into townships, designed to be six miles square. The numbering of the townships is shown on the right hand side of the diagram. Guide meridians are run as often as may be necessary for the purpose of straightening the standard meridian lines as they become irregular in consequence of the corrections made on the standard parallels.



§ 237. **Laying off the townships into sections.**—We have seen that in making a survey of a new part of the country the township lines are established first. When this is done the sections are located and the corners marked by placing a stake or stone at the corner, or by digging a hole in the ground or erecting a mound on the spot. In wooded districts a tree is sometimes blazed near the section corner. These markers are called

"monuments of a survey." An ideal township under this system of surveying would produce thirty-six exact sections of six hundred and forty acres each, but owing to the fact, as already explained, that two north and south lines get nearer together as they are extended north, the north end of each township is about three rods narrower than the south end. Also, owing to inaccurate surveying, the east and west lines which bound the townships on the north and south, do not always run parallel to each other. This produces a township of more or less than thirty-six exact sections of six hundred and forty acres each. To provide for this irregularity the rows of sections on the north and west sides of the township are made to contain an irregular number of acres, which are called "fractional sections." All of the sections of the township except those in the rows bordering on the north and west lines of the township are made to contain six hundred and forty acres each, while the remaining ones are laid off out of the land remaining in the township. Thus we have a township of thirty-six sections, twenty-five of which are full sections, containing six hundred and forty acres each, and eleven are fractional sections, containing a greater or less number of acres. The sections of a congressional township are numbered from one to thirty-six, beginning at the northeast corner, and counting west therefrom, and then proceeding east on the tier of sections next below, and so on until section thirty-six is reached in the southeast corner of the township.

The accompanying diagram contains one full township and adjacent parts of the townships bounding the same on the north and west. The subdivision of townships is usually surveyed by a different crew of surveyors than those which survey the tract into townships. The first work of subdivision is to run lines parallel with the east line of the township and one mile apart, and to locate monuments or stakes upon these lines a distance of one-half mile apart. Lines one mile apart and parallel with the south line of the township are next run, thus dividing the township into one-mile squares, called sections, which are designated by number, as shown in the diagram. After measuring five and one-half miles north from the south line of the township, the distance remaining may be a few feet more or a few feet less than one-half mile, owing to the discrepancy of the two measurements; hence the quarter sections on the north are usually fractional; those

on the west of each township are also fractional, for a similar reason.

36	31	32	33	34	35	36
1	6	5	4	3	2	1
12	7	8	9	10	11	12
13	18	17	16	15	14	13
24	19	20	21	22	23	24
25	30	29	28	27	26	25
36	31	32	33	34	35	36

§ 238. **Subdividing the sections.**—A section is the smallest subdivision of which the lines are actually run on the ground, but smaller subdivisions are recognized, these being the "quarter section," containing one hundred and sixty acres, formed by running lines at right angles from points on the section boundaries half way between the corners; "half of quarter sections," containing eighty acres, and "quarter quarter sections," of forty acres each. The areas of the various divisions do not, however, always correspond exactly to the figures above given, owing to irregularities in the surveys, and the convergence of the meridians in going north. The descriptions of parts of the fractional sections differ somewhat from the descriptions in the full sections, and it is accomplished by having lots numbered in each of the irregular sections. If section one contains more or less than six hundred and forty acres it is surveyed so as to make three hundred and twenty acres in the south half and the remaining acres constitute the north half. Then each of the north quarters is divided into lots by a line running east and west. The south half of the northeast or northwest quarter is made to contain eighty acres

and is called "lot one" of that quarter. The remainder of the quarter is called "lot two" and will contain more or less than eighty acres, as the section is larger or smaller than six hundred and forty acres. In sections six, seven, eighteen, nineteen, thirty and thirty-one the surplus or deficient acreage is placed in the west half of the section and the east half is made to contain the prescribed three hundred and twenty acres, except in section six, which is also fractional in the north half. Where the fractional part occurs on the west side of the section, the lots are made to run north and south with lot one next to the center line of the section. Lot one always contains eighty acres, while the remaining lot numbered two contains more or less than eighty acres, as the section is more or less than a full section of six hundred and forty acres. When the section is very large more than two lots are made in a quarter. In such case several eighty-acre lots are marked off in the fractional quarters. As many full eighty-acre lots are surveyed as possible and the last lot of the quarter at the north end is left to contain as near eighty acres as it may, so that it does not contain one hundred and sixty acres or more. The lots are then numbered from one, beginning at the center line of the section. Where the fractional section is of the regulation

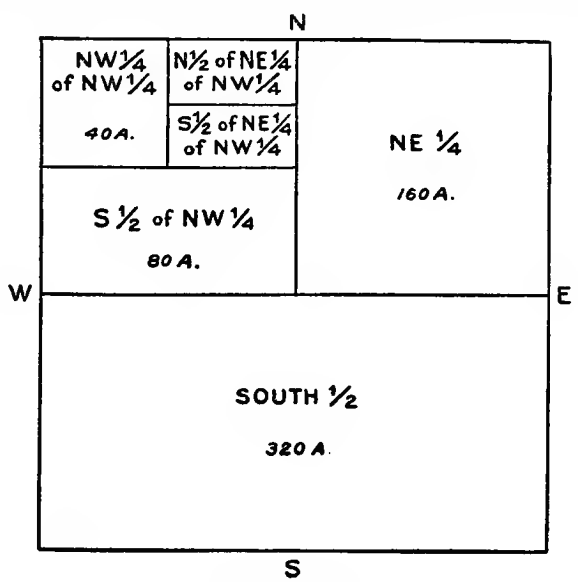


Diagram No. 1

length but is so narrow that a quarter thereof contains less than eighty acres, the section is divided into quarter quarters the same as if it were a full section, but each quarter quarter containing less than forty acres.

The accompanying diagram No. 1 is designed to illustrate the division of a section into parts formed by regular surveyed lines, and to furnish a description of the various subdivisions.

Diagram No. 2 is designed to illustrate the method of describing government lands bounded on the west by guide meridians, and also lands bordering on meandering waters. Whenever a

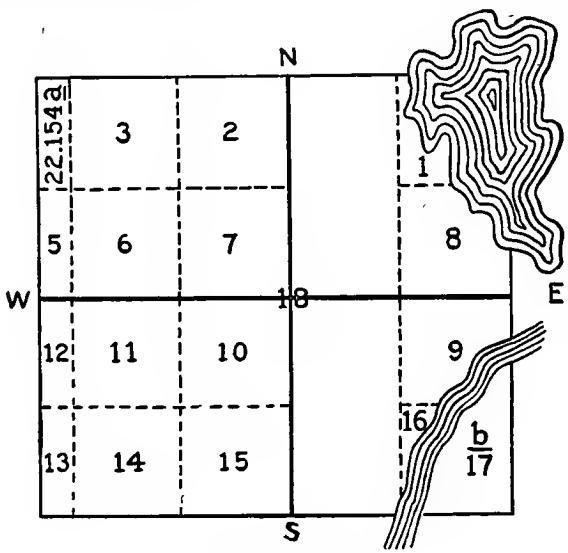


Diagram No. 2

guide meridian is run, it is evident that all sections lying directly east must be extended to it, thus making all such sections more than a square mile; the north and south quarter line of each section is run as in other sections, and all that portion west of it is divided into lots as shown in this diagram. Assuming the section, illustrated by diagram No. 2, to belong to Township 112 of Range 17 West of the fifth principal meridian, the tract marked "A" should be described as follows: "Lot four (4) of the northwest quarter (¼) of section eighteen (18), of township one hundred twelve (112) north, of range seventeen (17) west, of the fifth (5th) principal meridian, containing twenty-two and fifteen-hundredths (22.15) acres, more or less, according to the

government survey thereof." The tract marked "B" should be described in a similar manner; the "southeast quarter" of section 18 must be substituted for the "northwest quarter"; in other respects the descriptions would be the same except as to acreage.

§ 239. Plats and subdivisions.—Statutes usually provide that persons in laying off any town or addition thereto, or any addition to any city or town, or any subdivision of any lots or lands within the limits of any city or town shall, previous to the sale of any lots in such town, addition or subdivision, cause to be recorded in the recorder's office of the proper county a correct plat of such town, addition or subdivision, with the public grounds, streets and alleys properly marked, showing the length and width of each and with the lots regularly numbered and the size thereof marked upon the plat. This plat is generally required to be acknowledged by the owner to entitle it to record. Before admitting the plat to record, however, it must be submitted to and approved by the duly authorized town or city board, a certificate of which approval must be attached to the plat. Sometimes the surveyor is required to describe the land surveyed and officially certify to same. A plat of an addition to a town or city implies a previous survey and marking upon the ground, and one claiming under a deed describing the property surveyed by reference to such plat may show the existence of the stakes indicating the lines as marked by the surveyor.[1] In case of a contest as to the boundary line between a street and the abutting lots, the original survey will control the recorded plat.[2]

A municipality, in accepting and approving a plat, performs a discretionary or judicial act, which the courts will not review unless some distinct legal duty has been violated.[3] The approval of the plat of a proposed addition to a city by the common council does not constitute an acceptance of the streets thereon laid out, or amount to an act of jurisdiction over them, or impose an obligation upon the city to keep them in repair, although such plat vests the fee of the streets therein described in the city.[4] The execution, acknowledgment and recording of a plat, in conformity

[1] Burke v. McCowen, 115 Cal. 481, 47 Pac. 367.

[2] Thrush v. Graybill, 110 Iowa 585, 81 N. W. 798.

[3] Funke v. St. Louis, 122 Mo. 132, 26 S. W. 1034.

[4] Downend v. Kansas City, 156 Mo. 60, 56 S. W. 902, 51 L. R. A. 170.

with the statute operates as effectively as a deed to convey the title to the streets therein mentioned to the municipality.[5]

§ 240. Maps and plats as evidence.—The original plat of a survey, when duly executed, acknowledged, approved and recorded according to law, may always be used in evidence to show the position of the land, and is evidence of the most potent kind in determining the location of the lines and corners.[6] But an unofficial tracing or copy of a map is not admissible in evidence.[7] A plat, the accuracy of which is attested by the evidence of the surveyor who made it, is admissible in evidence on the question of boundary without proof of its execution, authentication and record.[8] In a suit of one railway company against another railway company to prevent the latter company from constructing a railroad track across a certain tract of land, of which the plaintiff company alleged ownership, on a hearing of the application for an interlocutory injunction, it was held not error to admit in evidence the affidavit of the surveyor and an attached plat of the land; it being deposed by the witness that he had made the survey and the plat, and that it truly represented the land in dispute.[9]

§ 241. Effect of reference in descriptions to maps or plats.—It is a very common practice of conveyancers to refer in a conveyance to a map or plat. Such a reference has the effect of incorporating the map or plat in the conveyance.[10] The fact that the plat referred to is invalid, because not made and filed in accordance with statutory provisions, does not affect the deed. A reference to a void plat for a description is just as effectual as a reference to a valid plat, if the description is correct and the plat referred to is accessible.[11] When there is a conflict between a map or a plat referred to and an actual survey the latter controls, and the reference to the map or plat may be rejected as surplusage.[12]

[5] Wollacott v. Chicago, 187 Ill. 504, 58 N. E. 426.

[6] Bell County Land & Coal Co. v. Hendrickson, 24 Ky. L. 371, 68 S. W. 842.

[7] Ellison v. Barnstrator, 153 Ind. 146, 54 N. E. 433.

[8] Justen v. Schaaf, 175 Ill. 45, 51 N. E. 695.

[9] Atlanta & W. P. R. Co. v. Atlanta &c. R. Co., 125 Ga. 529, 54 S. E. 736.

[10] Masterson v. Munroe, 105 Cal. 431, 38 Pac. 1106, 45 Am St. 57; In re Ferguson's Appeal, 117 Pa. St. 426, 11 Atl. 885; State Savings Bank v. Stewart, 93 Va. 447, 25 S. E. 543.

[11] Nichols v. New England Furniture Co., 100 Mich. 230, 59 N. W. 155.

[12] Cleveland v. Choate, 77 Cal. 73, 18 Pac. 875; Racine v. Case Plow Co., 56 Wis. 539, 14 N. W. 599.

The boundaries, monuments, courses and distances laid down on a map referred to are as much to be regarded the true descriptions of the land as if they were expressly recited in the deed.[13] When lands are granted according to an official plat of a survey, the plat itself, with all its notes, lines, descriptions and landmarks, becomes as much a part of the grant or deed by which they are conveyed, and controls so far as limits are concerned, as if such descriptive features were written out upon the face of the deed or the grant itself.[14]

§ 242. **Abstracting plat and subdivision.**—Inasmuch as plats and subdivisions depend for their validity upon the statute of each particular state the manner of presentation in the abstract will be governed largely by the local statute. The synopsis should contain the dedication and title of the subdivision, the name of the owner or owners, the date of dedication, the fact of acknowledgment by owner or owners, the certificate of the officer taking the acknowledgment, the surveyor's certificate, approval by the civic authorities, and the date of recording the plat. The map or plat of the subdivision is sometimes appended, but as a rule the book of plats and page thereof where it may be found is all that is shown. The following is submitted as an example of such synopsis:

Subdivision
by
Edwin Armstrong.

Plat, entitled "Clifton Place."
Dated February 7, 1903.
Recorded February 9, 1903.
Plat Book No. 13, page 18.

Surveyor's certificate, by Ancil Smith, dated February 6, 1903, certifies that he has surveyed a part of the Southeast Quarter of Section 22, Township 16 North, Range 3 East, of Marion County, Indiana, beginning at, etc. [set out description by surveyor], into lots and blocks, as shown upon the annexed plat; that said survey and plat was made by order and direction of Edwin Armstrong; that said plat correctly represents all the exterior boundaries of the land surveyed and the divisions thereon made;

[13] Erskine v. Moulton, 66 Maine 276; Cunningham v. Boston &c. R. Co., 153 Mass. 506, 27 N. E. 660.

[14] Cragin v. Powell, 128 U. S. 691, 9 Sup. Ct. 203, 32 L. ed. 566; Woods v. West, 40 Nebr. 307, 58 N. W. 938.

and that he has fully complied with the provisions of the law in surveying, subdividing, and platting the same.

Acknowledged by Edwin Armstrong, as owner, February 7, 1903.

Where plats and subdivisions have been made by executors, administrators, guardians or trustees under order or direction of court, the synopsis should contain the court proceedings respecting same.

§ 243. **Vacation of plat.**—Most statutes provide that any plat of lands lying without the corporate limits of a city or town, or any part thereof, may be vacated by the owner or owners thereof at any time before the sale of any lots therein, by a written instrument declaring the same to be vacated. Such instrument is usually required to be executed and acknowledged and recorded in like manner as deeds of land. The effect of such vacation operates to destroy the force and effect of the plat, and to divest all public rights in streets, alleys and other public grounds therein laid out or described in such plat. If any of the lots have been sold the plat may be thus vacated if the owners of the lots join in the execution of the vacating instrument.

Also provision is made for vacating plats and additions within or without the limits of a town or city by court proceedings instituted by the owner or owners of any lot or lots therein. After vacation the descriptions of the several lots and parcels of the plat is preserved as set forth in the plat to which the proportionate parts of any street or alley, or part thereof vacated, shall be added, unless the owners of every part or parcel thereof consent in writing that such lands be described as before such plat was made, or by acreage, metes or bounds, or other proportionate description.

Where the vacation is by written instrument as first above described, a synopsis of the instrument is all that need be set out in the abstract, but where the vacation is by court proceedings, all the steps taken in such proceeding must be shown.

Where no conveyances of lots have been made the synopsis of the vacation should follow immediately after the subdivision and plat affected thereby, but where conveyances have been made, such

conveyances will intervene in chronological order. Vacation by written instrument may be shown thus:

Vacation by Frank A. Maus.	Declaration of vacation of Frank A. Maus', New York Street Subdivision to Indianapolis, Ind., being a part of S. E. ¼ of Sec. 3, Tp. 15 North, of Range 3 East. Dated May 27, 1896. Recorded June 8, 1896. Book 196, page 45.

Recites that Frank A. Maus, who is the sole owner of all the lots in said subdivision as shown in the plat recorded May 1, 1896, in plat book 11, page 82, and vacates the same for the purpose of restoring the property to its condition before same was platted, meaning and intending to declare vacated, and does declare, vacated the whole of said plat and subdivision.

Acknowledged May 27, 1896.

§ 244. **Dedication by maps or plats.**—Dedication may be established against the owner of land by showing that he has platted the ground, representing streets and alleys on the plat, and has sold lots with reference to it,[15] or by showing that he has adopted a map or plat made by public officers or other persons,[16] or by showing that he has sold lots, describing them as bounded by a street or road.[17] Merely laying out grounds, or merely platting or surveying them, without actually throwing them open to use or actually selling lots with reference to the plat, will not, as a general rule, constitute a dedication,[18] and even when lots were sold with reference to an unrecorded plat, showing a street, it was held that a finding that there was no dedication, was justified where it appeared that the owner maintained obstructions across the same and told the purchaser that it was a private way,[19] So, there may be statements in the conveyance, or the like, that

[15] United States v. Illinois Cent. R. Co., 154 U. S. 225, 14 Sup. Ct. 1015, 38 L. ed. 971; Miller v. Indianapolis, 123 Ind. 196, 24 N. E. 228.

[16] In re Brooklyn St., 118 Pa. St. 640, 12 Atl. 664, 4 Am. St. 618.

[17] Durkin v. Cobleigh, 156 Mass. 108, 30 N. E. 474, 17 L. R. A. 270, 32 Am. St. 436.

[18] DeNefe v. Agency City, 143 Iowa 237, 121 N. W. 1049.

[19] People v. Sperry, 116 Cal. 593, 48 Pac. 723.

show that the reference was merely for purposes of description and that there is no dedication.[20] But, ordinarily, the sale of a single lot with reference to the plat will complete the dedication.[21] The rights which spring from a recorded plat, designating spaces as public ways, are very comprehensive and inure to the benefit of persons who purchase under such a plat as well as to the benefit of the public, for such persons have a right to the whole way as a street, and the owner can not close the street on either side of them.[22]

It is not only those who buy land or lots abutting on a street or road laid out on a map or plat that have a right to insist upon the opening of the street or road; but where streets and roads are marked on a plat and lots are bought and sold with reference to the plat or map, all who buy with reference to the general plan or scheme disclosed by the plat or map acquire a right in all the public ways designated thereon and may enforce the dedication.[23] The plan or scheme indicated on the map or plat is regarded as a unity and it is presumed, as it well may be, that the public ways add value to all the lots embraced in the general scheme or plan.[24]

[20] Baltimore v. Fear, 82 Md. 246, 33 Atl. 637.

[21] Fereday v. Mankedick, 172 Pa. St. 535, 34 Atl. 46.

[22] Indianapolis v. Kingsbury, 101 Ind. 200, 51 Am. Rep. 749.

[23] Strunk v. Pritchett, 27 Ind. App. 582, 61 N. E. 973.

[24] Conrad v. West End Hotel &c. Land Co., 126 N. Car. 776, 36 S. E. 282.

CHAPTER XI

ASCERTAINMENT OF QUANTITY OF LAND

SEC.
250. Computation of land areas and distances.
251. Tables of measure.
252. To find the area of a tract in shape of a parallelogram.
253. To find the area of a triangle.
254. To find the area of a trapezoid.
255. To find the area of a trapezium, or any other irregular polygon.
256. To find the area of irregular-shaped tracts.
257. Effect of the use of the words "more or less" in a description.

§ 250. **Computation of land areas and distances.**—Occasions will often arise in the examination and interpretation of titles to make computations and measurements with a view of ascertaining areas and distances. While a technical knowledge of surveying and civil engineering is not required of either abstracter or counsel, both should have sufficient ability in this respect to make such calculations as are ordinarily required to properly perform their respective duties. They should be familiar with the different methods now or formerly used in parceling land, as well as the standard tables of land measurement. It would serve no useful purpose here to explain in detail the systems of land measurement in vogue in different sections of the country and at different periods of our history, but in succeeding sections we will include the tables sanctioned by law in the United States for measuring both surface and distance and to illustrate how areas and distances may be approximately ascertained by simple arithmetical computations. Gross mistakes in descriptions, or in the alleged area of lands, may be discovered by making a map or plat of the land, and, from the measurements or area given, making such calculations as will determine the question involved. The only instruments needed for this work are a semi-circular protractor, a pair of dividers and a scale of equal parts. A scale divided into the fiftieth parts of an inch is very convenient on account of the accuracy with which, by means of it, the links of the Gunter's chain can be measured.

§ 251. **Tables of measure.**—The standard tables for land measurements in this country are the same as those of England. The table for linear measure is as follows:

12 inches make 1 foot, abbreviated ft.
3 feet make 1 yard, abbreviated yd.
5½ yards, or 16½ feet, make 1 rod, abbreviated rd.
40 rods make 1 furlong, abbreviated fur.
8 furlongs, or 320 rods, make 1 mile, abbreviated mi.

The table for square measure is as follows:

144 square inches make 1 square foot, abbreviated sq. ft.
9 square feet make 1 square yard, abbreviated sq. yd.
30¼ square yards make 1 square rod, abbreviated sq. rd.
40 square rods make 1 rood, abbreviated R.
4 roods make 1 acre, abbreviated a.
640 acres make 1 square mile, abbreviated sq. mi.

In making surveys of government lands and in all subsequent subdivisions, except small tracts and town lots, measurements are made by Gunter's chain. This chain is 66 feet in length, divided into 100 links, each of which links is 7.92 inches long. The table of linear measure where this chain is used is as follows:

7.92 inches make 1 link, abbreviated l.
25 links make 1 rod, abbreviated rd.
4 rods, or 66 feet, make 1 chain, abbreviated ch.
80 chains make 1 mile, abbreviated mi.

The table of square measure where the chain is used is as follows:

625 square links make 1 pole, abbreviated p.
16 poles make 1 square chain, abbreviated sq. ch.
10 square chains make 1 acre, abbreviated a.
640 acres make 1 square mile, abbreviated sq. mi.
36 square miles make 1 township, abbreviated tp.

The Gunter's chain was intentionally so constructed as to make 100,000 square links to the acre. If the dimensions are expressed in feet, as is usually the case in surveys of small tracts and town lots, an acre contains 43,560 square feet.

§ 252. **To find the area of a tract in shape of a parallelogram.**—A figure bounded by four straight lines and having its opposite sides parallel, is called a parallelogram. Where the lines form right angles it is sometimes called a rectangle. The area of such a figure is found by multiplying the base by the alti-

tude. Thus, a tract of land in the shape of a parallellogram, 14 chains, 27 links long, and 9 chains, 75 links wide, contains 1,391,-325 square links; and as 100,000 square links make an acre, 1,391,325 square links make 13.91325 acres. The fractional part of an acre represented by the decimal .91325 may then be reduced to roods, square rods, etc., or to square chains, poles, etc., as may be desired, by the process of multiplication and pointing off decimals. Thus, .91325 multiplied by 4, the number of roods in an acre, will give 3.653, being the number of roods and decimal parts of a rood; and if these decimals are multiplied by 40, the number of square rods in a rood, the product will be 26.12, being the number of square rods and decimal parts of a square rod. Continuing this process the decimal .12 of a rod may be reduced to square yards, the result being 3.63, the number of square yards and decimal parts of a square yard, and if the decimals .63 are multiplied by 9, the number of square feet in a square yard, the product will be 5.67, the number of square feet and decimal parts of a square foot. The decimal .67 may be reduced to square inches by multiplying it by 144, the number of square inches in a square foot, the result being 96.48, the number of square inches and decimal parts of a square inch. The tract would, therefore, contain 13 acres, 3 roods, 26 square rods, 3 square yards, 5 square feet and 96.48 square inches; or to express it decimally in acres, 13.91325 acres.

§ 253. **To find the area of a triangle.**—A plain figure bounded by three straight lines, and having consequently three angles, is called a triangle. Where one of these angles is a right angle, the figure is called a right-angle triangle. The area of a tract of land in the shape of a right-angle triangle is found by multiplying the base by the perpendicular, and dividing the product by 2. The number of acres and parts thereof may then be ascertained in the same manner as shown in the preceding section. But when the tract is triangular in shape but has no right angles, a different method of computing the area must be employed. Where the length of the three sides of such a triangle are known, the area is found by adding the three sides together, and taking the half sum; from this half sum each side is subtracted separately; then multiply the half sum and the three remainders continuously together. The square root of the product will be the area. Thus a triangular tract whose sides are 342,384,

and 436 feet respectively, contains 6,298.14 square feet. By dividing the number of square feet by 43,560, the number of square feet in an acre, the number of acres and fractional parts of an acre is obtained.

§ 254. To find the area of a trapezoid.—A trapezoid is a plane figure bounded by four straight lines, two of whose sides are parallel and two oblique. To find the area of a tract of land in the shape of a trapezoid, add the two parallel sides together and multiply half the sum by the distance between the parallel sides. Thus a tract bounded by two parallel lines, respectively 25 and 45 chains long and distant from each other 20 chains, contains 600 square chains, or 60 acres.

§ 255. To find the area of a trapezium, or any other irregular polygon.—A trapezium is a plane figure bounded by four straight lines but having no two sides parallel. The area of a tract of land in the shape of a trapezium or of any other irregular tract having more than four sides is found by dividing the figure into as many triangles and trapeziums as may be convenient, then find the area of each separately and combine the results. If the land is bounded by four straight lines, no two of which are parallel with each other and the length of each side is given, and the two opposite angles are supplements of each other, the area may be found by adding all the four sides together and taking the half sum; subtract each side separately from the half sum; multiply the four remainders continuously together, and extract the square root of the last product which will be the area.

§ 256. To find the area of irregular shaped tracts.—Where one of the boundaries of a tract of land consists of a body of water, a stream or any other irregular line and for this reason the surface can not be measured by dividing the tract into triangles and trapeziums, resort is had to the plan of drawing a base line as near as practicable to the boundary and measuring from it in several places, at equal distances to the boundary line. To half the sum of the first and last breadths, add the sum of all the intermediate breadths, and multiply the result by the common distance between the breadths to find the area. If the breadths were taken at unequal distances, the contents may be determined, with tolerable accuracy, by adding all the breadths together, dividing

the sum by the whole number of them for the mean breadth, and multiplying that by the length of the base line.

§ 257. **Effect of the use of the words "more or less" in a description.**—The words "more or less", after a statement of the quantity, are intended to cover only a reasonable excess or deficit. If the difference is very great it is evidence of a mistake which a court of equity may correct. The presence of these words does not imply that the purchaser takes the risk of the quantity. If the variation is slight, the purchaser has no remedy; but if the variation is large or material, he may be relieved from paying for the deficient quantity.[1] The use of these words does not bar an inquiry into a fraud or misrepresentation as to quantity on the part of the grantor and a very material variation in quantity is itself some evidence of such fraud or misrepresentation.[2]

The words "more or less" and the word "about" used in connection with quantity or distances, are words of safety and precaution. They are intended merely to cover some slight or unimportant inaccuracy and while enabling an adjustment to the imperative demands of fixed monuments, they do not weaken or destroy the statements of distance and quantity when no other guides are furnished.[3]

[1] Estes v. Odom, 91 Ga. 600, 18 S. E. 355; Hosleton v. Dickinson, 51 Iowa 244, 1 N. W. 550; Williamson v. Hall, 62 Mo. 405; Belknap v. Sealey, 14 N. Y. 143, 67 Am. Dec. 120.

[2] Estes v. Odom, 91 Ga. 600, 18 S. E. 355.

[3] Oakes v. DeLancey, 133 N. Y. 227, 30 N. E. 974, 28 Am. St. 628.

CHAPTER XII

THE FORMAL PARTS OF DEEDS

SEC.
260. Formal parts of a deed enumerated and described.
261. Names and descriptions of parties.
262. Grantors.
263. Grantees.
264. Designating nature and kind of conveyance.
265. Date of the deed.
266. Consideration.
267. Operative words.
268. Words of inheritance.
269. Description and boundaries.
270. Sufficiency of description.
271. Identification of description by act of the parties.
272. How description construed.
273. Recitals in deeds.
274. Habendum, or the estate created.
275. Exceptions and reservations.
276. Conditions precedent and subsequent.
SEC.
277. Restrictions as to the use of land.
278. Covenants for title.
279. Defective covenants.
280. Signature to the deed.
281. Sealing.
282. Attestation.
283. Acknowledgment.
284. Examples of defective acknowledgments.
285. How acknowledgment shown in abstract.
286. Delivery.
287. Registration.
288. Correcting errors in record, and re-recording.
289. Ancient deeds.
290. Technical and particular words and phrases.
291. Repugnant or conflicting parts of a deed.

§ 260. Formal parts of a deed enumerated and described. —The abstract should contain a brief summary of the formal and essential parts of every deed of conveyance found in the chain of title. The principal parts of a deed consist of the premises, the habendum, the tenendum, the reddendum, the conditions, the warranty, the covenants, and the conclusion. The term "premises" is used to designate all those parts of the deed which go before the habendum, and includes the names of the parties with their titles and additions, a recital of all such matters of fact as are necessary to explain the reason upon which the conveyance is founded, the consideration, and a correct description of the property. The habendum immediately follows the premises and states what estate the grantee shall have in the property granted, its duration, and to what use. In naming the grantee in the premises, if the words "and his heirs" are added, the grantee takes an estate in fee simple, though the habendum clause be wholly omitted. The tenendum clause was formerly used to express the tenure by

which the estate granted was holden, and followed immediately after the habendum, but was later joined to the habendum. The reddendum originally followed next after the tenendum and by it the grantor excepted or reserved something to himself out of that which he before granted. Following the reddendum comes the clause containing the conditions. The warranty was a covenant real by which the grantor of an estate of freehold and his heirs were bound to warrant the title. The next clause contained the covenants, by which the parties, or one of them, was obliged to do something beneficial to, or to abstain from something which, if done, might be prejudicial to the other. The last part of the deed is the conclusion, which mentions the execution and the date, either expressly or by reference to the beginning. This is sometimes called the "testimonium clause," and includes the signing and sealing, and the special release of dower, if such a provision is inserted in it, the attestation of the subscribing witnesses, if any are required, the words of attestation, and the number of the subscribing witnesses. After the attestation clause comes the revenue stamp, if one is required. Last of all comes the acknowledgment or proof of the deed, and the certificate showing the conformity with the law of another state where its validity depends upon its being made in conformity with such law.

All the above formal parts of a deed are not material in every case, as there may be deeds containing neither exceptions, reservations, conditions, nor covenants. It is for the abstracter to determine what parts are material and what may be safely omitted. A brief consideration of the various formal parts of a deed are given in succeeding sections. A digest of the law of the various states relative to the formal parts of deeds will be found in the appendix.

§ 261. **Names and descriptions of parties.**—In every valid deed of conveyance there must be parties—competent, on the one hand, to give title, and on the other to take. Hence the parties to a deed form the first important subject of inquiry in abstracting such an instrument. They should be shown with the same certainty of identity as in the deed itself. Where the parties are omitted from or erroneously designated in the deed the error or omission should be mentioned in the abstract in order that the attorney may found such objections upon the fact as he may deem

proper. It is usual for abstracters to head the entry after the manner of a legal caption by placing on the left hand margin of the paper the name of the grantor and grantee and uniting them by a bracket.

The parties should be correctly described by their Christian names as well as surnames. But it is not necessary that a party to a deed be described by name, if he be otherwise so described that he may be identified.[1] The full names of the parties should be correctly set forth in the deed and copied in the abstract. Such irregularities as the omission of the middle name of a party, a difference in the spelling of the name of the grantor, as recited in the deed and signed thereto, and designating the grantee by a wrong baptismal or Christian name, does not for that reason render the deed void, if it can be shown that they are one and the same person.[2] Where the grantor in a deed is described as "party of the first part," and the name of the party of the first part is given, which is the identical name signed to the deed, as grantor, whose acknowledgment as such was taken and the name of such grantor also appears in the warranty clause, the deed was held valid as against strangers to the title although the name of the grantor is omitted from the granting clause.[3]

§ 262. **Grantors.**—In deeds poll the parties are referred to as grantor and grantee, and are usually named or otherwise designated in the body of the instrument. The party conveying is usually designated as the grantor or conveying party. He should be so designated in the body of the instrument,[4] although it is held that one signing a deed is bound as grantor, though he is not named as such in the body of the deed.[5] In properly construing deeds as to which this question may arise, much, of course, must depend upon the context as well as upon the purpose of executing the deed by one not named as grantor. Thus where no names are mentioned at all in the body of the instrument, but such expressions are used as "we convey," and the deed is executed by several, it was held to be the deed of all executing it.[6]

[1] Hamilton v. Pitcher, 53 Mo. 334.
[2] Morse v. Carpenter, 19 Vt. 613.
[3] Runyan v. Snyder, 45 Colo. 156, 100 Pac. 420.
[4] Batchelor v. Brereton, 112 U. S. 396, 5 S. Ct. 180, 28 L. ed. 748; King v. Rhew, 108 N. Car. 696, 13 S. E. 174, 23 Am. St. 76.
[5] Hargis v. Ditmore, 86 Ky. 653, 9 Ky. L. 783, 7 S. W. 141; Hronska v. Janke, 66 Wis. 252, 28 N. W. 166.
[6] Sheldon v. Carter, 90 Ala. 380, 8 So. 63.

One who signs, seals, and delivers a deed, though not named therein as a grantor, is still bound as a grantor, and the deed is operative as a conveyance of his estate.[7] A deed signed by one not named as a grantor is not his deed,[8] yet if the grantor's name is mentioned in the body of the deed, his signing the deed by a wrong name will not invalidate it, if it sufficiently appears that the same person was intended, or that the variance was due to clerical error.[9]

A description of a party to a deed by name, residence, and occupation does not within itself identify the party, but only furnishes the means and affords a presumption of identification.[10] Though the name written in the deed is not the same as the name signed to it, the variance may be so slight as not to destroy the presumption that they are intended for the same person.[11] Also, where an error occurs in the name or residence of the grantor apparent upon the face of the deed, and from its contents susceptible of correction so as to identify the grantor with certainty, such error does not affect the validity of the deed.[12] The grantor may be identified by the certificate of acknowledgment, as where the officer certifies that he knows the person signing the deed to be the same described in it, and who executed it.[13] The grantor may convey the land by any name which he may use as a signature, and the title will pass to his grantee, though he received the title under a different name, but it must be shown that the names used applied to one and the same person.[14] And if the grantor signs the deed by his Christian name only, his name in full appearing in the body of the deed, the signing is sufficient and binding.[15]

The middle name or initial of a grantor is not a part of his legal name, which consists of one given name and one surname.[16] It follows, therefore, that the omission of such middle name, or the insertion of a wrong middle name or initial in a deed does not affect its validity.[17] But in some instances, the middle name,

[7] Sterling v. Park, 129 Ga. 309, 58 S. E. 828, 13 L. R. A. (N. S.) 298n, 121 Am. St. 224, 12 Ann. Cas. 201.

[8] Gaston v. Weir, 84 Ala. 193, 4 So. 258; Adams v. Medsker, 25 W. Va. 127.

[9] Middleton v. Findla, 25 Cal. 76.

[10] Tinder v. Tinder, 131 Ind. 381, 30 N. E. 1077.

[11] Lyon v. Kain, 36 Ill. 362; Dodd v. Bartholomew, 44 Ohio St. 171; 5 N. E. 866.

[12] Dodd v. Bartholomew, 44 Ohio St. 171, 5 N. E. 866.

[13] Ballard v. Carmichael, 83 Tex. 355, 18 S. W. 734.

[14] Lyon v. Kain, 36 Ill. 362.

[15] Zann v. Haller, 71 Ind. 136, 36 Am. Rep. 193.

[16] Banks v. Lee, 73 Ga. 25.

[17] Nicodemus v. Young, 90 Iowa 423, 57 N. W. 906.

or its initial is regarded as a material part of a name, and especially is this true when the first name is not given, but only its initial.[18] If the name under which one has purchased land is not his correct name, nor idem sonans, and he conveys by his correct name, his identity as purchaser may be proved; but until such proof is made, and the deed to him is reformed, his deed does not convey title.[19] Where a deed is that of a partnership it should be signed by all the partners, unless all the partners be present and authorize one member to sign for all.[20]

A difference in the spelling of the name of the grantor, as recited in the deed and as signed thereto does not invalidate the deed if it can be shown that they are one and the same person;[21] but it is such an irregularity as must be noted on the abstract in order that it may be cleared up by proper affidavit. If a deed be executed by a person not mentioned therein as grantor, that fact should be noted also. If a deed be signed by a party acting in a representative capacity, and he is not designated in the body of the instrument as such representative, the deed is defective.[22]

Where the deed is executed by an attorney in pursuance of a power, it is defective unless the recitals in the body of the instrument shows that it is the act of the principal. It must also show that the person executing same had power and authority to act in the premises. Unless such power was under seal, the deed is invalid.[23]

A deed is void which shows on its face that it was executed by a commissioner appointed by a court in a state other than that in which the land is situated. Also a conveyance by an executor who does not profess to act under the testamentary power is invalid.[24] Where the provisions of a deed purporting to be in trust for the benefit of creditors, but discloses an attempt to hinder or delay creditors, is void on its face.[25]

The abstract should contain the names of all the grantors, the character in which they act. These names, wherever they appear,

[18] State v. Higgins, 60 Minn. 1, 61 N. W. 816, 27 L. R. A. 74, 51 Am. St. 490.

[19] Peckham v. Stewart, 97 Cal. 147, 31 Pac. 928.

[20] McGahan v. Bank, 156 U. S. 218, 15 S. Ct. 347 39 L. ed. 403.

[21] Tustin v. Faught, 23 Cal. 237; Lyon v. Kain, 36 Ill. 362.

[22] Bobb v. Barnum, 59 Mo. 394.

[23] Plummer v. Russell, 2 Bibb (Ky.) 174.

[24] Contee v. Lyons, 19 D. C. 207; Dowdy v. McArthur, 94 Ga. 577, 21 S. E. 148.

[25] Johnson v. Thweatt, 18 Ala. 741.

should be carefully compared with each other, and any variances carefully noted. If the grantor be an executor, administrator, trustee, attorney in fact, public official, officer of court, or officer of a corporation, the mode of designation and the manner of signing must be noted, and the nature and extent of the grantor's powers examined. If the conveyance was made in an official or representative capacity, that fact should appear in the description of the grantor and so noted on the abstract. Where the deed gives the residence of the grantor, this need not be set out in the abstract, unless such residence be outside the state, in which case it may aid in determining his identity in the search for judgments. Any irregularity, error, or omission of the grantor's name in the deed should be noted on the abstract, so that counsel may determine whether or not the grantor has been sufficiently designated. The names of the grantor appearing in the granting clause, at the end of the deed, and in the acknowledgment, should be carefully compared for discrepancies, and should any appear, they must be properly noted.

The abstracter should not only see that the grantor is properly named or designated, but he should see whether the instrument has been executed by all parties whose concurrence in the deed is necessary to convey a good title. If the deed be that of a husband, he should see whether the wife joined, and vice versa. If the conveyance be by one who had an equitable estate only, as frequently happens, he should see whether the party having the legal title has joined as grantor.

§ 263. **Grantees.**—The same degree of care in setting out the names and descriptions of grantors should be observed in designating grantees. The grantee is usually designated in the premises by his name, but this is not indispensable, for if from the whole instrument it appears who he is, it will suffice.[26] If, however, there is nothing on the face of the instrument indicating who the grantee is, it is defective and passes no title.[27] So, if the name of the grantee is left blank, with no other designation of him in the deed, the instrument is inoperative as a conveyance so long as it remains in this condition.[28] The fact that one is

[26] Bay v. Posner, 78 Md. 42, 26 Atl. 1084; Newton v. McKay, 29 Mich. 1.

[27] Allen v. Allen, 48 Minn. 462, 51 N. W. 473.

[28] Barden v. Grace, 167 Ala. 453, 52 So. 425, Ann. Cas. 1912A, 537.

named in the consideration clause of a deed does not make him a grantee.[29] It is not necessary that the grantee be named at all, if he is so described that he can be clearly ascertained.[30]

A deed to the heirs of a living person, without naming them, is void for uncertainty,[31] unless there be something in the deed from which it may be inferred that the word "heirs" was not used in its technical sense, but as meaning children.[32] A deed to an immediate estate in land, made to a grantee not in being, is absolutely void.[33]

It is not indispensable that the name of the grantee, if given, should be inserted in the premises. If the instrument shows who he is, if it designates him, and so identifies him that there is no reasonable doubt respecting the party constituted grantee, it is not of vital consequence that the matter which establishes his identity is not in the common or best form, or in the usual or most appropriate position in the instrument.[34]

It is the general rule that where the statute requires both the husband and wife to join in a deed of her property, a conveyance by the wife directly to the husband is a nullity, and this upon the ground that the husband can not be both the grantor and grantee.[35] A deed directly from a married woman to her husband is void at law.[36] But the disability of husband and wife to convey, the one to the other, has been expressly removed by statute in some states.[37]

A corporation, having a legal existence and being capable of taking title to land, may be a grantee, and should be described by its official name. But a conveyance to an unincorporated company which is shortly afterwards duly organized as a corporation, and goes into possession under the deed, passes a title to such corporation as against one not holding by a superior title, but under a subsequent tax sale.[38] The misnomer of a corporation

[29] Hardin v. Hardin, 32 S. Car. 599, 11 S. E. 102.

[30] Clark v. Northern Coal &c. Co., 33 Ky. L. 1047, 112 S. W. 629; Gillespie v. Rogers, 146 Mass. 610, 16 N. E. 711.

[31] Booker v. Tarwater, 138 Ind. 385, 37 N. E. 979.

[32] Tinder v. Tinder, 131 Ind. 381, 30 N. E. 1077.

[33] Davis v. Hollinsworth, 113 Ga. 210, 38 S. E. 827, 84 Am. St. 233.

[34] Newton v. McKay, 29 Mich. 1.

[35] Breit v. Yeaton, 101 Ill. 242; Johnson v. Jouchert, 124 Ind. 105, 24 N. E. 580, 8 L. R. A. 795.

[36] Connar v. Leach, 84 Md. 571, 36 Atl. 591; Jarrell v. Crow, 30 Tex. Civ. App. 629, 71 S. W. 397.

[37] Such statutes exist in Iowa, New York, North Carolina, Ohio, Oregon, Washington and perhaps a few other states.

[38] Clifton Heights Land Co. v. Randell, 82 Iowa 39, 47 N. W. 905.

intended to be the grantee does not invalidate the deed when the true name of the corporation appears in the covenant of warranty or other part of the deed,[39] or when it appears in any way from the deed itself what corporation was intended.[40] A misnomer of a corporation has the same legal effect as the misnomer of an individual;[41] and it is only necessary in either case that it should clearly appear from the deed by name or description that a particular grantee capable of identification was intended.

A partnership not being a legal person, either natural or artificial, can not, as such, be the grantee of the legal title to land.[42] The conveyance should be to the individual members, naming them, and describing them as constituting a firm. In this manner they take the legal title as tenants in common subject to partnership equities.[43]

While the words "junior" or "senior" is no part of a person's name, they are often used in deeds to distinguish the party named from another person of the same name. The person intended, however, may be shown in some other way, as by giving his residence.[44] Where the deed discloses errors, omissions, or discrepancies in designating the grantee, these should be shown on the abstract.

§ 264. **Designating nature and kind of conveyance.**—The nature or kind of conveyance should be shown by a written designation thereof on the right hand margin of the sheet opposite the caption containing the names of the parties. Such characterization of the deed has, of course, no legal efficacy, but only serves to direct the attention of the reader to the kind of deed being considered. The true character of the deed can only be ascertained from a general survey of the deed as a whole. The kinds of deeds most frequently referred to are "warranty deeds" and "quitclaim deeds." The former is nothing more than a deed containing a covenant of warranty,[45] and by common understanding it has come to mean a deed that warrants a good title. A quitclaim deed is simply a deed of release, and operates to pass

[39] Centenary M. E. Church v. Parker, 43 N. J. Eq. 307, 12 Atl. 142.
[40] Asheville Division v. Aston, 92 N. Car. 578.
[41] Ryan v. Martin, 91 N. Car. 464.
[42] Silverman v. Kristufek, 162 Ill. 222, 44 N. E. 430.
[43] Blanchard v. Floyd, 93 Ala. 53, 9 So. 418; Morse v. Carpenter, 19 Vt. 613.
[44] Cobb v. Lucas, 15 Pick (Mass.) 7.
[45] Allen v. Hazen, 26 Mich. 142.

all the estate, right, title, or interest that the grantor has in the premises. So where the deed contains a covenant of general warranty, it should be designated in the abstract as a "Warranty Deed," but if the covenant of warranty be absent and words of release are used, or if the deed is described as a quitclaim deed, the abstract should show it to be a "Quitclaim Deed." It is often said that quitclaim deeds differ from warranty deeds in that the former contain no covenants of warranty, but whether a deed is a quitclaim or not depends largely upon the words used, and the circumstances showing the purpose of the instrument, while the mere absence of a covenant of warranty does not constitute it a quitclaim.[46] It is for the examining counsel to determine from the words used the kind and character of the conveyance in question.

§ 265. **Date of the deed.**—While the date is no part of the deed, it is prima facie evidence of the time of its execution and delivery,[47] The date is sometimes inserted at the close, in the testimonium clause, and if it be later than the date expressed at the beginning of the deed it will be treated as the true date.[48]

The deed takes effect only from the time of its delivery, and the time of delivery may always be shown.[49] Since a date is no material part of a deed, a false or impossible date will not invalidate it, where the real date can be proved, and the deed will take effect from the time of its delivery.[50] Prima facie, the date specified in the deed is the date of its delivery,[51] although this presumption may be rebutted,[52] and a party to a deed is not estopped by force of any expressed date in the deed from showing that delivery took place at some other time.[53] The presumption that a deed was delivered on the day it bears date is not overcome by the fact that the acknowledgment bears a later date.[54] The mere fact that the date of a deed in a chain of title is subse-

[46] Taylor v. Harrison, 47 Tex. 454, 26 Am. Rep. 304.

[47] Meech v. Fowler, 14 Ark. 29; Ward v. Dougherty, 75 Cal. 240, 17 Pac. 193 7 Am. St. 151; Faulkner v. Adams, 126 Ind. 459, 26 N. E. 170.

[48] Kurtz v. Hollingshead, 4 Cranch C. C. (U. S.) 180, Fed. Cas. No. 7953.

[49] Treadwell v. Reynolds, 47 Cal. 171; Mitchell v. Bartlett, 51 N. Y. 447.

[50] Floyd v. Ricks, 14 Ark. 286, 58 Am. Dec. 374.

[51] Lake Erie & W. R. Co. v. Whitham, 155 Ill. 514, 40 N. E. 1014, 28 L. R. A. 612. 46 Am. St. 355.

[52] Blake v. Fash, 44 Ill. 302.

[53] Laws of Eng. Vol. 10, p. 382 (o).

[54] Hardin v. Crate, 78 Ill. 533; Raines v. Walker, 77 Va. 92.

quent to the date of its acknowledgment does not justify a refusal to take a conveyance of the land on the ground that the title is not clear. The real date of the delivery of the deed may be subsequent to its acknowledgment, and even after registration.[55]

The rights of parties are often made to depend upon an accurate statement of time, and the date of a deed may become important in determining questions of priority or in ascertaining whether all the statutory requirements in force at the time of execution have been complied with.[56]

As deeds are usually drawn the first recital in the premises is the date. This should be correctly copied in the abstract immediately below the line designating the character of the instrument. One line is usually sufficient for the purpose. If no date is given this fact should be noted in the place where the date would otherwise belong. If there is a defect or disparity of dates, both or all dates must be noted so as to bring the matter prominently before the notice of examining counsel.

§ 266. **Consideration.**—At the present time there is an apparent conflict of authority as to the necessity of a consideration for the conveyance of real estate. Many cases hold that a deed is valid made without a consideration in fact, and without any being expressed.[57] In a comparatively recent case, however, it was held in effect that a deed without a consideration expressed is invalid.[58] But as between the parties to a deed at the present day, no consideration, expressed or unexpressed, is necessary in those states where there are statutes to the effect that all conveyances of land signed and sealed by the grantor, having good authority to convey, shall be valid to pass the same, without any other act or ceremony whatever.[59] A deed of conveyance, though it be wholly voluntary, operates to pass title, as between the parties, as effectually as if it had been made for an adequate valuable consideration.[60] So also a deed of conveyance under seal imports a consideration, and none need in the first instance be pleaded or

[55] Dresel v. Jordan, 104 Mass. 407.
[56] Smith v. Porter, 10 Gray (Mass.) 66.
[57] Randall v. Ghent, 19 Ind. 271; Howard v. Turner, 125 N. Car. 107, 34 S. E. 229.
[58] Catlin Coal Co. v. Lloyd, 180 Ill. 398, 54 N. E. 214, 72 Am. St. 216.
[59] Houston v. Blackman, 66 Ala. 559, 41 Am. Rep. 756; Trafton v. Hawes, 102 Mass. 533, 3 Am. Rep. 494; Chambers v. Chambers, 227 Mo. 262, 127 S. W. 86, 137 Am. St. 567; Robertson v. Hefley, 55 Tex. Civ. App. 368, 118 S. W. 1159
[60] Martin v. Caldwell 49 Ind. App. 1, 96 N. E. 660; Comstock v. Son, 154 Mass. 389, 28 N. E. 296.

proved.[61] The acknowledgment of a consideration in a deed is prima facie evidence of a valuable consideration paid and the amount paid.[62] A valuable consideration is not always a money consideration. It may consist in anything which the parties esteem of value, anything that is a benefit to the grantor or a damage to the grantee.[63]

A concise statement of the consideration should follow that of the particulars of registration in the synopsis. The nature of it should be stated, as money or natural affection, that inquiry may, if necessary, be made, wherever the deed is liable to be called in question as in violation of the statute against fraudulent conveyances. The recital of the payment should be stated, because its absence is notice to the grantee that the prior grantor is unpaid, and that, therefore, a vendor's lien for purchase money exists against the property. The necessity of stating the consideration, and by whom it was paid, arises from the equitable doctrine that a conveyance not appearing to be induced by value paid by the grantee or damage suffered by him, must be assumed to have been intended to be held by the grantee in trust for the grantor, or other person who paid the consideration money. If the deed expresses no consideration, this fact should be shown in the same place indicated for the consideration statement, where one is expressed in the deed.

§ 267. **Operative words.**—The operative words of a deed of conveyance are the words by which the estate passes from the grantor to the grantee, and they are usually embodied in that part of the premises known as the granting clause, but it is sufficient if they are found in any part of the instrument, and are so used as to express an intention to convey.[64] Previous to Lord Coke's time it was the established practice to insert in deeds of conveyance all the words which were appropriate to the different forms of deeds, but at present the word "grant" is sufficient to amount to a grant, a feoffment, a lease, a release, confirmation or surrender. And the words "give," "grant," "bargain" and "sell" seem to be, according to the authorities, sufficient for all purposes

[61] Saunders v. Blythe, 112 Mo. 1, 20 S. W. 319.

[62] Mills v. Dow's Admr., 133 U. S. 423, 10 Sup. Ct. 413, 33 L. ed. 717.

[63] Charleston C. & C. R. Co. v. Leech, 33 S. Car. 175, 11 S. E. 631, 26 Am. St. 667.

[64] Branson v. Studabaker, 133 Ind. 147, 33 N. E. 98; Bridge v. Wellington, 1 Mass. 219.

as operative words transferring the title. In fact, any words which denote an intention to transfer the title are sufficient to make an effectual deed.[65]

Where, however, by statute or common law, certain technical words are made necessary in a conveyance, their equivalents will not suffice. Where the statutory form of deed is not employed, attention should be given to the operative words of conveyance in the deed. A document containing no words of conveyance can never operate as a deed.[66] Some words of conveyance must be used in every deed or no title will pass.[67] Even where a statute provides that any instrument in writing signed by the grantor is effectual to transfer the legal title, if such was the intention of the grantor, gathered from the entire instrument, some words of conveyance are necessary, and a court has no right to put them in by interpretation.[68] But a deed without sufficient words of conveyance in the granting clause will pass a fee if words sufficient for that purpose appear in other parts of the deed.[69]

In states where certain technical words of grant are made necessary to a valid conveyance the examining attorney should see that these precise words are employed and should object to a deed which does not contain them. As words of grant are necessary to the validity of the deed, and as they often imply covenants, it is important that they be set out in the synopsis of the deed in the abstract. The operative words of deed usually follow the recital of the consideration, and this order should be observed in stating them in the abstract.

§ 268. **Words of inheritance.**—At common law, to create an estate in fee simple by deed it is essential that the limitation shall be to the grantee "and his heirs," and no other words and no description of the estate is sufficient, even though the meaning be the same and the intention clear.[70] If the grant be to a corporation sole, the word "successors" is the proper word to use in order to pass a fee;[71] but in the case of a corporation aggregate no

[65] Gambril v. Doe, 8 Blackf. (Ind.) 140, 44 Am. Dec. 760; Cobb v. Hines, 44 N. Car. 343, 59 Am. Dec. 559.

[66] Cobb v. Hines, 44 N. Car. 343, 59 Am. Dec. 559; Brown v. Manter, 21 N. H. 528, 53 Am. Dec. 223.

[67] Gambril v. Doe, 8 Blackf. (Ind.) 140, 44 Am. Dec. 760.

[68] Bell v. McDuffie, 71 Ga. 264.

[69] Bridge v. Wellington, 1 Mass. 219.

[70] Young v. Mahoning Co., 53 Fed. 895; McDill v. Meyer, 94 Ark. 615, 128 S. W. 364; Boggan v. Somers, 152 N. Car. 390, 67 S. E. 965; Lemon v. Graham, 131 Pa. St. 447, 19 Atl. 48, 6 L. R. A. 663.

[71] Olcott v. Gabert, 86 Tex. 121, 23 S. W. 985.

words of limitation are necessary.[72] Even under the common law rule, no technical words of limitation are required in a strict quitclaim deed.[73] The rule is otherwise, however, where the quitclaim is by one tenant in common to a cotenant.[74] Where words of inheritance do not appear in a deed, but are used in another instrument to which the deed refers, a fee simple title will pass by the deed.[75] The common law rule requiring the use of words of limitation and inheritance has been changed by statute in many states; and in some states it is to be presumed that a fee simple was intended, unless a less estate is expressly limited or appears to be conveyed by operation of law.[76] Irrespective of statutes on the subject, it is declared that the strict rule of the common law should not be applied for the reason that it often defeats the plain intention of the parties.[77]

Some abstracters are disposed to regard words of limitation and inheritance in deeds as of little importance, but inasmuch as they mark the period which is to determine the estate, or limit the quantity of the estate, they must be scrutinized with great care. These words are usually found in the habendum clause immediately following the words "to have and to hold." Wherever found in a deed it is a good practice to copy the words verbatim in the abstract.

§ 269. **Description and boundaries.**—Next in importance after the parties to the deed is the description of the property attempted to be conveyed, but for convenience its place in the abstract should be immediately after the words of conveyance. Although the property be accurately described in the heading of the abstract it is thought best to describe it in the synopsis of each deed in the chain of title exactly as it is described in the instruments of conveyance, so that any discrepancies may be readily found by the examiner. That part of the description which pertains to the situation of the land in a given county and state may be abridged, but the remainder of the description should be in the

[72] Wilcox v. Wheeler, 47 N. H. 488.

[73] Rector v. Waugh, 17 Mo. 13, 57 Am. Dec. 251.

[74] Rector v. Waugh, 17 Mo. 13, 57 Am. Dec. 251.

[75] Lemon v. Graham, 131 Pa. 447, 19 Atl. 48, 6 L. R. A. 663.

[76] Words of inheritance must be used in deeds in Pennsylvania, New Jersey, Delaware, South Carolina, Florida, Ohio and Wyoming.

[77] Cole v. Lake Co., 54 N. H. 242.

exact words of the deed. Every description of the property found in the various instruments in the chain of title should be carefully compared with the description in the commencement or caption of the abstract, and any variance, either in form or substance, noted. The practice of omitting the description entirely, but inserting in its stead the words "description same as in caption," or simply noting any variation from the boundaries, lines, or monuments as stated in the caption, is not to be recommended.

§ 270. **Sufficiency of description.**—Among the more important particulars to be looked for in the description of the property in a deed are: (1) The state, county and town where the land is situated; (2) public or private surveys; (3) monuments, either natural or artificial, from which courses and distances are laid off; (4) streets and highways, a point on which may have formed the starting point and end of the description; (5) the boundaries of the land and their measurements, known as metes and bounds, and (6) the quantity and area of the land. Not all the above particulars, however, are mentioned in any one description. In the orderly arrangement of the parts of a deed, the description of the parcel or tract follows immediately after the operative words.

The description should contain all the particulars necessary to clearly and accurately identify the property, such as its location in a town and county named, its boundaries, their measurements, and the total area. A house in a town is usually described as situated on a particular street or road, and the dimensions of the lot of land are usually given in linear feet, or, where laid out or platted, it is usually described by the lot number; while land in the country is usually described by reference to government surveys, or to private surveys of the particular property, and the boundaries are often fixed by reference to the land of adjoining owners. Also, boundaries are sometimes determined by reference to fixed monuments, or by their distance from streets or natural or permanent objects. Deeds which do not describe or designate the lands are invalid for uncertainty, and where the description is wholly omitted, it can not be supplied by extrinsic evidence.[78]

While descriptions will be construed liberally, so far as possible,

[78] Shoemaker v. McMonigle, 86 Ind. 421; Crooks v. Whitford, 47 Mich. 283, 11 N. W. 159.

to carry out the intention of the parties, nothing passes by a deed but what is described in it, whatever the intention of the parties may have been. The main object of a description, however, is to furnish a means of identification,[79] and when a description is sufficient to enable a surveyor to identify the land with reasonable certainty, it is a sufficient description.[80] Parol evidence is admissible to identify the property, or to fit the description to the premises, but not to contradict the description.[81] A misnomer of the city, town, or county in which the land is situated does not invalidate the deed if the description is sufficient to identify the land.[82] The rule is that the description will be sufficient if the land can be identified with reasonable certainty, and this rule is taken in connection with that other rule which holds that to be certain which can be made certain.[83] A description from which it is possible to ascertain and identify the land intended to be conveyed is sufficient. And a deed which contains no other description than a reference to another deed containing a full description is sufficient.[84] If the description of the premises given in a deed furnishes a sufficient means of locating and identifying the land, the conveyance will be sustained, though some of the particulars of description may be erroneous or inconsistent.[85]

Both examiner and counsel should carefully compare the description in each deed forming the chain of title with every other deed therein, and with the description in the caption of the abstract.

§ 271. Identification of description by act of the parties. —A description which in itself does not identify the land may be cured by the acts of the parties.[86] If the parties to a deed which

[79] St. Stephen's Evangelical Lutheran Church v. Pierce, 8 Del. Ch. 179, 68 Atl. 194.

[80] Louisville & N. R. Co. v. Cullen, 32 Ky. L. 1110, 108 S. W. 857; Bogard v. Barhan, 52 Ore. 121, 96 Pac. 673, 132 Am. St. 676; Dunn v. Taylor (Tex. Civ. App.) 107 S. W. 952.

[81] Chattahoochie & G. R. Co. v. Pilcher, 163 Ala. 401, 51 So. 11; Watters v. Rome &c. R. Co., 133 Ga. 641, 66 S. E. 884; Cathey v. Buchanan Lumber Co., 151 N. Car. 592, 66 S. E. 580.

[82] Perry v. Clark, 157 Mass. 330, 32 N. E. 226.

[83] Winnipisiogee Paper Co. v. New Hampshire Land Co., 59 Fed. 542; Thompson v. Southern California Motor Road Co., 82 Cal. 497, 23 Pac. 130; Austin v. Dolbee, 101 Mich. 292, 59 N. W. 608.

[84] Phelps v. Phelps, 17 Md. 120; Glover v. Shields, 32 Barb. (N. Y.) 374.

[85] Vose v. Bradstreet, 27 Maine 156; Bell v. Woodward, 46 N. H. 315.

[86] Vejar v. Mound City Assn., 97 Cal. 659, 32 Pac. 713; McNamara v. Seaton, 82 Ill. 498.

does not describe the property with certainty, either before or after the date of the same, mark out or identify and appropriate certain land as the exact and identical parcel conveyed, or to be conveyed, by such deed, it will be held to be effective to convey such land. Their declaration and acts at the time of the conveyance may be proved to determine the intent of the parties.[87] When a tract of land intended to be conveyed is not identified in the conveyance, the parties may afterwards survey and stake out the land conveyed, and if the grantee then takes possession, this ascertains the grant and gives effect to the deed.[88] Also a conveyance by metes and bounds, accompanied by transfer of possession and marking the boundaries by natural objects, has been held to pass title, though no particular locality is set forth in the deed. Where the grantee takes possession of a tract of land under a deed which fails to give the boundary of one side, the court will supply the side omitted and hold the description sufficient. Such acts of identification can only be shown by matter in pais, of which the abstracter has no concern in his work of compiling the abstract. His conclusions are deduced from an examination of the records, and unless the parties have recorded the matter embodying their acts of identification he is not bound to make any note of such acts in the abstract.

§ 272. **How description construed.**—In construing a description of land, the intention of the parties is a controlling fact,[89] and such intention must be determined from the deed.[90] The circumstances and surroundings of the parties and their conduct subsequent to the execution of the instrument are to be considered; and in case of conflicting descriptions that construction should be adopted which will give effect to the intention of the parties.[91] The whole description of a deed, inartificially drawn, should be read together without giving special prominence to any one expression. A marked line referred to, being indisputably established, the remainder of the description should be read so as to harmonize with it.[92]

[87] Harris v. Oakley, 130 N. Y. 1, 28 N. E. 530.

[88] Ray v. Pease, 95 Ga. 153, 22 S. E. 190; Simpson v. Blaisdell, 85 Maine 199, 27 Atl. 101, 35 Am. St. 348.

[89] Rioux v. Cormier, 75 Wis. 566, 44 N. W. 654.

[90] Clement v. Bank of Rutland, 61 Vt. 298, 17 Atl. 717, 4 L. R. A. 425.

[91] Hubbard v. Whitehead, 221 Mo. 672, 121 S. W. 69.

[92] Bentley v. Napier (Ky. App.) 122 S. W. 180.

When the land is described by a designated subdivision of a section, it ordinarily means the government subdivision, but the intention of the parties to convey a definite piece of land actually located will prevail over this presumption.[93] Where a deed refers to the deed under which the grantor obtained title to the property, that deed is admissible in evidence to identify the land conveyed.[94]

When land is described in a deed as bounded on one side by the land of a third person, the true boundary line of such third person's land must be taken as the boundary line, and not the line as it was understood and agreed to exist at the time of the execution of the deed, if there is a variance between such two lines.[95] A boundary line described in a deed controls an alleged agreed line laid off by the parties prior to the execution of the deed, where the lines do not coincide.[96] A general description of land in a deed by giving the name by which the estate is commonly known is controlled by a subsequent particular description.[97] Where there are two descriptions of the property in a deed, one of which describes the land with reasonable certainty, and the other, giving some additional particulars, is incorrect, the incorrect particular or circumstance of description will be rejected as surplusage.[98]

It is a well established rule of construction that monuments used in fixing the boundary lines of real estate prevail, in cases of discrepancies, over courses and distances.[99] The reason of this rule is, that mistakes are deemed more likely to occur with respect to courses and distances than in regard to objects which are visible and permanent.[1] But the rule does not hold good if it clearly appears from the description, in the light of surrounding circumstances, that the courses and distances as given correctly describe the land intended to be conveyed.[2] Aside from this, the order in

[93] Town v. Greer, 53 Wash. 350, 102 Pac. 239.

[94] Steele v. Bryant, 132 Ky. 569, 116 S. W. 755.

[95] Bell v. Redd, 133 Ga. 5, 65 S. E. 90.

[96] Holden v. Alexander, 82 S. Car. 441, 62 S. E. 1108.

[97] Dochterman v. Marshall, 92 Miss. 747, 46 So. 542.

[98] Vestal v. Garrett, 197 Ill. 398, 64 N. E. 345; Cumberledge v. Brooks, 235 Ill. 249, 85 N. E. 197; Lanman v. Crooker, 97 Ind. 163, 49 Am. Rep. 437; Merrick v. Merrick, 37 Ohio St. 126, 41 Am. Rep. 493.

[99] Ayers v. Watson, 113 U. S. 594, 5 Sup. Ct. 641, 28 L. ed. 1093.

[1] Morrow v. Whitney, 95 U. S. 551, 24 L. ed. 456; Clements v. Pearce, 63 Ala. 284.

[2] White v. Luning, 93 U. S. 514, 23 L. ed. 938; Higinbotham v. Stoddard, 72 N. Y. 94; Hale v. Cottle, 21 Ore. 580, 28 Pac. 901.

which calls are to be resorted to in locating lands is: (1) Natural boundaries, (2) artificial marks, (3) adjacent boundaries, and (4) courses and distances.[3] Of course, where the monument is lost or destroyed and can not be located by oral testimony, resort will be had in fixing the boundaries to course and distance.[4]

Another rule of construction is that, conveyances of land bounded by an existing street or highway carry the title to the center of the street or highway, unless the description discloses a contrary intent. This rule is said to be based upon the principle that the legal terminus of a boundary by a monument is at the central point of the monument.[5] Another reason given for the rule is, that it will be presumed that the grantor had no intention of reserving a fee in the street or highway adjoining the land conveyed, when the way has ceased to be a benefit to him.[6]

Where the land conveyed borders on tide-waters the grantee takes only to high-water mark,[7] unless there is something in the deed to indicate an intention to pass the title to low-water mark.[8] This rule applies to grants from the sovereign as well as from private persons.[9] In some states a deed to lands bordering on a navigable stream extend the title to the middle of the main channel thereof.[10] In other states it is held that the grantee's title is carried to the edge of the water at high water; and still others, to the edge at low water.[11] Where the land borders on lake or pond, some courts hold that the grantee's title extends to the bed of the lake or pond, while others hold that the water's edge marks the boundary.[12]

[3] Chapman v. Hamblet, 100 Maine 454, 62 Atl. 215; Yanish v. Tarbox, 49 Minn. 268, 51 N. W. 1051.

[4] Blackburn v. Nelson, 100 Cal. 336, 34 Pac. 775.

[5] Paine v. Consumers' Storage Co., 71 Fed. 626, 19 C. C. A. 99; Olin v. Denver &c. R. Co., 25 Colo. 177, 53 Pac. 454.

[6] Overland Machinery Co. v. Alpenfels, 30 Colo. 163, 69 Pac. 574; Huff v. Hastings Express Co., 195 Ill. 257, 63 N. E. 105.

[7] Long Beach Land & Water Co. v. Richardson, 70 Cal. 206, 11 Pac. 695.

[8] Oblenis v. Creeth, 67 Fed. 303.

[9] Shively v. Bowlby, 152 U. S. 1, 14 Sup. Ct. 548, 38 L. ed. 331.

[10] Bellfountain Imp. Co. v. Niedringhaus, 181 Ill. 426, 55 N. E. 184, 72 Am. St. 269; Kentucky Lumber Co. v. Green, 87 Ky. 257, 10 Ky. L. 139, 8 S. W. 439; Hall v. Alford, 114 Mich. 165, 72 N. W. 137, 38 L. R. A. 205; Lake Shore & M. S. R. Co. v. Platt, 53 Ohio St. 254, 41 N. E. 243, 29 L. R. A. 52; Chandos v. Mack, 77 Wis. 573, 46 N. W. 803, 10 L. R. A. 207, 20 Am. St. 139.

[11] Williams v. Glover, 66 Ala. 189; St. Louis I. M. & S. R. Co. v. Ramsey, 53 Ark. 314, 13 S. W. 931, 8 L. R. A. 559, 22 Am. St. 195; McManus v. Carmichael, 3 Iowa 1; Fulmer v. Williams, 122 Pa. St. 191, 15 Atl. 726, 1 L. R. A. 603, 9 Am. St. 88.

[12] Concord Mfg. Co. v. Robertson, 66 N. H. 1, 25 Atl. 718, 18 L. R. A. 679.

§ 273. **Recitals in deeds.**—In the ordinary forms of deeds in general use in this country there are no formal narrative or introductory recitals. They formerly were a key to the operative part of the deed, and immediately followed the description of the parties, though at the present time, in deeds poll, such recitals as are used are often placed at the end of the description of the property. They usually consist merely of a reference to the deeds under which the grantor derives his title. Recitals may also be used to show the reasons, objects, or purposes for which the conveyance is made.[13] "Recitals" is a term which may also be applied to statements regarding the estate or title found in any part of the deed.

Recitals of whatever kind should be set out in the abstract fully and in the order in which they appear in the deed; condensing the matter only where it would be impracticable to copy the exact language of the deed. The importance of stating in the abstract the recitals in deeds arises from the circumstance that they are always notice to a grantee or mortgagee of the facts recited, and of everything to which, if followed up by reasonable inquiry, they will naturally lead; and they may operate by way of estoppel, so as to prevent the party making them from controverting their truth.[14] Where, however, the recitals in a deed do not agree with the operative part, the terms of the operative part will control.[15] Numerous cases illustrating the doctrine of constructive notice from recitals in deeds under which the purchaser claims may be found in the reports. They show the necessity of a careful perusal of every deed in the chain of title. Thus the land may be subject to some restriction as to its use contained in a deed from some former owner,[16] or it may be subject to a trust,[17] or, by the recital in the consideration clause of a deed by a former owner, through which conveyance the present grantee must derive his title, that the consideration is "to be paid," the land in the present grantee's hands may be subject to a vendor's lien for the purchase money.[18] No covenants are implied from the mere recitals

[13] McCoy v. Fahrney, 182 Ill. 60, 55 N. E. 61.

[14] Cordova v. Hood, 17 Wall. (U. S.) 1, 21 L. ed. 587.

[15] Miller v. Tunica County, 67 Miss. 651, 7 So. 429.

[16] Whitney v. Union R. Co., 11 Gray (Mass.) 359, 71 Am. Dec. 715.

[17] Dean v. Long, 122 Ill. 447, 14 N. E. 34.

[18] Cordova v. Hood, 17 Wall. (U. S.) 21 L. ed. 587; Deason v. Taylor, 53 Miss. 697.

of a deed, such as that the premises contain a specified number of acres, though in some instances such recitals estop the grantor from asserting an after-acquired claim, or denying the existence of the facts recited.[19]

§ 274. **Habendum, or the estate created.**—The office of the habendum is to limit the estate.[20] And the word "limit" as used in this connection, means to mark out or define. Its purpose is to declare or define the estate of the grantee in the thing granted—whether it is for life, in fee, etc. The habendum is not an essential part of a deed, if the estate is otherwise limited or defined. Thus the nature and duration of the estate are sometimes defined in the premises. In naming the grantee in the granting clause, if the words "and his heirs" are added, the grantee takes the estate in fee simple, though the habendum clause be wholly omitted.[21] Discrepancies frequently arise between the premises and the habendum. For instance, an estate of one kind may be limited in the premises and a different estate limited in the habendum. In such cases the habendum is not controlling, and the estate as given in the premises stands.[22] The habendum, where it is not repugnant, may explain, enlarge, or qualify, but can not contradict or defeat the estate granted in the premises.[23] Thus the habendum may supply the quantum or extent of the estate when the premises fail to describe same,[24] or, the estate may be limited in the habendum, although not mentioned in the premises,[25] or, where the premises by uncertain implication attempts to define the estate, resort must be had to the express limitation defined in the habendum.[26] In most of the statutory forms of deeds there is no habendum; and irrespective of such statutes it is not an essential part of a deed, if the estate is otherwise limited or defined. In conveyances creat-

[19] Ferguson v. Dent, 8 Mo. 667.

[20] McDill v. Meyer, 94 Ark. 615, 128 S. W. 364; Totten v. Pocahontas Coal & Coke Co., 67 W. Va. 639, 68 S. E. 373.

[21] Montgomery v. Sturdivant, 41 Cal. 290; Major v. Bukley, 51 Mo. 227; Karchner v. Hoy, 151 Pa. St. 383, 25 Atl. 20.

[22] Hughes v. Hammond, 136 Ky. 694, 125 S. W. 144, 26 L. R. A. (N. S.) 808; Link v. MacNabb, 111 Md. 641, 74 Atl. 825.

[23] Breed v. Osborne, 113 Mass. 318; Rines v. Mansfield, 96 Mo. 394, 9 S. W. 798.

[24] Doren v. Gillum, 136 Ind. 134, 35 N. E. 1101.

[25] Wommack v. Whitmore, 58 Mo. 448.

[26] Jacobs v. All Persons, 12 Cal. App. 163, 106 Pac. 896; Riggin v. Love, 72 Ill. 553; Bodine v. Arthur, 91 Ky. 53, 12 Ky. L. 650, 14 S. W. 904.

ing trusts, and in assignments for the benefit of creditors, etc., the habendum may appropriately declare the trusts on which the property is to be held.[27]

§ 275. **Exceptions and reservations.**—In conveying lands the grantor often wishes to retain some part of the land described or to have some right therein. This is accomplished by inserting in the deed the proper clauses of exception and reservation. The office of the exception clause in a deed is to withhold from its operation some part or parcel of the thing, which, but for the exception, would pass by the general description to the grantee. While on the other hand, a reservation is the creation of some new right issuing out of the thing granted, and which did not exist as an independent right, in behalf of the grantor and not of a stranger.[28] A reservation is never a part of the estate itself, but is something taken back out of that already granted, as rent, or the right to cut timber, or to do something in relation to the estate; while an exception is of some part of the estate not granted at all.[29]

It is not always easy to distinguish between an exception and a reservation in a conveyance, and the terms "reserving" and "excepting" are not conclusive in determining which is intended, but this must be determined by the character and effect of the provision itself.[30] The appropriate word or words for the creation of an exception are, "saving and excepting" or "excepting" alone. While the word commonly used to create a reservation is "reserving." But these words are often used together, and in such cases it becomes difficult to determine whether a particular clause is a reservation or an exception. In one case it was held to create a reservation, rather than an exception.[31] Sometimes these terms are used indiscriminately, and what is described in a conveyance as an exception is often held to be a reservation.[32] Technically the term "reservation" is applicable only to rents and services and whatever things are stipulated to be rendered for the tenure of

[27] Nightingale v. Hidden, 7 R. I. 115.

[28] Brown v. Cranberry Iron &c. Co., 59 Fed. 434; Marshall v. Trumbull, 28 Conn. 183, 73 Am. Dec. 667; Dawson v. Western Maryland R. Co., 107 Md. 70, 68 Atl. 301, 14 L. R. A. (N. S.) 809, 126 Am. St. 337n, 15 Ann. Cas. 678.

[29] Youngerman v. Polk County, 110 Iowa 731, 81 N. W. 166.

[30] Gould v. Howe, 131 Ill. 490, 23 N. E. 602.

[31] Biles v. O. & G. H. R. Co., 5 Wash. 509, 32 Pac. 211.

[32] Wellman v. Churchill, 92 Maine 193, 42 Atl. 352.

the land, but its application has been extended, and easements are now said to be reserved; but their reservation is said to operate by way of implied grant.[33] An exception retains the title in the thing excepted in the grantor, though the purpose for which the exception is made be a future one.[34] Examples of reservations are: a right of way, of water, of light, or of any other right or profit to arise out of the thing granted by whatever name the parties may give to the reservation.[35] But if a particular way already existing is reserved, the reservation may be construed as an exception, if from the deed itself, and the situation of the parties, such appears to have been the intention of the parties.[36] If a reservation be doubtful it must be construed in favor of the grantee.[37]

Liens for purchase money, annuities, charges for support and maintenance of the grantor, and the like, are frequently reserved on the faces of conveyances; and require careful attention on the part of both the abstracter and examining counsel. Everything, whether in the nature of an exception or a reservation should be copied verbatim in the abstract. Counsel will often experience difficulty in determining whether the language used constitutes a reservation or an exception. He may be called upon to determine whether the language used expresses an intention to retain an incorporeal right for life, or whether it is to retain a definite part of the thing granted.[38] A reservation is always in favor of the grantor, and, if it does not contain words of inheritance, it exists only for the life of the grantor.[39]

§ 276. **Conditions precedent and subsequent.**—A condition precedent is one to be performed before the estate vests,[40] while a condition subsequent is one to be performed after the vesting and the intent of which is to defeat the estate.[41] Whether

[33] Whitney v. Fitchburg R. 178 60 N. E. 384.

[34] Brown v. Cranberry Iron &c. Co., 59 Fed. 434; Wood v. Boyd, 145 Mass. 176, 13 N. E. 476.

[35] Kister v. Reeser, 98 Pa. St. 1, 42 Am. Rep. 608.

[36] Chappell v. New York &c. R. Co., 62 Conn. 195, 24 Atl. 997, 17 L. R. A. 420.

[37] Jacobs v. Roach, 161 Ala. 201, 49 So. 576.

[38] Engel v. Ayer, 85 Maine 448, 27 Atl. 352.

[39] Ashcroft v. Eastern R. Co., 126 Mass. 196, 30 Am. Rep. 672.

[40] Borst v. Simpson, 90 Ala. 373, 7 So. 814 Phillips v. Gannon, 246 Ill. 98, 92 N. E. 616; Sullivan-Sanders Lumber Co. v. Reeves, 58 Tex. Civ. App. 488, 125 S. W. 96.

[41] Bryan v. Bliss-Cook Oak Co., 178 Fed. 217; Platt v. Platt, 42 Conn. 330; Phillips v. Gannon, 246 Ill. 98, 92 N. E. 616.

the condition be one or the other depends upon the intention of the parties to be gathered from the whole instrument, there being no technical words which distinguish them,[42] and a doubtful condition will be construed as subsequent rather than precedent.[43] The presence of a re-entry clause, while not indispensable, is always important as evidence of an intention to impose a condition subsequent.[44]

Under a deed creating a condition subsequent the title vests in the grantee, and remains in him until it is divested by the entry of the grantor;[45] but in a condition precedent the title does not vest at all unless the condition is first performed.[46] A condition will not be raised by implication from the mere declaration in the deed that the conveyance is made for a special and particular purpose without being coupled with words appropriate to make such a condition.[47]

A condition is created by the use of such words as "on condition," "provided," "so as," "so that," "if it happen," or any other like appropriate words which import that the vesting or continuance of the estate is to depend upon the observance of the provision named. These words of condition should be a part of the habendum or come directly after it.[48] If used in this place the words of condition qualify the grant, controlling, but not contradicting, the more general words used in the premises. If the words of condition are found in any other part of the deed, as, for example, among the covenants, or, as is often the case, in the premises, as a part of the statement of consideration, their unusual and inappropriate position may have an influence on the interpretation of the deed.[49] Where the short form statutory deed is used, in which the habendum is absent, about the only place in the usual printed form for the insertion of a condition is just after the description of the property, and this appears to be the place where the condition is inserted when this form of

[42] Osgood v. Abbott, 58 Maine 73.
[43] Phillips v. Gannon, 246 Ill. 98, 92 N. E. 616.
[44] Druecker v. McLaughlin, 235 Ill. 367, 85 N. E. 647.
[45] Spect v. Gregg, 51 Cal. 198; Spofford v. True, 33 Maine 283, 54 Am. Dec. 621.
[46] Finlay v. King, 3 Pet. (U. S.) 346, 7 L. ed. 701; Chute v. Washburn, 44 Minn. 312, 46 N. W. 555.
[47] Faith v. Bowles, 86 Md. 13 37 Atl. 711, 63 Am. St. 489.
[48] Elyton Land Co. v. South & N. A. R. Co., 100 Ala. 396, 14 So. 207; Warner v. Bennett, 31 Conn. 468.
[49] Graves v. Deterling, 120 N. Y. 447, 24 N. E. 655.

deed is used.[50] In whatever form or position the condition appears in the deed it should be copied verbatim in the abstract, and its position in the deed with reference to other clauses should be clearly indicated.

§ 277. Restrictions as to the use of land.—Restrictions upon the use and enjoyment of the land conveyed are generally regarded as covenants, and not conditions.[51] But if there is any doubt whether a provision is a restrictive covenant or a condition, it will be held to be the former.[52] A restriction may, of course, if such be the intention of the parties, be so expressed as to make it a condition;[53] but where the restriction is a covenant, and not a condition, its breach occasions no forfeiture.[54] Whether or not the recitals in a deed create an estate upon condition or constitute a mere covenant, must be ascertained from the language employed, the situation of the parties, their relation to the subject of the transaction and the object in view.[55] An agreement in the deed limiting the use of the premises is a covenant, not a condition, and its violation will not work a forfeiture of the estate granted.[56] Where land is conveyed for certain purposes and there is no provision for re-entry for condition broken, or words indicating an intention that the appropriation of the premises to any other purpose should defeat the estate granted, the provision does not constitute a condition.[57]

A restriction on the use of real property is an encumbrance,[58] and the words creating same should be copied in the abstract so that counsel may determine their scope and import. Restrictions are to be fairly and reasonably interpreted according to their apparent purpose of protection or advantage intended by the parties. They will be upheld if not against public policy or a prohibition of the use of the land granted. They will never be

[50] Preston v. Bosworth, 153 Ind. 458, 55 N. E. 224, 74 Am. St. 313.

[51] Stone v. Houghton, 139 Mass. 175, 31 N. E. 719; Graves v. Deterling, 120 N. Y. 447, 24 N. E. 655.

[52] Seaboard Air Line R. Co. v. Anniston Mfg. Co., 186, Ala. 264, 65 So. 187.

[53] Adams v. Valentine, 33 Fed. 1; Dana v. Wentworth, 111 Mass. 291.

[54] Graves v. Deterling, 120 N. Y. 447, 24 N. E. 655.

[55] Union Stock Yards Co. v. Nashville Packing Co., 140 Fed. 701, 72 C. C. A. 195.

[56] Graves v. Deterling, 41 Hun 643, 3 N. Y. St. 128.

[57] Tinker v. Forbes, 136 Ill. 221, 26 N. E. 503.

[58] Halle v. Newbold, 69 Md. 265, 14 Atl. 662; Lodge v. Swampscott, 216 Mass. 260, 103 N. E. 635; Foster v. Foster, 62 N. H. 46; Dieterlen v. Miller, 114 App. Div. (N. Y.) 40, 99 N. Y. S. 699, 19 N. Y. Ann. Cas. 26.

implied unless such appears to be the presumed intention of the parties.

The burden or obligation of a restrictive covenant, made, upon the conveyance of land, by the grantor or grantee, will in some, but not in all, jurisdictions, pass to and bind a subsequent transferee of the land affected thereby. Even in jurisdictions where such covenant is held not to run with the land, an agreement as to the use of land may, under certain circumstances, affect a subsequent purchaser of the land who takes with notice of the agreement. The question is not whether the covenant runs with the land, but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, and with notice of which he purchased.[59] It should be remembered in investigating a title that one important effect of a recital in a deed is that of giving notice to all who derive title through the deed. So, where a deed in the chain of title contains the recital of a restriction as to the use of the land, a subsequent grantee of the land takes it subject to the restriction.[60]

§ 278. **Covenants for title.**—Covenants for title are agreements by the grantor in solemn form inserted in the deed for the protection of the grantee in case the latter's title should be afterward overthrown, or incumbrances upon the property successfully asserted. As a general rule the grantee's right to relief against the grantor, in case he should suffer loss through a defective title after the contract has been executed by a conveyance, depends upon the covenants in the deed. In the absence of covenants for title, the general rule prevails that the grantee is, in the absence of fraud or mistake, absolutely without relief at law or in equity. Consequently, it is important that the deed should contain covenants adequate for his protection, and in those states where the grantee is held entitled to a conveyance with general covenants, his right should never be deemed to have been parted with, except upon clear evidence that, by the terms of the contract, the grantor was bound only to execute a quitclaim deed, or a deed without any covenants whatever.

In this country the usual covenants in an ordinary warranty

[59] Whitney v. Union R. Co., 11 Gray (Mass.) 359, 71 Am. Dec. 715. Tallmadge v. East River Bank, 26 N. Y. 105.

[60] Whitney v. Union Ry. Co., 11 (Mass.) 359, 71 Am. Dec. 715.

deed are those: (1) Of seisin, (2) of good right to convey, (3) against incumbrances, (4) of warranty, (5) for quiet enjoyment, and (6) for further assurance.[61] These covenants are either general or special. They are general when against the acts, claims and demands of any and all persons whomsoever; and special when they are against the acts and claims of the grantor or of any person claiming by, through or under him. The latter is commonly called a quitclaim, and is, with respect to defects of title not arising from some act of the grantor or those claiming under him, no more in effect than a conveyance without covenants of any kind.

No particular form or words are necessary to create a covenant. It may be created without the use of the word "covenant" in the clause containing the stipulation.[62] It may be embodied in a recital in any part of the deed, and a single sentence may contain several covenants.[63] A deed of conveyance may, however, be perfectly valid, and may convey title, without covenants of any kind, if in other respects it conforms to law. In such case the grantee assumes the risk of soundness of title. He can not show a parol agreement which will convert a deed without covenants into one with them. Where, in a chain of title, there is a series of deeds with general covenants for title, the title is sometimes regarded as more secure than where the conveyances are quitclaim deeds, or deeds with limited or special covenants only, the presence of which has been said to afford some ground for suspicion that there is some defect in the title.[64]

By statute in many states, covenants for title are implied from the use of certain words of conveyance. In other states the statutes provide that no covenants shall be implied in a conveyance of real estate, whether such conveyance contains special covenants or not, but these statutes are held not to apply to leases.[65] Where it is provided by statute that the use of certain words in a conveyance themselves import covenants for title, their use is as effectual for that purpose as though such covenants had been expressly contained in the deed.[66] Where, by virtue of statute, covenants for

[61] 4 Kent Com. 471.

[62] Randel v. Chesapeake &c. Canal Co., 1 Har. (Del.) 151.

[63] Johnson v. Hollensworth, 48 Mich. 140, 11 N. W. 843.

[64] Johnson v. Williams, 37 Kans. 179, 14 Pac. 537, 1 Am. St. 243; Peters v. Cartier, 80 Mich. 124, 45 N. W. 73, 20 Am. St. 508.

[65] Boreel v. Lawton, 90 N. Y. 293; Shaft v. Carey, 107 Wis. 273, 83 N. W. 288.

[66] Ragle v. Dedinan 50 Ind. App. 359, 98 N. E. 367.

title are implied from the use of certain words of conveyance, no implied covenants will arise when inconsistent with the express covenants, or when it appears from the language used by the parties that it was not intended that any such covenant as that implied by the statute should take effect.[67] Statutes provide that covenants for title are implied from the use of such words as "grant, bargain, and sell,"[68] "grant and convey,"[69] "convey and warrant,"[70] and "bargained and sold."[71] By statute or by judicial decisions in some states, the covenant of warranty is made to include the other covenants of title.[72] In states where covenants are implied from the use of certain words of grant, the words used should be literally transcribed. Where the deed is in form a "warranty deed," but does not contain any of the customary covenants, the omission should be noted in the abstract.

§ 279. **Defective covenants.**—A vast number of objections to title are founded upon errors and irregularities in expressing covenants in deeds. Clerical mistakes and inadvertent omissions in this respect are of frequent occurrence, and the abstracter should use extreme care in abstracting that portion of every deed containing covenants of any kind. It is a common practice for conveyances to introduce a covenant in some such words as "that the grantor covenants to warrant and defend as against all persons claiming by, through, from or under himself, and none other." Now, these super-added words qualify the covenant of warranty and make the covenant what is sometimes called a qualified warranty, and reduce the deed to the quality of a mere quitclaim deed.[73] In attempting to express a covenant of seisin in one case the grantor used the word "signed" instead of "seised," and it was held that a court of law could not read "seised" for "signed," so as to make the sentence in which it was used operative as a

[67] Douglass v. Lewis, 131 U. S. 75, 9 Sup. Ct. 634, 33 L. ed. 53; Dun v. Dietrich, 3 N. Dak. 3, 53 N. W. 81.

[68] Heflin v. Phillips, 96 Ala. 561, 11 So. 729; Brodie v. Watkins, 31 Ark. 319; McDonough v. Martin, 88 Ga. 675, 16 S. E. 59, 18 L. R. A. 343; Altringer v. Capeheart, 68 Mo. 441; Memmert v. McKeen, 112 Pa. St. 315, 4 Atl. 542.

[69] Cruger v. Ginnuth, 3 Wills, Civ. Cas. Ct. App. (Tex.) 24.

[70] Dalton v. Taliaferro, 101 Ill. App. 592; Jackson v. Green, 112 Ind. 341, 14 N. E. 89.

[71] Douglas v. Lewis, 131 U. S. 75, 9 S. Ct. 634, 33 L. ed. 53.

[72] Van Wagner v. Van Nostrand, 19 Iowa 422; Smith v. Jones, 97 Ky. 670, 17 Ky. L. 456, 31 S. W. 475; Messer v. Oestreich, 52 Wis. 684, 10 N. W. 6.

[73] Bennett v. Davis, 90 Maine 457, 38 Atl. 372; Doane v. Willcutt, 5 Gray (Mass.) 328, 66 Am. Dec. 369.

covenant of seisin.[74] Covenants of seisin in a warranty deed, wherein the grantor covenants "for his heirs, executors, and administrators," creates no liability on the part of the grantor for a breach of such covenant.[75]

§ 280. Signature to the deed.—By the early common law no signing was necessary to give effect and validity to a deed of conveyance, as the seal alone was the test of its existence.[76] But the English statute of frauds and similar statutes in most of the states of this country expressly provide that all deeds of conveyance shall be signed by the party making them, or by his agent duly constituted.[77] As to the manner of signing, all that is required is that the deed should be signed so as to show that the grantor intended it as his act and deed.[78] Nor is it essential that the signature be at the end of the deed, but it will be sufficient if it appear in the body of the instrument, especially if the deed was written by the grantor himself who has inserted his name in it,[79] or even in case the deed was written by another, who inserted the grantor's name at the latter's direction, and was acknowledged by the grantor and delivered as his deed.[80] But the statutes of many states provide that the instrument must be "subscribed," and under such requirement the deed should be signed at the bottom or end thereof, as it has been held that there is a difference between the "signing" and "subscribing" of an instrument.[81] The mere signing, sealing, and acknowledging a deed, in which another person is named as grantor, does not make it the deed of the person so signing who is not named as grantor,[82] and the naming of a person in a deed as grantor does not ordinarily make it his deed unless it is signed and sealed by him.[83] But a deed written by a person who inserts his name as a grantor is

[74] Hagler v. Simpson, 44 N. Car. 384.

[75] Rufner v. McConnel, 14 Ill. 168; Traynor v. Palmer, 86 Ill. 477; Bowne v. Wolcott, 1 N. Dak. 497, 48 N. W. 426.

[76] Jerome v. Ortman, 66 Mich. 668, 33 N. W. 759.

[77] Hutchins v. Byrnes, 9 Gray (Mass.) 367; Devereux v. McMahon, 108 N. Car. 134, 12 S. E. 902, 12 L. R. A. 205; Wright v. Wakeford, 17 Ves. (Jr.) 454a.

[78] Armstrong v. Stovall, 26 Miss. 275.

[79] Devereux v. McMahon, 108 N. Car. 134, 12 S. E. 902, 12 L. R. A. 205.

[80] Newton v. Emerson, 66 Tex. 142, 18 S. W. 348.

[81] Winston v. Hodges, 102 Ala. 304, 15 So. 528. But see Cal. Canneries Co. v. Seatena, 117 Cal. 447, 49 Pac. 462.

[82] Harrison v. Simons, 55 Ala. 510; Payne v. Parker, 10 Maine 178, 25 Am. Dec. 221.

[83] Thomas v. Caldwell, 50 Ill. 138; Adams v. Medsker, 25 W. Va. 127.

valid, though not subscribed by him, where there is proof that he delivered the instrument to the grantee, or other evidence showing his intention to make his signature final.[84] The deed may be executed by the grantor's mark in place of his signature, and it is not essential that the words "his mark" should accompany the mark where it appears that the mark was made by him, or was made by another in his presence and adopted by him,[85] nor is it necessary that a signing by mark should be specially attested by witnesses, unless witnesses to deeds otherwise signed are required.[86]

A deed of conveyance can not be executed by a third person for the grantor in his absence unless such third party is authorized to do so by an instrument under seal. It is the custom in many places to insert in the deed a brief recital of the power of attorney, its place of record, etc., which is proper and desirable, but has been held to have no effect as showing authority.[87] The attorney may execute the deed by signing the name of the principal alone, without signing his own, but the usual method is to sign both the principal's name and his own, and not merely that of the principal.[88]

A deed by a corporation is properly executed by an authorized officer signing the corporate name, adding his own signature and official title, and affixing the corporate seal. The conveyance should purport to be that of the corporation, and not merely that of its officers.[89] The abstracter should carefully observe and note in the abstract any departure from the legal requirements as to signing the deed; especially in the cases of deeds by married women, conveyances by delegated authority and by corporations.

§ 281. Sealing.—Seals are a relic of that period when men, as a rule, could not write. When signatures became common acquirements, a seal was supposed to impart a certain solemnity to the act of signing and deliberation upon the contents of the instrument. While there has been a tendency in modern times to dispense with the seal, some states still retain the formality of using the seal in the execution of deeds. Where the use of the seal is not dispensed with by statute, it is an essen-

[84] Newton v. Emerson, 66 Tex. 142, 18 S. W. 348.

[85] Sellers v. Sellers, 98 N. Car. 13, 3 S. E. 917.

[86] Finley v. Prescott, 104 Wis. 614, 80 N. W. 930, 47 L. R. A. 695.

[87] Waggener v. Waggener, 3 T. B. Mon. (Ky.) 542.

[88] Wood v. Goodridge, 6 Cush. (Mass.) 117, 52 Am. Dec. 771.

[89] Norris v. Dains, 52 Ohio St. 215, 39 N. E. 660, 49 Am. St. 716.

tial part of a deed,[90] and the mere recital in the testimonium clause of an instrument signed and delivered for a deed, that the parties have affixed their seals, will not make it a sealed instrument if no scroll or mark is affixed.[91] On the other hand, if it is in fact sealed, the omission of a recital of the fact in the instrument does not destroy its effect as a deed.[92] In jurisdictions where the common-law seal is required, there should generally be some wafer annexed or impression made, as it has been recently held that the letters "L. S." do not make a common-law seal,[93] and in another case it was held that the word "seal" with a brace at each end, printed when the blank was printed, and following the grantor's signature, was not a seal.[94] However, it appears that the courts in some jurisdictions have been more liberal on the question as to what is a seal, and have authorized the use of a scroll instead.[95]

In many states no seal of any kind is essential to the validity of a deed; but where an impression upon the paper itself, or a scroll is required, it is often required to be recognized as such in the body of the instrument. This is usually the office of the testimonium clause. If not so recognized, the scroll is apt to be disregarded and the paper held to be unsealed and inoperative as a deed.[96] In some cases the acknowledgment of the instrument as a deed supplies the failure of the grantor to recognize the seal in the body of the instrument.[97]

Where a seal or scroll is required the examiner should see that there are as many scrolls or seals as there are signatures to the instrument. It is only in case the execution is defective or something has been omitted that the abstract need contain any reference to the execution, but any defects or omissions must be literally transcribed.

§ 282. **Attestation.**—No attestation was necessary to the validity of a deed at common law, and is not now necessary except when required by statute. Under some statutes requiring

[90] Brown v. Dickey, 106 Maine 97, 75 Atl. 382; Todd v. Union Dime Sav. Inst., 118 N. Y. 337, 23 N. E. 299.

[91] Comley v. Ford, 65 W. Va. 429, 64 S. E. 447.

[92] Cummins v. Woodruff, 5 Ark. 116.

[93] Barnard v. Gantz, 140 N. Y. 249, 35 N. E. 430.

[94] Manning v. Perkins, 86 Maine 419, 29 Atl. 1114.

[95] In re Hacker's Appeal, 121 Pac. 192, 15 Atl. 500, 1 L. R. A. 861.

[96] Clegg v. Lemessurier, 15 Grat. (Va.) 108.

[97] Cosner v. McCrum 40 W. Va. 339, 21 S. E. 739.

attestation, unattested deeds are in effect void, though the statutes do not expressly declare them so.[98] An acknowledgment does not dispense with the necessity of attestation unless the statute so provides.[99] To constitute a good attestation the witnesses must sign the deed as witnesses in the presence of the grantor, or, if in his absence, at his special request to attest the instrument,[1] and if the witnesses failed to sign at the time of the execution, though present, and if they sign afterward without the request of the parties, it is not a good attestation.[2] Under a statute which in general terms requires the witnesses to subscribe or sign the deed as a witness, a witness who makes his mark is sufficient;[3] but such is not the rule where the statute provides that the witness must be able to write and must write his name as a witness.[4]

The attestation clause has been held not essential to the validity of the deed where the instrument is attested and signed by the witnesses.[5] In order that it may appear on the instrument that the witnesses sign in this capacity, their signatures usually follow a brief attestation clause placed at the end of the instrument and to the left of the grantor's signature. This clause varies in form, the more usual forms being: "Signed, sealed and delivered in the presence of," "sealed in the presence of," "in the presence of," or, in some states, simply one word, as "attest," or "witness" is used.

In jurisdictions where attestation is required, any omission or irregularity respecting it should be noted on the abstract, but if the attestation be in compliance with the statute there is no necessity of any note concerning attestation.

§ 283. **Acknowledgment.**—An acknowledgment is a declaration made before a competent officer, by one who has executed an instrument, that it is his act and deed. The certificate of acknowledgment is the formal statement of the officer of the fact of the declaration made by the party that the instrument is his act and deed. The term "acknowledgment" is often used as

[98] Winsted Sav. Bank &c. Assn. v. Spencer, 26 Conn. 195; Crane v. Reeder, 21 Mich. 24, 4 Am. Rep. 430.

[99] Tarpey v. Desert Salt Co., 5 Utah 205, 14 Pac. 338.

[1] Mutual Life Ins. Co. v. Corey, 54 Hun (N. Y.) 493, 27 N. Y. St. 608, 7 N. Y. S. 939, Rev'd 135 N .Y. 326, 31 N. E. 1095.

[2] Hollenback v. Fleming, 6 Hill (N. Y.) 303.

[3] Devereux v. McMahon, 102 N. Car. 284, 9 S. E. 635.

[4] Stewart v. Beard, 69 Ala. 470.

[5] Blalock v. Miland, 87 Ga. 573, 13 S. E. 551.

designating the certificate.[6] The chief purpose of the acknowledgment is to afford proof of the due execution of the deed by the grantor, sufficient to authorize the recorder to record it. But a deed without acknowledgment, or defectively acknowledged, generally passes the title equally with one acknowledged, as against the grantor and his heirs;[7] but without an effectual acknowledgment, a deed can not be recorded so as to impart notice of the conveyance to the world.[8] Acknowledgment has also been held essential in certain cases in order to render the instrument effective.[9] But it will be observed that the statutes usually make an unacknowledged deed without effect as against a purchaser, not as between the parties to such deed.[10] The certificate of acknowledgment must disclose the place or venue where it has been taken, as it must appear that the officer acted within the territorial limits of his jurisdiction.[11]

A statutory requirement that the official character of the officer taking the acknowledgment be authenticated must be strictly complied with.[12] This authentication is usually done by the clerk of the court in whose office the evidence of the official character of the officer taking the acknowledgment is kept. The authentication, however, is not generally required where the officer taking the acknowledgment has an official seal, and performs the act under his hand and seal.

Where the statute requires a married woman to be examined privily, the certificate of the officer must state that he so examined her, and that she acknowledged the instrument to be her free and voluntary act. Also where the statute requires that a married woman shall state that she does not wish to retract her act and deed, the certificate will be fatally defective if it does not recite that fact.[13]

The recital that the grantor appeared before the officer and acknowledged the deed is the gist of the whole certificate. The

[6] Rogers v. Pell, 154 N. Y. 518, 49 N. E. 75.

[7] Sicard's Lessee v. Davis, 6 Pet. (U. S.) 124, 8 L. ed. 342; Wilson v. Wilson, 85 Nebr. 167, 122 N. W. 856.

[8] Bass v. Estill, 50 Miss. 300; Coffey v. Hendricks, 66 Tex. 676, 2 S. W. 47.

[9] Blume v. White (Tex. Civ. App.) 111 S. W. 1066.

[10] Baker v. Baker, 239 Ill. 82, 87 N. E. 868; Zacharia v. Cohen Co., 140 Iowa 682, 119 N. W. 136; Burton-Whayne Co. v. Farmer's & Drovers' Bank, 130 Ky. 389, 113 S. W. 445, 114 S. W. 288.

[11] Hudson v. Webber, 104 Maine 429, 72 Atl. 184.

[12] Phillips v. People, 11 Ill. App. 340; Knighton v. Smith, 1 Ore. 276.

[13] Churchill v. Monroe, 1 R. I. 209; Grove v. Zumbro, 14 Grat. (Va.) 501.

word "acknowledged" is not indispensable, but unless the fact of acknowledgment be made to appear by the use of that word or its equivalent, the certificate will be fatally defective.[14] It is the better practice for the officer to insert the date of the certificate in the attestation clause; but this is not indispensable unless made so by statute.[15] It is absolutely essential that the certificate shall be signed by the officer by whom it is made and the recital of his name in the body of the certificate will not suffice.[16] It is not necessary that the officer shall add to his signature his official designation, if the capacity in which he acts elsewhere appears in the certificate.[17] Where by statute it is provided that the certificate shall be under the signature and seal of the officer, the omission of the seal will be fatal.[18]

In a few states the acknowledgment of deeds before certain designated officers, is an essential element of execution, but in most of the states the only object of the acknowledgment is to furnish the recording officer with proof that the deed is genuine, while as between the parties, except where one of the grantors is a married woman, the deed is valid without the acknowledgment. While, as a general rule, deeds are valid and effective as between the parties without acknowledgment, that formality is of vital importance to the grantee. For, unless all the formalities in this respect are observed, the deed, though admitted to record, will not be notice to subsequent purchasers and creditors of the grantor, who might, in consequence, deprive the grantee of the estate. Besides, a defective certificate of acknowledgment is regarded as a defect in the grantee's title, and should he afterward wish to sell the estate the defect might seriously interfere. There has been no more prolific source of objections to title than irregular or informal certificates of acknowledgment. It therefore behooves the abstracter to subject the deed to the closest scrutiny for any departure from the required form, and to note in the abstract any omission or irregularity respecting the acknowledgment. Counsel should insist on a rigid adherence to the form expressly provided by statute. As a general rule, substantial compliance with a statutory form of acknowledgment is all that is

[14] Cabell v. Grubbs, 48 Mo. 353.
[15] Webb v. Huff, 61 Tex. 677.
[16] Carlisle v. Carlisle, 78 Ala. 542.
[17] Brown v. Farran, 3 Ohio 140.
[18] Mason v. Brock, 12 Ill. 273, 52 Am. Dec. 490.

required. Words of equivalent import may be substituted for the words used in the statute or in the form.[19]

§ 284. Examples of defective acknowledgments.—It is thought proper in this connection to direct the reader's attention to some of the more common errors and omissions in the acknowledgment of deeds, as a vast number of objections to title are founded upon defects in this respect.

Where the statute prescribes a form of acknowledgment, a substantial compliance therewith is necessary. It has been held that the omission from a statutory form of certificate of the words "for the purposes therein contained" is fatal.[20] Under a statute providing that "the certificate of acknowledgment shall state the act of acknowledgment," and that a specified form containing a recital that the party executed the instrument as his "free act and deed" may be used, it was held that a certificate omitting that the instrument was the free act and deed of the grantor was not a sufficient compliance with the statute.[21] Where a statute provides that the deeds of corporations must be acknowledged by the president and secretary, an acknowledgment by the vice-president and assistant secretary of a corporation was held insufficient.[22] Under a statute requiring the officer to certify that the person making the acknowledgment is personally known or proved to him by competent evidence to be the identical person who executed the deed, it is held not sufficient for the officer to state simply that the deed was acknowledged by the grantor named in the deed, without declaring the officer's knowledge of the identity.[23] It is not sufficient for the officer to say that he is "satisfied of such identity."[24] Where the name of the grantor as recited in the certificate is unlike the name of the grantor as recited in the deed, the acknowledgment is invalid.[25] If the person who acknowledged the deed is not in any way identified as the person who executed the deed, the omission of the name of the grantor from the certificate is a fatal defect.[26] It is indispensable

[19] Kelly v. Calhoun, 95 U. S. 710, 24 L. ed. 544.

[20] Childers v. Wm. H. Coleman Co., 122 Tenn. 109, 118 S. W. 1018.

[21] Gross v. Watts, 206 Mo. 373, 104 S. W. 30, 121 Am. St. 662.

[22] Erickson v. Conniff, 19 S. Dak. 41, 101 N. W. 1104.

[23] Schley v. Pullman Palace Car Co. 120 U. S. 575, 7 Sup. Ct. 730, 30 L. ed. 789.

[24] Kimball v. Semple, 25 Cal. 440; Fryer v. Rockefeller, 63 N. Y. 268.

[25] McKenzie v. Stafford, 8 Tex. Civ. App. 121, 27 S. W. 790.

[26] Hiss v. McCabe, 45 Md. 77; Smith's Lessee v. Hunt, 13 Ohio 260, 42 Am. Dec. 201.

that the certificate shall show the fact of acknowledgment. The statement that the person who appears before the officer is known to him as the person who executed the deed, for the purpose therein stated, has been held to be insufficient.[27] A certificate reciting that the grantor appeared "and acknowledged that ——" signed, sealed, and delivered the same is not sufficient, because it does not show that the grantor acknowledged that he executed the deed.[28]

Where the certificate fails to show private examination of a married woman, but shows instead that she was examined "according to law," it does not show a compliance with the requirement of the statute.[29] Under a statute providing, as the part of a certificate of acknowledgment by a married woman, that she "does not wish to retract" her execution of the conveyance, the omission of this statement or words of equivalent import is held to render the certificate fatally defective.[30]

§ 285. How acknowledgment shown in abstract.—Where the form of acknowledgment is such as fills the requirements of the law at the time when it was taken, a brief mention of the fact of the acknowledgment and its date is all that is required. This should be placed immediately after recital of the date and place of recording, or it may be inserted at the end of the synopsis, and may be in form thus:

Acknowledged March 1, 1912.

Slight deviations from the prescribed form, or minor omissions, may be described as follows:

Acknowledged March 1, 1912. No fac simile of notarial seal or any indications thereof by scroll appears, but body of certificate contains a statement that the officer who made it affixed his seal of office.

But where the defect or omissions are such as to render the certificate invalid, the entire certificate, or so much thereof as will clearly show the defect or omission, should be set out in the abstract. Thus where the statute requires the certificate to show the separate examination of a married woman, and the certifi-

[27] Short v. Conlee, 28 Ill. 219; Cabell v. Grubb, 48 Mo. 353.

[28] Buell v. Irwin, 24 Mich. 145; Huff v. Webb, 64 Tex. 284.

[29] Meddock v. Williams, 12 Ohio 377.

[30] Bateman, Petitioner, 11 R. I. 585; Ruleman v. Pritchett, 56 Tex. 482; McMullen v. Eagan, 21 W. Va. 233.

cate in question omits such statement, that part of the certificate of acknowledgment relating to such married woman should be set out.

§ 286. **Delivery.**—The execution of a conveyance is not complete and no title passes by the deed until there is a delivery of the same to the grantee, either actual or constructive. The customary mode of delivery is the actual handing over of the deed by the grantor to the grantee with the expressed intention of passing the title, but this method is not absolutely essential. The controlling question of delivery in all cases is one of intention and the delivery is complete when there is an intention manifested on the part of the grantor to make the instrument his deed, and he does some act putting it beyond his power to revoke.[31] No particular form or ceremony is necessary in making the delivery.[32] It may be by acts without words, or words without acts, or both. Anything which clearly manifests an intention on the part of the grantor that the deed shall presently become operative and effectual, that the grantor loses all control over it, and that the grantee is to become possessed of the estate, constitutes a sufficient delivery.[33] The act of delivery must be accompanied by an intent that the deed shall become operative as such, and it must be delivered in such manner as to terminate the control of the grantor over the instrument.[34]

Where the grantor deposits his deed with a third person, to be held by the latter until the grantor's death, and then delivered to the grantee therein named, the grantor reserving no dominion or control over the deed during his lifetime, the delivery is complete, and an immediate estate vests in the grantee, subject to a life estate in the grantor.[35] After the grantor has made delivery in this manner he can not change his intention and withdraw the deed without the consent of his grantee.[36] But an unauthorized deliv-

[31] Black v. Sharkey, 104 Cal. 279, 37 Pac. 939; Weber v. Christen, 121 Ill. 91, 11 N. E. 893, 2 Am. St. 68.

[32] Melvin v. Melvin, 8 Cal. App. 684, 79 Pac. 696; Shute v. Shute, 82 S. Car. 264, 64 S. E. 145.

[33] Riegel v. Riegel, 243 Ill. 626, 90 N. E. 1108.

[34] Hearn v. Purnell, 110 Md. 458, 72 Atl. 906; Gaylord v. Gaylord, 150 N. Car. 222, 66 S. E. 1028.

[35] Moore v. Trott, 156 Cal. 353, 104 Pac. 578, 134 Am. St. 131; Callerand v. Piot, 241 Ill. 120, 89 N. E. 266; Hoagland v. Beckley, 158 Mich. 565, 123 N. W. 12; Maxwell v. Harper, 51 Wash. 351, 98 Pac. 756; Klabunde v. Casper, 139 Wis. 491, 121 N. W. 137.

[36] Maxwell v. Harper, 51 Wash. 351, 98 Pac. 756.

ery to a third person may be subsequently ratified by the grantor; and the grantee may ratify the receipt of a deed by a third person for him.[37]

The grantor must part with control over the deed; a delivery to a third person with directions to keep the deed, and if the grantor never calls for it, to deliver it to the grantee does not constitute delivery.[38] A deed must become operative upon its execution, or not at all. It will be presumed to have been delivered on the day it bears date, if it was acknowledged on the same date,[39] but this presumption may be overcome by proof.[40] It has sometimes been said that the date of the acknowledgment, when that differs from the date of the deed, is to be presumed to be the date of delivery, though this presumption may be overcome by proof of an earlier date of delivery.[41]

Possession of the deed by the grantee at any time, unexplained, raises the presumption of a delivery to him by the grantor,[42] yet, on the other hand, the mere fact of the grantee's possession of the deed does not necessarily amount to a delivery, since the deed may have been obtained by theft or fraud,[43] or the grantee may hold it as agent of the grantor,[44] or he may have possession of it merely for the purpose of examination.[45]

To complete the delivery of a deed acceptance on the part of the grantee is essential. The acceptance may be either actual or presumed, but the general rule is that the grantee's acceptance must be proved by some act, declaration, or circumstance. Thus acceptance will be implied from the act of the grantee in demanding possession of the premises,[46] or from his performance of conditions.[47]

That the recording of a deed affords a presumption of a legal delivery to the grantee is supported by the weight of authority,

[37] Rhea v. Planters Mut. Ins. Assn., 77 Ark. 57, 90 S. W. 850.

[38] Fortune v. Hunt, 149 N. Car. 358, 63 S. E. 82.

[39] Cover v. Manaway, 115 Pa. St. 338, 8 Atl. 393, 2 Am. St. 552.

[40] Eaton v. Trowbridge, 38 Mich. 454.

[41] Henry v. Bradshaw, 20 Iowa 355.

[42] Wright v. Wright, 77 Fed. 795; Fenton v. Miller, 94 Mich. 204, 53 N. W. 957; Mercantile Safe Deposit Co. v. Huntington, 89 Hun 465, 35 N. Y. S. 390, 69 N. Y. St. Rep. 776, 2 N. Y. Ann. Cas. 215; Schurtz v. Colvin, 55 Ohio St. 274, 45 N. E. 527.

[43] Golden v. Hardesty, 93 Iowa 622, 61 N. W. 913; Sauter v. Dollman, 46 Minn. 504, 49 N. W. 258.

[44] Dietz v. Farish, 44 N. Y. Super. Ct. 190.

[45] Lee v. Richmond, 90 Iowa 695, 57 N. W. 613; Comer v. Baldwin, 16 Minn. 172.

[46] Stonehill v. Hastings, 135 App. Div. 48, 119 N. Y. S. 897.

[47] Stockwell v. Shalit, 204 Mass. 270, 90 N. E. 570.

and some cases go so far as to hold that the recording of a deed is sufficient if not conclusive evidence of its delivery.[48] Questions respecting the delivery of deeds present but few features to the abstracter, as he views the instruments as they appear on the record, and the record seldom discloses anything that would indicate nondelivery.

§ 287. **Registration.**—In this country every conveyance of real estate by deed or mortgage is subject to registry laws, by which its priority as respects other conveyances depends for the most part upon priority of record. Priority of record, as a general rule, gives priority of title; and this priority dates from the time the instrument is delivered to the recorder for record. Hence the date of record becomes an all-important matter in determining questions of priority, especially when the instrument itself bears no date.

All the particulars respecting the deed should be taken from the records whenever practicable, but in case the enrolling officer has neglected to transcribe the instrument until long after the same was left for record, the abstracter must cover the period of his search by examining the original document.

A vast number of objections to title are founded upon errors or irregularities in the registration of deeds under which title is claimed. Want of regular registration, there being no other proof of its existence, is a fatal objection to the title.[49] A deed defectively recorded, or not recorded at all, is in some states a good equitable lien, so that while it has no effect as against subsequent purchasers in good faith, yet it is superior to the claims of general creditors who were such at the date of the deed.[50] The recording of a deed in the wrong book does not charge subsequent purchasers with notice of its contents.[51] It is held that a record which is erroneous on account of mistakes is constructive notice only of its contents, and not of facts which it would contain were it correct.[52] As between the parties to a deed, its validity is not affected by mistakes of the recording officer in transcrib-

[48] Cecil v. Beaver, 28 Iowa 241, 4 Am. Rep. 174.

[49] Bartlett v. Blanton, 4 J. J. Marsh, (Ky.) 426.

[50] Lake v. Doud, 10 Ohio 415.

[51] Cady v. Purser, 131 Cal. 552, 63 Pac. 844, 82 Am. St. 391.

[52] Davis v. Ward, 109 Cal. 186, 41 Pac. 1010, 50 Am. St. 29.

ing it.[53] The constructive notice imported by the record of an instrument is strictly limited to that which is set forth on its face; and if, in a deed as recorded, the particular land in controversy is not so described as to identify it with reasonable certainty, the record is not notice to subsequent bona fide purchasers or judgment creditors.[54] The omission from the record of a copy of the seal on a deed purporting to be executed under seal does not affect its validity.[55] Where there is a clerical error in recording the name of the notary public before whom a deed was attested, the record is still constructive notice of the grantee's title.[56] After the date of the deed in the synopsis should come the fact of its registry, including the date, the volume and page, and the title of the record and the office to which it belongs. These particulars logically belong at the conclusion of the synopsis, but for the convenience of the examining counsel they should be inserted as indicated above. These particulars should follow each other in the order given above, and should be as brief and concise as possible.

§ 288. Correcting errors in record, and re-recording.—A register may correct an error in the record at any time subsequent to the registration. If he has omitted to indicate the seal or scroll opposite the grantor's signature, he may afterward supply the omission, or may record the deed anew.[57] Where the doctrine prevails that the record is notice of only what appears of record, though this be defective, a correction of a mistake in the record made by the register can not affect the rights of a purchaser without notice of the mistake who has become such after the record was made, but before the making of the correction.[58] There are authorities, however, to the effect that the register has no authority to correct the record.[59] The effect of a record as notice or as evidence is not confined to the first recording of a deed, but at least equal weight is to be given to a later record properly made.

[53] Thomas v. Stuart's Ex'r, 91 Va. 694, 22 S. E. 511.

[54] Bank of Ada v. Gullikson, 64 Minn. 91, 66 N. W. 131.

[55] Sibly v. England, 90 Ark. 420, 119 S. W. 820.

[56] Roberson v. Downing Co., 120 Ga. 833, 48 S. E. 429, 102 Am. St. 128, 1 Am. Cas. 724.

[57] Sellers v. Sellers, 98 N. Car. 13, 3 S. E. 917.

[58] Chamberlain v. Bell, 7 Cal. 292, 68 Am. Dec. 260.

[59] Jennings v. Dockham, 99 Mich. 253, 58 N. W. 66; Doe v. Dugan, 8 Ohio 87, 31 Am. Dec. 432.

Where an instrument, incorrectly transcribed at the date of examination, has been subsequently corrected by the register, this fact should be noted in the abstract by setting out the corrected matter. This should come at the close of the synopsis as a supplemental foot-note.

A notice of re-record should, whenever practicable, be placed immediately after the synopsis of the original, and should be in form similar to the following:

George M. Caldwell, unmarried, to Elias F. Johnson.	Warranty Deed. Dated June 1, 1902. Recorded June 28, 1902. Vol. 28, page 10. Consideration, $1,000.

Conveys land in Grant county, Ind., described as follows: (description). A re-record of the deed recorded Sept. 27, 1890, in Deed Record 18, page 200 (and shown at No. 12 of this abstract.)

§ 289. **Ancient deeds.**—A deed more than thirty years old proven to have come from a proper place of custody, and having nothing suspicious about it, is called an "ancient deed." It is presumed to be genuine without express proof of its execution.[60] So a deed shown to be thirty years old or more may be received in evidence without proof of execution. But this rule applies only to original deeds, not to copies, nor the record of such deeds.[61] The rule, however, does not dispense with proof of the truth of recitals in such deed constituting the basis of the grantor's right or power to convey.[62] It may be presumed from the lapse of time that the magistrate taking the acknowledgment to such a deed acted within his jurisdiction, that it was properly acknowledged, and hence that it was properly recorded.[63] The presumption of due execution arising in case of ancient deeds extends to a power of attorney under which such a deed purports to have been executed.[64]

Where a deed in the chain of title is of long standing, and the

[60] Davis v. Wood, 161 Mo. 17, 61 S. W. 695; Havens v. Seashore Land Co., 47 N. J. Eq. 365, 20 Atl. 497.

[61] McCleery v. Lewis, 104 Maine 33, 70 Atl. 540, 19 L. R. A. (N. S.) 438n.

[62] Koch v. Streuter, 232 Ill. 594, 83, N. E. 1072.

[63] Hudson v. Webber, 104 Maine 429, 72 Atl. 184.

[64] Reuter v. Stuckart, 181 Ill. 529, 54 N. E. 1014.

rights of parties thereunder have become established by adverse possession, the same particularity need not be observed in setting out their formal parts in the abstract as is required in the case of later deeds. Legislatures sometimes enact what are termed "curative acts," which act retrospectively on past causes and existing rights, validating irregularities in legal proceedings or giving effect to contracts between parties which might otherwise fall for failure to comply with technical legal requirements.[65] The most common of these acts relate to defects and irregularities in acknowledgments and registration of deeds made a specified time prior to their passage. Under such acts, when questions of priority arise, a deed is to be considered as having been originally properly acknowledged and recorded.[66] A curative act may apply to the acknowledgment of a deed involved in a suit which is pending at the time of the passage of the act, as there can be no vested right in a rule of evidence.[67] But while such an act will cure defects in the certificate of acknowledgment it will not validate defects in the deed itself, as, for instance, where it is not signed by the grantor.[68] Statutes of this character relate only to the ceremony of the execution of a deed, and if a deed is not defective in execution or acknowledgment there is nothing for the curative act to operate upon.[69]

§ 290. Technical and particular words and phrases.—The intention of the parties to a conveyance, when apparent and not repugnant to any rule of law, will control technical terms.[70] Thus where a technical word or phrase is used, evidently in a sense different from its technical signification, it will be construed in the sense in which the grantor intended.[71] There are words in deeds which have a technical meaning, and are construed accordingly; but language in deeds, not technical, must be taken in its ordinary and usual sense.[72]

It was formerly the practice to use a great many words and

[65] Meigs v. Roberts, 162 N. Y. 371, 56 N. E. 838, 76 Am. St. 322.

[66] East v. Pugh, 71 Iowa 162, 32 N. W. 309.

[67] Reid v. Hart, 45 Ark. 41.

[68] Greenwood v. Jenswold, 69 Iowa 53, 28 N. W. 433.

[69] Bowden v. Bland, 53 Ark. 53, 13 S. W. 420, 22 Am. St. 179.

[70] Prentice v. Duluth Storage & Forwarding Co., 58 Fed. 437, 7 C. C. A. 293.

[71] Central Pac. R. Co. v. Beal, 47 Cal. 151.

[72] Bradshaw v. Bradbury, 64 Mo. 334.

phrases without regard to their true meaning, and it is still the common practice to insert in deeds nearly all the operative terms ever needed in conveying real estate. In modern conveyances, however, most of these terms are surplusage. The deed of bargain and sale is the instrument of transfer almost exclusively in use at the present time, though the technical words originally used in other forms of conveyances are often joined with the appropriate words of a deed of bargain and sale. The words "bargain and sell" are not essential to a deed of bargain and sale. If the only reason urged for construing a particular clause in a deed is founded upon the technical words used, they will be disregarded in determining the effect to be given to the conveyance, and such a construction adopted as on a general view seems most likely to carry the intention of the parties into effect.[73] Where, however, by statute or common law, certain technical words are made necessary in a conveyance, equivalent words will not answer. Thus an instrument in which the only words of grant are "sell" or "sign over", can not take effect as a deed.[74]

Where words or phrases commonly used in deeds, but which have no legal signification, are omitted from a deed, that fact need not, of course, be noted on the abstract; but where technical words of limitation or inheritance are omitted from a deed purporting to convey only a limited estate or interest, the omission of such technical words should be shown together with whatever operative words appear, to supply those omitted or to indicate the intention of the parties.

There is no general rule of construction applicable to particular words and phrases in a deed. The primary object in all cases is to carry out the manifest intention of the parties. It may be helpful in this connection to mention some instances of how certain particular words and phrases have been construed. The word "appurtenances" means land, and passes title to the garden, curtilage, and close adjoining the house, but does not include land other than the land conveyed.[75] The words "in addition to" denote that something is added to what precedes it.[76] The words "have granted" signify the same as the word "do hereby grant."[77]

[73] Post v. Weil, 115 N. Y. 361, 22 N. E. 145, 5 L. R. A. 422, 12 Am. St. 809.

[74] McKinney v. Settles, 31 Mo. 541.

[75] Ammidown v. Ball, 8 Allen (Mass.) 293; Otis v. Smith, 9 Pick (Mass.) 293.

[76] Panton v. Tefft, 22 Ill. 366.

[77] Pierson v. Armstrong, 1 Iowa 282, 63 Am. Dec. 440.

The words "to" and "from," when used to express boundaries, are ordinarily terms of exclusion, and the terminus is not included.[78] A grant "of the use of timber" has been held not to pass title to the soil, but only an incorporeal right to use timber thereon.[79] The word "convey" is as effective in passing title as the word "grant."[80] The words "go to" in a deed of conveyance will pass title.[81] Likewise the words "assign and convey" will pass a freehold estate.[82] The words "and all the buildings thereon" have no legal operation in a conveyance of land.[83] The words "more or less," following a description of land in a deed, means about the specified number of acres, and are designed to cover only such small errors of surveying as usually occur in surveys.[84]

§ 291. Repugnant or conflicting parts of a deed.—If a deed of conveyance contains two clauses which are repugnant to each other, the first will prevail.[85] But, if possible, the repugnant provisions will be so construed as to carry out the true intent of the parties, and to accomplish this purpose the deed will be considered as a whole.[86] Still, if the purpose of the deed can clearly be ascertained, repugnant words, though they appear first in the deed, must yield to that purpose.[87] A construction which will create a repugnance between different parts of a deed should be avoided.[88] If there is a repugnancy between the language of the grantor expressed in the deed and words incorporated therein as a recital from some other instrument, the language of the grantor will prevail over the recital.[89]

The habendum may limit, restrain, lessen, enlarge, explain, vary, or qualify, but not entirely contradict or be repugnant to the estate granted in the premises;[90] but the granting clause will control the habendum unless the latter clearly expresses the intent

[78] Bonney v. Morrill, 52 Maine 252.
[79] Clark v. Way, 11 Rich. (S. Car.) 621.
[80] Patterson v. Carneal, 3 Marsh A. K. (Ky.) 618, 13 Am. Dec. 508.
[81] Folk v. Varn, 9 Rich. Eq. (S. Car.) 303.
[82] Hutchins v. Carleton, 19 N. H. 487.
[83] Crosby v. Parker, 4 Mass. 110.
[84] Crislip v. Cain 19 W. Va. 438.
[85] Pritchett v. Jackson, 103 Md. 696, 63 Atl. 965; Blackwell v. Blackwell, 124 N. Car. 269, 32 S. E. 676.
[86] McDougal v. Musgrave, 46 W. Va. 509, 33 S. E. 281.
[87] Goldsmith v. Goldsmith, 46 W. Va. 426, 33 S. E. 266.
[88] Chew v. Kellar, 171 Mo. 215, 71 S. W. 172.
[89] Scott v. Michael, 129 Ind. 250, 28 N. E. 546.
[90] Hafner v. Irwin, 20 N. Car. 433, 34 Am. Dec. 390.

of the parties.[91] A clause will not be construed as repugnant to the grant and therefore void so as to defeat the manifest intention of the parties.[92] If two parts of a deed may well stand together consistently with the rules of law, they will be construed to have that effect rather than be held repugnant.[93] The premises is never controlled by the covenants, although the covenants may be considered in aid of a construction of what is granted.[94] In case there are two inconsistent descriptions equally explicit, that will control which best expresses the intention of the parties as manifested by the whole instrument.[95]

[91] Owensboro & N. R. R. Co. v. Griffith, 92 Ky. 137, 17 S. W. 277.

[92] Faivre v. Daley, 93 Cal. 664, 29 Pac. 256.

[93] Corbin v. Healy, 20 Pick. (Mass.) 514.

[94] Mills v. Catlin, 22 Vt. 98.

[95] Wade v. Deray, 50 Cal. 376; Driscoll v. Green, 59 N. H. 101.

CHAPTER XIII

GENERAL CLASSIFICATION OF PRIVATE CONVEYANCES

SEC
295. Modern kinds of deeds.
296. Indentures and deeds poll.
297. Construction of deeds.
298. Validity of conveyances.
299. Warranty deeds.
300. Abstracting warranty deeds.
301. Quitclaim deeds.
302. Abstracting quitclaim deeds.
303. Deeds with special warranties.
304. Statutory forms of deeds.
305. Common-law deeds.
306. Deed of release.
307. Deeds of confirmation.
308. Deeds of surrender.
309. Deeds of assignment.
310. Deeds of defeasance.
311. Conveyances to take effect in the future.
312. Deeds conveying base, qualified, and conditional estates or interests.
313. Conveyances with restrictive conditions and covenants.
314. Conveyances of land in the adverse possession of another.
315. Fraudulent conveyances.
316. Conveyances subject to incumbrance.
317. Dedicatory deeds.
318. Deeds creating resulting trusts.

§ 295. **Modern kinds of deeds.**—The conveyance or transfer of title to real estate from an individual by an appropriate instrument, is a private conveyance. The instruments commonly employed in conveyances of this character are the "warranty deed," technically known as the deed of bargain and sale, and the "quitclaim deed," or deed of release and quitclaim.

The warranty deed is one containing a covenant of warranty—either general or special, and by common understanding has come to mean a deed that warrants a good title.[1] Where the grantor agrees to warrant and defend the title against the lawful claims of all persons whomsoever, it may be termed a general warranty deed, but where he promises protection only against certain persons or claims, it may be called a special warranty deed. Modern warranty deeds and quitclaim deeds are but the evolutions of conveyances at common law, and they are effectual to convey whatever title or interest the grantor may possess.

The common-law deeds of release, confirmation, surrender and assignment, have been largely replaced by the quitclaim deed; while the old form of deed of bargain and sale has given way to the shorter form of bargain and sale deed, with or without

[1] Allen v. Hazen, 26 Mich. 142.

covenants of warranty, or with a covenant against the grantor's acts. Originally, a quitclaim deed was intended, and indeed operated, only where the grantee already held possession of the land, or some title to it, and the grantor intended to renounce all his right or title in favor of the grantee. But it was soon used where a person intended to sell and convey land, but not to give any warranty. Deeds also differ not only that they may suit the particular purposes of the parties and the terms of their bargain, but those used in each state differ somewhat in form from those used in another state. But these differences are generally, if not always, differences only of form, and are seldom essential to the meaning and effect of the deeds.

§ 296. **Indentures and deeds poll.**—Deeds are either indentures or deeds poll. The former is a deed executed by two or more parties. It commences with the words, "This indenture," then follows a statement of the date, the names and descriptions of the parties, the recitals, the consideration, the operative words, the parcels, the habendum, the covenants, and at the close the testimonium clause, which refers to the date of the instrument stated at the beginning. A deed of indenture is the deed not only of the grantor, who alone executes it, but also of the grantee, to whom the conveyance is made, although it be not sealed and delivered by him.[2] In its usual form, it is executed in duplicate, and originally the duplicates were cut apart in the middle by an indented or irregular line, which gave to it the name "indenture."[3]

A deed poll is a deed made by one party only. If it contains no recitals, the introductory words are, "Known all men by these presents," etc. If there are recitals, the introductory words should be, "To all to whom these presents shall come" the grantor "sends greeting," followed by the recitals, which are introduced by "whereas."

Deeds poll are generally used in the New England states; while in other states the deed of indenture is in general use. The form of a deed poll may be converted into an indenture by changing the word "grantor" to "the party of the first part" in the beginning of the deed. And a deed by indenture may be made a deed poll by changes of an opposite kind.

[2] Woodruff v. Woodruff 44 N. J. Eq. 349, 16 Atl. 4, 1 L. R. A. 380.

[3] Bowen v. Beck, 94 N. Y. 86, 46 Am. Rep. 124.

If the grantor in a deed poll is a married woman, and it is intended that she shall relinquish her dower, her name must be mentioned in the testimonium clause, and it must be distinctly stated that she signs the deed in token of her relinquishment or release of dower. But where a deed of indenture is used, and she is joined in the beginning as grantor with her husband, it is not necessary that anything should be said in the deed about her release of dower or homestead.

§ 297. Construction of deeds.—The main object in construing a deed is to ascertain the intention of the parties and give it effect.[4] And this intention must be arrived at from the language of the instrument in the absence of any showing of a mistake or oversight on the part of the draftsman.[5] The whole deed and every part thereof should be considered in order to ascertain the intention of the parties, and when such intention is ascertained the deed should be so construed as to give effect to it.[6] For the purpose of showing such intention, contemporaneous writings by the parties may be used.[7]

Such a construction should be adopted as will give force and effect to a deed rather than one that will render it of no effect.[8] When the terms of a deed are perfectly plain and unambiguous their meaning and effect can not be changed or overturned by the unexpressed intention of the parties.[9]

Conditions in a deed which are repugnant to the grant are void.[10] As a general rule where the estate is expressly set forth in the premises it can not be defeated by repugnant words in the habendum.[11] This rule does not apply where it appears from the language of the whole deed that there was an intention that the habendum should control or limit the estate or interest taken under the caption or granting clause.[12]

[4] Triplett v. Williams, 149 N. Car. 394, 63 S. E. 79, 24 L. R. A. (N. S.) 514n; Pack v. Whitaker, 110 Va. 122, 65 S. E. 496.

[5] Hudson v. Hudson (Ky. App.) 121 S. W. 973.

[6] Brown v. Reeder, 108 Md. 653, 71 Atl. 417.

[7] Putzel v. Van Brunt, 40 N. Y. Super. Ct. 501.

[8] Maxwell v. Harper, 51 Wash. 351, 98 Pac. 756.

[9] Geneva v. Henson, 195 N. Y. 447, 88 N. E. 1104.

[10] Levy v. McDonnell, 92 Ark. 324, 122 S. W. 1002, 135 Am. St. 183.

[11] Triplett v. Williams, 149 N. Car. 394, 63 S. E. 79, 24 L. R. A. (N. S.) 514n; Teague v. Sowder, 121 Tenn. 132, 114 S. W. 484.

[12] Hudson v. Hudson (Ky. App.) 121 S. W. 973.

Courts will construe clauses in deeds as covenants rather than as conditions, if they can reasonably do so.[13] The parties to a deed are presumed to make it with reference to the state or condition of the premises at the time, and, if the description is sufficient, when made, no subsequent change in conditions can invalidate it.[14] Where the property is described in clear and unambiguous language, no question of construction arises, and the intention of the parties will not be allowed to control, though it is shown to be different from that expressed in the deed.[15] But if, on inspection of the deed, the identity of the land is altogether uncertain, the court should pronounce the deed void.[16]

All parts of the deed are to be construed together, and that description adopted which will give effect to the deed, rather than one which would render it void for uncertainty.[17] General expressions in the deed will be controlled by more specific ones.[18] Surplusage is to be rejected.[19] Presumptions are construed most strongly against the grantor,[20] and in case of two conflicting descriptions, the grantee will, on this principle, be permitted to elect under which he will hold.[21]

§ 298. Validity of conveyances.—Besides the defects of form and substance which tend to invalidate a conveyance, and which are determinable from an inspection of the instrument, other defects, shown only by evidence aliunde, may render the instrument invalid. Such, for instance, is want of capacity or assent, mistake, fraud, misrepresentation, concealment, duress, undue influence, and inadequacy or illegality of consideration. The deed may be regular on its face, and executed in due conformity with law, and at the same time be invalid because of the existence of some one of the defects enumerated above. It must be borne in mind, however, that the existence of such defects do not always render the deed absolutely void, but may, under certain circumstances, render it voidable only. Thus, the deed of a

[13] Haydon v. St. Louis &c. R. Co., 222 Mo. 126, 121 S. W. 15.

[14] Sengfelder v. Hill, 21 Wash. 371, 58 Pac. 250.

[15] Kimball v. Semple, 25 Cal. 440.

[16] Cox v. Hart, 145 U. S. 376, 12 Sup. Ct. 962, 36 L. ed. 741.

[17] Gano v. Aldridge, 27 Ind. 294; Anderson v. Baughman, 7 Mich. 69, 74 Am. Dec. 699.

[18] Hannibal &c. R. Co. v. Green, 68 Mo. 169.

[19] Kruse v. Wilson, 79 Ill. 233.

[20] Charles River Bridge v. Warren Bridge, 11 Pet. (U. S.) 420, 9 L. ed. 773, 938.

[21] Armstrong v. Mudd, 10 B. Mon. (Ky.) 144, 50 Am. Dec. 545.

minor conveying his land for a valuable consideration is voidable, and not void.[22] Even a deed of gift, or deed without consideration, is voidable rather than void.[23]

A deed utterly void is as one which never existed. It confers no right or title upon the party named as grantee. But a deed fraudulent as to creditors and purchasers, and voidable by them, is nevertheless valid as between the parties to it, and the title is deemed to have passed and vested in the grantee, liable to be divested at the suit of the party aggrieved. A void deed is incapable of confirmation or of being made good by any subsequent act of the party, while one which is merely voidable may be made good by matter ex post facto.[24]

The rules respecting innocent purchasers without notice are intended to protect those who purchase a legal estate and pays the entire purchase-money without notice of an outstanding equity. They do not protect one who acquires no semblance of title.[25] Thus if the grantor held under a forged deed, the grantee would not be protected, while if the deed was genuine, but merely voidable, as having been procured by fraudulent representations, or as having been executed in fraud of creditors, and the grantee had no notice of the fact, he could not be deprived of the estate. The deed of a person lacking capacity to convey passes no title, even as against a purchaser for value without notice. The grantee can, of course, ascertain the competency of the grantor only by inquiry in pais. But these inquiries are seldom made in respect to remote grantors, the risk in such cases being generally considered slight.

§ 299. Warranty deeds.—What is popularly termed a "warranty deed" is simply a deed containing a covenant of warranty, and by common understanding has come to mean a deed that warrants a good title.[26] This form of deed is usually treated in the books as a deed of bargain and sale, though the technical words originally used in other forms of conveyances are often joined with the appropriate words of a deed of bargain and sale. In fact, almost every deed made upon a pecuniary consideration

[22] Tucker v. Moreland, 10 Pet. (U. S.) 58, 9 L. ed. 345.

[23] Slaughter v. Cunningham, 24 Ala. 260, 60 Am. Dec. 463; Oxley v. Tryon, 25 Iowa 95.

[24] Hone v. Woolsey, 2 Edw. Ch. (N. Y.) 289.

[25] Vattier v. Hinde, 7 Pet. (U. S.) 252, 8 L. ed. 675; Cogel v. Raph, 24 Minn. 194.

[26] Allen v. Hazen, 26 Mich. 142.

is regarded as a deed of bargain and sale. Whatever the words used, if they import a present sale for a pecuniary consideration, and the deed can not operate as a lease and release by reason that the grantee is not in possession, nor as a contract to stand seised to uses, because there is no consideration of blood or marriage, effect will be given to it as a bargain and sale.[27]

The words "bargain and sell" are not essential to a deed of this character. No technical words are required to raise a use. If the words used and the consideration paid create a contract of sale, or bargain, a trust is instantly raised upon which the statute of uses operates. The statute performs the task of the ancient livery of seisin. Thus the words "remise, release, and quitclaim" are sufficient to raise a trust or use for the benefit of the bargainee, which the statute transfers into possession.[28] The words "release and assign" have the same effect; and so the words "make over and confirm,"[29] or the words "make over and grant."[30]

In most states there are statutory provisions authorizing the transfer of title to real estate by simple forms of conveyance, which, in their operation, much resemble the common-law grant, except that they are confined to things incorporeal. Even where there are such statutory provisions, the words "bargain and sell" are ordinarily used in the deed. In such states it is difficult, though for most purposes unimportant, to say whether a particular conveyance operates by force of the statute of uses or under the local statute.

An agreement to convey by a good and sufficient warranty deed requires a good and perfect title, as well as a good and sufficient warranty deed.[31] The use of the following clauses just before the clause of execution constitute the deed a warranty deed: And I, the said A. B. (the grantor), for myself, my heirs, executors, and administrators, do covenant with the said C. D. (the grantee), his heirs and assigns that I am lawfully seised in fee of the aforesaid premises; that they are free from all encum-

[27] Chiles v. Conley, 2 Dana (Ky.) 21; Lynch v. Livingston, 8 Barb. (N. Y.) 463.

[28] Jackson v. Fish, 10 Johns. (N. Y.) 456.

[29] Jackson v. Root, 18 Johns. (N. Y.) 60.

[30] Jackson v. Alexander, 3 Johns. (N. Y.) 484, 3 Am. Dec. 517.

[31] Little v. Paddleford, 13 N. H. 167; Burwell v. Jackson, 9 N. Y. 535, Seld. Notes 243.

brances; that I have good right to sell and convey the same to the said C. D. as aforesaid; and that I will, and my heirs, executors, and administrators shall, warrant and defend the same to the said C. D., his heirs and assigns forever, against the lawful claims and demands of all persons.

§ 300. Abstracting warranty deeds.—Where the deed to be abstracted is an ordinary deed of bargain and sale in the usual form and without unusual conditions and stipulations, it is customary to note only the prominent features of the instrument, it being taken for granted that all the formalities of execution have been complied with. While every point upon which the validity of the title under the deed depends should be noted, care should be exercised not to include unimportant or irrelevant matters. The abstracter may save himself, as well as counsel, much unnecessary labor by confining his notations to a brief and methodical statement of only the salient features of the instrument. A detailed statement of unimportant recitals render the abstract cumbersome and only tend to distract and confuse the mind of the reader. An ordinary warranty deed may be sufficiently presented as follows:

John Jones, and Sarah A., his wife,	Warranty Deed.
	Dated Jan. 1, 1917.
to	Recorded Jan. 20, 1917.
	Deed Record, Vol. 40, page 25.
Henry C. Brown.	Consideration, $10,000.00.

Conveys land in Grant county, Ind., described as the northwest quarter of the southeast quarter of section nine, township twenty-five north, range eight, east of the third principal meridian.

Acknowledged Jan. 1, 1917.

If the abstract was made from the original deed instead of the record thereof that fact should be noted immediately after the foregoing synopsis. Where a deed is abstracted as shown above it may be assumed that the abstracter has done his work properly, and that the deed as appears of record was executed and acknowledged in conformity with all the requirements of law. It is presumed also that the deed contains only such recitals as are common to all deeds of bargain and sale, and that it contains all the covenants necessary to convey a good and indefeasible title. It

is the practice of some abstracters to note, after the entry regarding the acknowledgment, that the deed contains full covenants of seisin and warranty; but this is discretionary with the abstracter. At the end of the abstract of each deed, a separate memorandum should be made of any defect or matter of doubt that appears. If the habendum is expressed in any other than the usual formal words, the variation should be noticed.

§ 301. Quitclaim deeds.—A quitclaim deed, or in other words a deed of release, never operated as a conveyance in a technical sense, but merely as an enlargement of the estate of the releasee if he was at the time in possession of the land, or had some estate to be enlarged, such as an estate for years.[32]

The usual words in a release are "remise, release and forever quitclaim," and the usual words in a quitclaim deed are the same with the added words of "all the right, title, and interest" that the grantor has in the premises. The words used may, however, constitute the deed one of bargain and sale, and not a mere quitclaim deed.[33] By statute in many states, and by usage in others, a quitclaim deed, or deed of release, operates to pass all the estate the releasor could convey by a deed of bargain and sale, or by any other form of deed.[34] It conveys all the title the grantee has at the time of its execution,[35] but it can never inure to convey any after-acquired title, which was not actually owned in equity at the time of the deed.[36]

The grantor in a quitclaim deed does not affirm the possession of any title, and is not precluded from thereafter acquiring a valid title, and from attempting to enforce it; and, conversely, the grantee in such deed may deny having received any estate by the deed.[37]

The grantee in a quitclaim deed to real estate is presumed to take it with notice of all outstanding interests and claims of which he can obtain knowledge by the exercise of a reasonable degree of diligence, in the examination of all the public records

[32] Porter v. Perkins, 5 Mass. 233, 4 Am. Dec. 52; Kyle v. Kavanagh, 103 Mass. 356, 4 Am. Rep. 560; Kerr v. Freeman, 33 Miss. 292.

[33] Taylor v. Harrison, 47 Tex. 454, 26 Am. Rep. 304; Cummings v. Dearborn, 56 Vt. 441.

[34] Sherman v. Sherman, 23 S. Dak. 486, 122 N. W. 439.

[35] Nidever v. Ayers, 83 Cal. 39, 23 Pac. 192.

[36] Anderson v. Yoakum, 94 Cal. 227; Montgomery v. McCumber, 128 Ind. 374, 27 N. E. 1114; People v. Miller, 79 Mich. 93, 44 N. W. 172.

[37] San Francisco v. Lawton, 18 Cal. 465, 79 Am. Dec. 187.

affecting the title to the property included in such deed, and from inquiries which he might make of persons whom the records show had redeemed the property included in such deed, and from inquiries which he might make of persons whom the records show had redeemed the property from tax-sale and had paid subsequent taxes thereon, or were otherwise ostensibly interested in such property.[38] In other words, a grantee in a quitclaim deed is not a bona fide purchaser.[39] In Maine, however, it is held that the grantee in a quitclaim deed may be a bona fide purchaser,[40] and in a recent case in Indiana the court said, that "while there is some conflict in the authorities upon this question, we think the correct doctrine under the recording acts is that one may become a bona fide purchaser under a quitclaim deed, the same as under any other form of conveyance."[41] In Massachusetts it is held that a quitclaim deed in the ordinary form is sufficient to convey title free and clear of an equitable right to a purchaser for value without notice of the equity.[42] If a deed purports in terms to convey only the right, title and interest of the grantor to the premises described therein, instead of conveying in terms the land itself, a general covenant of warranty contained in the deed is limited to that right or interest, and can not be broken by the enforcement of a paramount title outstanding against the grantor at the time of the conveyance.[43] Where a deed purports to convey only the right, title, and interest of the grantor in the land described therein, but contains a covenant of warranty, the scope of the covenant may be limited to the subject-matter of the conveyance at the date thereof.[44] A general covenant will not enlarge the title under a deed conveying in terms the grantor's right, title, and interest, but will be limited to the interest of the grantor at the time of the conveyance.[45] Where the terms of a deed of conveyance, taking the whole together, show that the instrument is in its essence a quitclaim deed, and that the makers intended no warranty except as against themselves and their own acts, no

[38] Smith v. Rudd, 48 Kans. 296, 29 Pac. 310.

[39] Peters v. Cartier, 80 Mich. 124, 45 N. W. 73, 20 Am. St. 508.

[40] Bradley v. Merrill, 88 Maine 319, 34 Atl. 160.

[41] Smith v. McClain, 146 Ind. 77, 45 N. E. 41.

[42] Livingston v. Murphy, 187 Mass. 315, 72 N. E. 1012, 105 Am. St. 400.

[43] Reynolds v. Shaver, 59 Ark. 299, 43 Am. St. 36.

[44] Bates v. Foster, 59 Maine 157; Allen v. Holton, 20 Pick (Mass.) 458; Merritt v. Harris, 102 Mass. 328.

[45] Kimball v. Semple, 25 Cal. 440; Gibson v. Chouteau, 39 Mo. 536.

covenant will be raised out of a recital of facts, or out of a use of words of conveyance.[46] A quitclaim deed may be used as a means of releasing claims of record against real estate.[47]

§ 302. **Abstracting quitclaim deeds.**—In abstracting an ordinary quitclaim deed only the prominent features need be noted. The method of presentation exemplified in the case of a warranty deed may be followed, except that the instrument should be designated a "quitclaim deed" in the place of a "warranty deed," as in the example given for abstracting a warranty deed. It is not customary to recite the operative words of the deed, as the use of the word "convey" in connection with its designation as a "quitclaim deed," will be sufficient to indicate its character and legal import. But in case the deed contains a statutory covenant of warranty, the words of the covenant should be set out, as they have the same effect as an express covenant in giving the grantee the benefit of his grantor's subsequently acquired title, and making it in effect a warranty deed.[48] But a conveyance in terms of the grantor's right, title and interest is not enlarged in scope by a general covenant, but such covenant must be limited to fit the estate and interest of the grantor.[49] As the legal effect of a quitclaim deed is to pass all the "right, title, interest, claim, demand," etc., of the grantor, the omission or insertion of such words in the abstract is immaterial; but when such words are followed by covenants of any kind, particularly of warranty, it is good practice to set out every part of the instrument which tends to disclose the nature of the instrument and estate conveyed.

§ 303. **Deeds with special warranties.**—The covenant of warranty in a deed may be restricted to certain persons or claims, as where the grantor warrants the title against all persons claiming through him.[50] Such covenant of special warranty does not preclude the grantor from setting up an after-acquired title against the grantee,[51] and the grantee has no remedy for failure

[46] McDonough v. Martin, 88 Ga. 675, 16 S. E. 59, 18 L. R. A. 349.
[47] Wood v. Rusher, 42 Minn. 389, 44 N. W. 127.
[48] Pratt v. Pratt, 96 Ill. 184.
[49] Hanrick v. Patrick, 119 U. S. 156, 7 Sup. Ct. 147, 30 L. ed. 396.
[50] Sanders v. Betts, 7 Wend. (N. Y.) 287; Western Min. & Mfg. Co. v. Peytona Cannel Coal Co., 8 W. Va. 406.
[51] Davenport v. Lamb, 13 Wall. (U. S.) 418, 20 L. ed. 655; Doane v. Willcutt, 5 Gray (Mass.) 328, 66 Am. Dec. 369.

of title arising from a paramount title held by others than those claiming through his grantor.[52]

The covenant of nonclaim, sometimes used, is the same in effect as a special covenant of warranty.[53] General covenants in a deed, whether they be expressed or implied from the use of the words "grant, bargain and sell," are not restricted in their operation by special covenants unless the different covenants are so irreconcilable that they can not all have their full force, or unless the limited covenant refers to, or is connected with the general covenants in such a manner as to show the intention of the grantor was to restrain the force and effect of the general covenants.[54]

In construing a deed which covenanted that the grantors "will warrant specially the land hereby conveyed; that they have the right to convey the said land to the said grantees; that the said grantees shall have quiet possession thereof, free from all encumbrances; that they shall execute such further assurances of said land as may be requisite; and that they have done no act to encumber the same," it was held that the word "specially" governs all the succeeding covenants.[55]

In most states a special warranty against the claims of the grantor, and of all persons claiming through him, is expressed by the use of the words "warrant specially," or "with special warranty." Where special covenants of warranty are expressed in the deed they should be noticed in the abstract, and where such covenants are implied from the operative words in the deed the operative words should be set out in the abstract.

§ 304. **Statutory forms of deeds.**—In early times deeds of conveyance were simple and brief, but from about the beginning of the seventeenth century until comparatively recent years the common mode of conveying land in England was by the "lease and release," which involved the making of two long instruments. From 1833 until the present time many acts of parliament have tended to simplify the forms of conveyances until

[52] Buckner v. Street, 15 Fed. 365, 5 McCrary (U. S.) 59.

[53] Gee v. Moore, 14 Cal. 472; Holbrook v. Debo, 99 Ill. 372; Kimball v. Blaisdell, 5 N. H. 533, 22 Am. Dec. 476.

[54] Miller v. Bayless, 194 Mo. 630, 92 S. W. 482.

[55] Alleemong v. Gray, 92 Va. 216, 23 S. E. 298.

now very few words will incorporate, by virtue of statute, many of the old clauses which were previously inserted at full length.

In this country statutes have been enacted in many states providing short forms of deeds. While these forms are used in some states, they are not followed in others. When these forms are attempted to be used, they are seldom as short as the statutory form, but have the formal beginning and conclusion of an indenture or deed poll, and sometimes contain many parts of the older forms. One important result of such statutes is to import into the deed, by the use of certain words named in the statute, the covenants specified in it with the same effects on the rights and liabilities of the parties as if the covenants had been fully expressed. The words necessary to accomplish this result vary in the different states, and the covenants thus implied by the use of certain words are not always general in their nature, but are often restricted or special. In none of the states prescribing short forms of deeds is it necessary, or customary to use the form prescribed, and longer forms are still in general use. In some states the use of the words "convey and warrant" has the effect to import covenants into the deed, while in other states the use of the words "grant, bargain and sell" will imply covenants. In still other states both sets of words are to be found, one set implying certain covenants, and the other set certain other covenants. The word "grant" in several of the states, where used, has the effect to import limited or special, rather than general covenants into a deed. When the statutory words are used, the effect is to import the covenants as effectively into the deed as if they were expressed at length.[56] But in order that this may be the effect, the statutory words must be employed; as, for example, where the statute gives this effect to the words "grant, bargain and sell" the same effect will not be given to one of the words merely, "grant."[57] It has been held that if the grantor, instead of using the statutory words, inserts an express covenant, this has the effect of restricting the full force which would otherwise be given to the statutory words.[58]

[56] Lehndorf v. Cope, 122 Ill. 317, 13 N. E. 505; Beasley v. Phillips, 20 Ind. App. 185, 50 N. E. 488; Van Wagner v. Van Nostrand, 19 Iowa 422; Foote v. Clark, 102 Mo. 394, 14 S. W. 981, 11 L. R. A. 861.

[57] Wheeler v. Wayne, 132 Ill. 599, 24 N. E. 625.

[58] Douglas v. Lewis, 131 U. S. 75, 9 Sup. Ct. 634, 33 L. ed. 53; Leddy v. Enos, 6 Wash .247, 33 Pac. 508, 34 Pac. 665.

The abstract should always contain the operative words of the deed, whether they are the statutory words or the old forms of expression.

§ 305. **Common-law deeds.**—Our ancestors brought with them, upon the first settlement of this country, the modes of conveying real estate then in use in England. Several different kinds of deeds were then used, each having its appropriate use and effect. While many of the old rules relating to these forms of deeds are obselete, it is still necessary at times to recur to them in order to appreciate the effect of modern conveyances or to understand modern statutes and decisions. These so-called common-law deeds were classified into: (1) Deeds creating estates, called "original deeds," and (2) deeds modifying estates already created, called "derivative deeds." To the first class belonged such deeds as feoffment, gift, grant, lease, exchange, and partition. The second class included such deeds as release, surrender, confirmation, assignment, and defeasance. Besides the above there were certain deeds which derived their force and effect as legal conveyances from the Statute of Uses. These latter were deeds of bargain and sale, covenant to stand seised to uses, and lease and release.[59]

These common-law deeds, with some modifications and occasionally with new names, are still retained to some extent in this country, although the deeds of feoffment and gift are not used in some states. Our modern deeds are modifications of the old common-law deeds, and may be divided into four species, namely: (1) The quitclaim deed, (2) bargain and sale deed without any covenant for title, (3) bargain and sale deed with special covenants for title, and the warranty deed. All the above forms of deeds, except the quitclaim deed, are deeds of bargain and sale, and are adequate to transfer title to most any estate in real property.

§ 306. **Deed of release.**—At common law a deed of release was a form of transfer used only where some right to real estate existed in one person, the actual possession of which was in another.[60] It belonged to the class of derivative or secondary conveyances, and served to pass any interest in the land which the

[59] 2 Bl. Comm. 338.

[60] Miller v. Emans, 19 N. Y. 384.

releasor had.[61] One tenant in common could not release to his co-tenant, because they had distinct freeholds. When a man had the right of possession in himself, he was compelled to convey by feoffment. He could give a release only when out of possession, and it could then only be made to one in possession.[62] But by long established practice it makes no difference whether the releasee has an existing estate in possession or not.[63]

This form of conveyance at common law resembled our modern quitclaim deed, except that in the latter possession in the grantee is not necessary. In some states the only difference between the two is that a quitclaim deed is treated as an original conveyance.[64] A deed of release ordinarily gives up a future interest to a present holder, and so enlarges his estate; or it removes from an owner's title a mortgage, easement, dower right, or other outstanding incumbrance.[65]

The ordinary operative words of a deed of release at common law are, "remise, release, and forever quitclaim"—the same as those of a quitclaim deed of to-day. The latter instrument is the outgrowth of the common-law release, and is now quite generally used to fill its office.[66] By statute in many states, and by usage in others, a deed of release, or a quitclaim deed, operates to pass all the estate the releasor could convey by a deed of bargain and sale, or by any other form of deed.

§ 307. **Deeds of confirmation.**—A deed of confirmation at common law was of the class of derivative or secondary deeds, and was used to validate and make indefeasible a prior voidable transfer. This form of deed is of a nature similar to a release, and is the proper form to make sure a voidable estate.[67] A deed of confirmation does not have the effect to validate a conveyance that was originally void,[68] although such an instrument might now, in a proper case, be made operative as a deed of bargain and sale, or some other form of conveyance.[69]

[61] Jackson v. Root, 18 Johns. (N. Y.) 60.

[62] Baker v. Woodward, 12 Ore. 3, 6 Pac. 173.

[63] Hoyt v. Ketcham, 54 Conn. 60, 5 Atl. 606.

[64] Rogers v. Hillhouse, 3 Conn. 398; Kerr v. Freeman, 33 Miss. 292; Hall v. Ashby, 9 Ohio 96, 34 Am. Dec. 424.

[65] Doe v. Reed, 5 Ill. 117, 38 Am. Dec. 124; Bryan v. Uland, 101 Ind. 477, 1 N. E. 52; Jackson v. Stackhouse, 1 Cow. (N. Y.) 122, 13 Am. Dec. 514.

[66] United States v. California &c. Land Co., 148 U. S. 31, 13 Sup. Ct. 458, 37 L. ed. 354; Lewis v. Shearer, 189 Ill. 184, 59 N. E. 580.

[67] Turk v. Skiles, 45 W. Va. 82, 30 S. E. 234.

[68] Branham v. San Jose, 24 Cal. 585.

[69] Fauntleroy's Heirs v. Dunn, 3 B. Mon. (Ky.) 594.

A title defeasible because coming through the deed of an infant or insane person may be made good by the confirmatory deed of the former after he reaches his majority, or by that of the latter after he regains his sanity.[70] The operative words used in a deed of confirmation are "given, granted, ratified, approved, and confirmed," although any other words sufficiently showing the intention to confirm may be employed.[71] The office of confirmation deeds is largely filled in modern transactions by the quitclaim deed. It frequently occurs, however, that the recitals in a deed show that it was given to ratify or confirm some previous transaction, or to correct some error or irregularity in a former deed, in which case the recitals become material for the purpose of showing a correction of the errors mentioned. In such case confirmatory recitals should be briefly noted in the abstract, as:

This deed given, as stated therein, to correct an error in a former deed between the same parties, dated May 10, 1905, wherein the grantee's name was erroneously given as John Smyth instead of John Smith.

§ 308. **Deeds of surrender.**—A surrender is that form of secondary conveyance whereby an estate for life or years is yielded up to one who has the immediate estate in reversion or remainder, and by which the lesser estate becomes merged in the greater by mutual agreement.[72] It is the converse of a release, as it operates by the falling of a lesser estate into the greater, while a release operates by the greater estate descending upon the less.

The technical and proper words for this conveyance are, "surrender and yield up;" but any form of words by which the intention of the parties is sufficiently made clear will operate as a surrender. The surrender may be express or implied. It is implied when an estate incompatible with the existing estate is accepted, or the lessee takes a new lease of the same lands.[73] The implied surrender is usually referred to as a surrender "by operation of law." The words commonly used in an express surrender are,

[70] McGreal v. Taylor, 167 U. S. 688, 17 Sup. Ct. 961, 42 L. ed. 320; Luhrs v. Hancock, 181 U. S. 567, 21 Sup. Ct. 726, 45 L. ed. 1005; Clay v. Hammond, 199 Ill. 370, 65 N. E. 352, 93 Am. St. 146; Blinn v. Schwartz, 177 N. Y. 252, 69 N. E. 542.

[71] 2 Bl. Comm. 325.

[72] Hays v. Goldman, 71 Ark. 251, 72 S. W. 563; Fisher v. Edington, 80 Tenn. 189.

[73] Otis v. McMillan, 70 Ala. 46; Flagg v. Dow, 99 Mass. 18.

"surrender, grant, and yield up," but no particular words are necessary, it being sufficient if the intention of the parties clearly appear.[74] An express surrender, to be valid, must be by one in possession, and the interest surrendered must bear such a relation, both in quantum and position, to the estate of the surrenderee, in order that it may merge therein. As in release and confirmation the quitclaim has largely taken the place of surrender for most purposes, but the instrument is still used for the relinquishment of dower rights and leasehold interests. The operative part of a deed of surrender is usually preceded by matter of inducement or preamble stating the circumstances under which the deed is made. A brief synopsis of this, and the surrender clause, should appear in the abstract. An example of the surrender of a life estate is as follows:

William Smith to John Smith, only son and heir apparent of said William Smith.	Deed of Surrender, Dated June 1, 1910. Recorded June 20, 1910. Vol. 25, page 75. Consideration $1,000.00.

Recites that "whereas, by virtue of a deed dated the 20th day of March, 1900, the land hereinafter described was conveyed to the grantor herein during his natural lifetime; and whereas the grantor herein has agreed with the grantee herein to sell to him the life estate of the grantor in said land for the price of one thousand dollars: Now in consideration of one thousand dollars paid to the grantor by the grantee, the receipt whereof is hereby acknowledged, the grantor hereby surrenders, grants, and yields up unto the grantee all that parcel of land [describing same] and the estate for life or life interest of said grantor therein, to the intent that the same may merge and be extinguished in the reversion and the inheritance of the said premises, and that the said grantee thereafter may be seised of or entitled to the fee simple and inheritance in possession thereof. Acknowledged June 1, 1910." As deeds of this character are usually long and technical, condensation and abbreviation should be practiced and everything eliminated except the salient features.

[74] Harris v. Hiscock, 91 N. Y. 340.

§ 309. **Deeds of assignment.**—Another form of derivative or secondary conveyances at common law was the deed of assignment. It was originally used in the transfer of estates for years, but it is now more particularly used to transfer some particular estate or interest in land,[75] such as an estate for life, or for years, not back to the reversioner or remainderman, but to an outside party.[76]

It is also used to transfer a mortgage, a judgment lien, a rent, an easement, or any other outstanding claim or encumbrance on realty. At common law it was understood to mean a parting with the whole property, and could be made orally; but is required by the statute of frauds to be in writing, except when affecting personalty interests such as a mortgage lien that may pass by delivery of the instrument.

The words commonly used in an assignment are "assign, transfer, and set over," although other words clearly showing the intention of the parties would be sufficient. An assignment of a deed, indorsed thereon, does not convey any interest in the lands therein described. In equity it might entitle the assignee to a decree for specific performance, but it can not operate as a transfer of the legal title.[77]

§ 310. **Deeds of defeasance.**—A defeasance is an instrument which avoids or defeats the force and operation of some other deed, and that which in the same deed would be called a "condition" of it, in another deed is a defeasance; but it must contain proper words to defeat or put an end to the deed of which it is intended to be a defeasance, as that it shall be void or of no force or effect.[78] It is not necessary that the dates of the defeasance and the original deed should correspond. It is to be executed at the same time, that it may be a part of the same transaction.[79] To be valid, a defeasance must be made between the same persons who were parties to the original deed, and must be signed and executed by the person whose estate is to be defeated.[80] It is immaterial whether the contract which constitutes

[75] Ball v. Chadwick, 46 Ill. 28.

[76] 2 Bl. Comm. pp. *326, *327.

[77] Dupont v. Wertheman, 10 Cal. 354; Porter v. Read, 19 Maine 363; Reaume v. Chambers, 22 Mo. 36; Bentley v. Deforest, 2 Ohio 221, 15 Am. Dec. 546; Contra, Lemon v. Graham, 131 Pa. St. 447, 19 Atl. 48, 6 L. R. A. 663; Harlowe v. Hudgins, 84 Tex. 107, 19 S. W. 364, 31 Am. St. 21.

[78] Lippincott v. Tilton, 14 N. J. L. 364.

[79] Harrison v. Trustees of Philip's Academy, 12 Mass. 456.

[80] Miller v. Quick, 158 Mo. 495, 59 S. W. 955.

the defeasance be incorporated in the same instrument or in a separate instrument contemporaneously executed;[81] but the defeasance and the conveyance are now generally combined into one document, and take the form of the modern mortgage.

§ 311. **Conveyances to take effect in the future.**—By the common law, an estate of freehold could not be conveyed to commence in futuro, because it could not be created without livery of seisin. This reason does not apply to conveyances operating by force of the statute of uses.[82] This was also due to the technical doctrine that there must always be some one seised of the freehold. By statute, however, in many states, freeholds may now be created to commence in futuro, with or without a preceding estate. A deed, in whatever terms, reserving to the grantor the enjoyment of the property during his life, is generally considered as a present conveyance of the fee to the grantee, subject to the reservation, and not as testamentary in character.[83] Even a declaration that the deed shall not go into effect until the death of the grantor does not give it a testamentary character.[84]

A deed must take effect upon its execution if at all. It must pass a present interest to the grantee, though his right to enter into possession may be deferred to a future time. If the intention is manifest that the deed should not take immediate effect, but shall be operative only upon the grantor's death, it will never take effect at all unless it is executed with such formalities that it may be given effect as a testamentary disposition.[85] But a deed may be delivered to take effect upon the grantor's death. If a grantor delivers a deed to a third person absolutely as his deed, without reservation and without intending to reserve any control over the instrument, though this is not to be delivered to the grantee until the death of the grantor, the deed when delivered upon the grantor's death is valid, and takes effect from the first delivery.[86]

[81] Dubuque Nat. Bank v. Weed, 57 Fed. 513.

[82] Chancellor v. Windham, 1 Rich. L. (S. Car.) 161, 42 Am. Dec. 411.

[83] Knowlson v. Fleming, 165 Pa. St. 10, 30 Atl. 519.

[84] Bunch v. Nicks, 50 Ark. 367, 7 S. W. 563; Shackelton v. Sebree, 86 Ill. 616.

[85] McCalla v. Bane, 45 Fed. 828; Wellborn v. Weaver, 17 Ga. 267, 63 Am. Dec. 235; Blackman v. Preston, 123 Ill. 381, 15 N. E. 42.

[86] McCalla v. Bane, 45 Fed. 828; Bury v. Young, 98 Cal. 446, 33 Pac. 338, 35 Am. St. 186; Loveland v. Loveland, 136 Ill. 75, 26 N. E. 381; Maxwell v. Harper, 51 Wash. 351, 98 Pac. 756.

In states in which the Statute of Uses is not in force, it has been decided that, since livery of seisin is obsolete, the common-law rules based upon abeyance of the seisin do not control, and that, aside from any express statutory authorization, future estates can be created by a conveyance inter vivos, unsupported by any precedent estate.[87] "The mere technicalities of ancient law are dispensed with upon compliance with statutory requirements. The acknowledgment and recording are accepted in place of livery of seisin, and it is competent to fix such time in the future as the parties may agree upon as the time when the estate of the grantee shall commence. No more necessity for limiting one estate upon another, or for having an estate, of some sort, pass immediately to the grantee in opposition to the expressed intention of the parties. The feoffment is to be regarded as taking place, and the livery of seisin as occupying, at the time fixed in the instrument, and the acknowledgment and recording are to be considered as giving the necessary publicity which was sought in the ancient ceremony."[88]

Conveyances to take effect in the future are usually in the form of a deed of bargain and sale, with a provision postponing the grantee's enjoyment and occupancy until the grantor's death or to some other specified time.[89] In abstracting a deed of this character the proviso limiting the enjoyment and occupancy of the estate should be shown. Where the character of the grantee's estate is set out in the habendum, this should be copied literally. The words of grant, and covenants, if any, should also appear in the abstract. The presentation in other respects will not differ from the ordinary forms of abridgments already shown.

§ 312. **Deeds conveying base, qualified, and conditional estates or interests.**—Where the deed to be abstracted is an absolute conveyance of the entire interest of the grantor the nature and legal import of the instrument may be indicated by the use of the words "warranty deed," or "quitclaim deed," as the case may be; the former being used when the deed contains covenants running with the land, and the latter when the deed purports to convey only the present interest or estate of the grantor. But where the instrument does not purport to be an absolute con-

[87] Bunch v. Nicks, 50 Ark. 367, 7 S. W. 563; Gorham v. Daniels, 23 Vt. 600.

[88] Abbott v. Holway, 72 Maine 298.

[89] Abbott v. Holway, 72 Maine 298.

veyance of the entire interest or estate of the grantor, the instrument should be referred to simply as a "deed," and all the material provisions and operative words set out in full, so that counsel may determine their legal import and effect.

Conveyances of this kind embrace such estates or interests as estates for life or years, conditional or qualified estates, equitable estates, estates in expectancy, easements and the like. The validity and effect of such conveyances is not always determined by the application of general principles, as in case of warranty and quitclaim deeds, but by the application of special provisions of law to the particular provisions of the conveyance. Hence, greater particularity of statement is required in abstracting a deed of this character than is required of any other form of conveyance. The nature and extent of the estate granted is frequently determined from the operative words and from the words of purchase and limitation, while the language of the habendum is often employed to explain or define the grant made in the premises. Conditions and restrictions require special attention, and where covenants appear it is best to note them also. The habendum may explain, enlarge, or qualify, but can not contradict or defeat the estate granted by the premises;[90] but so far as the habendum is inconsistent with the declaration in the premises it must be rejected.[91] The premises of a deed are often expressed in general terms which admit of explanations which are usually found in the habendum. The premises frequently do not describe, or profess to describe, the quantum or extent of the estate granted or intended to be granted.[92] If no words of inheritance are used in the premises, the grantee by the premises takes by implication only a life estate at most. The habendum may then by express limitation define the estate granted as an estate for life in fee, or in fee tail, and the estate so expressly defined necessarily excludes the uncertain implication from the premises.[93] If the habendum clause is repugnant to the estate already vested by the deed it is void.[94] Effect will be given to both

[90] Rines v. Mansfield, 96 Mo. 394, 9 S. W. 798; Tyler v. Moore, 42 Pa. St. 374; Thompson v. Carl, 51 Vt. 408.

[91] Winter v. Gorsuch, 51 Md. 180.

[92] Doren v. Gillum, 136 Ind. 134, 35, N. E. 1101.

[93] Riggin v. Love, 72 Ill. 553; Berry v. Billings, 44 Maine 416, 69 Am. Dec. 107.

[94] Ratcliff v. Marrs, 87 Ky. 26, 10 Ky. L. 134, 7 S. W. 395, 8 S. W. 876; Smith v. Smith, 71 Mich. 633, 40 N. W. 21; Havens v. Seashore Land Co. 47 N. J. Eq. 365, 20 Atl. 497.

the granting clause and the habendum, if possible to do so by a fair construction, where the interest intended to be conveyed is defined in both clauses. If the habendum is to the grantee for the life of another, after a grant to him and his heirs, there is no repugnancy.[95] The covenant of warranty applies to the estate conveyed, and can not enlarge the estate.[96]

§ 313. Conveyances with restrictive conditions and covenants.—The owner of land, desiring to protect and improve the neighborhood for any special purpose, may impose such restrictions as he sees fit in making sales of his land, provided such restrictions are not against public policy.[97] He may determine for himself what kinds of business are undesirable in the vicinity of residences, and covenants restraining them can be enforced without any proof whatever that they are injurious or offensive.[98] Restrictions in the use of land conveyed in fee are not favored, but the courts will enforce them where the intention of the parties in their creation was clear. Such restrictions are to be fairly and reasonably interpreted accordingly to their apparent purpose. On the one hand they are not to be construed narrowly, and on the other hand they are not to be unduly enlarged.[99] A restriction which amounts to a prohibition of the use of the land granted is void.[1] Where a restriction is confined within reasonable bounds, and the party in whose favor it is made has an interest in the subject-matter of the restriction, or others in privity with him have such an interest, it will be sustained.[2] A covenant not to engage in a particular business upon the land conveyed or retained is valid if limited to a reasonable time.[3] It is competent for the grantee to covenant to reconvey the land for a specified sum within a period named.[4] A provision that the grantee shall not convey without the consent of the grantor is repugnant to the grant and void.[5] Restrictions as to the use of the land or the mode of

[95] Rowland v. Rowland, 93 N. Car. 214.

[96] Ballard v. Child, 46 Maine 152; White v. Brocaw, 14 Ohio St. 339; Hull v. Hull, 35 W. Va. 155, 13 S. E. 49, 29 Am. St. 800.

[97] Webb v. Robbins, 77 Ala. 176; Peabody Heights Co. v. Willson, 82 Md. 186, 32 Atl. 386, 1077, 36 L. R. A. 393; Sanborn v. Rice, 129 Mass. 387; Rowland v. Miller, 139 N. Y. 93, 34 N. E. 765, 22 L. R. A. 182; In re Thompson's Appeal, 101 Pa. St. 225.

[98] Coudert v. Sayre, 46 N. J. Eq. 386, 19 Atl. 190.

[99] Smith v. Bradley, 154 Mass. 227, 28 N. E. 14.

[1] Craig v. Wells, 11 N. Y. 315.

[2] Grigg v. Landis, 21 N. J. Eq. 494.

[3] Mollyneaux v. Wittenberg, 39 Nebr. 547, 58 N. W. 205.

[4] Randall v. Sanders, 87 N. Y. 578.

[5] Murray v. Green, 64 Cal. 363, 28 Pac. 118.

its enjoyment, though expressed to be "conditions," will not be construed to be technical conditions unless it appears that the parties so intended or understood them to be "conditions," a breach of which would work a forfeiture of the estate.[6]

No particular form of words is considered absolutely essential in creating a condition in a grant or deed; but it is essential that the intention to create it shall be clearly shown by some words. It is well recognized that certain terms are more apt to create a condition than are others. The most appropriate words used for this purpose are such phrases as "on condition," "provided always," or similar expressions which indicate that in a certain event prescribed the estate becomes defeasible by entry of the grantor or his heirs, but that until entry the estate is to continue. Whatever the words used, they should be literally copied in the abstract.

§ 314. Conveyances of land in the adverse possession of another.—At common law the conveyance of land in the adverse possession of another was void. When livery of seisin was essential to a conveyance of land, it was of course impossible to make livery when the land was in the possession of another.[7] Another reason for the rule is found in the policy of the law to prevent the sale of pretended titles whereby litigation is encouraged. If the owner is not disposed to attempt the enforcement of a doubtful claim, public policy requires that he should not be allowed to transfer it to another, and thus encourage strife and litigation.[8] The common-law rule has been affirmed by statute and judicial decisions in a few states.[9] It is a transfer of land in adverse possession against which such statutes animadvert, but the deed made between the parties is good as between them and to all the world. It is only void as to the party in possession and his privies.[10] Even in those states in which the doctrine is retained, inasmuch as the reasons for it have in a great measure ceased to exist, the tendency of the later decisions is to modify

[6] Lake Erie & W. R. Co. v. Priest, 131 Ind. 413, 31 N. E. 77; Ayling v. Kramer, 133 Mass. 12; Fuller v. Arms, 45 Vt. 400.

[7] Dexter v. Nelson, 6 Ala. 68; McMahan v. Bowe, 114 Mass. 140, 19 Am. Rep. 321.

[8] Russell v. Doyle, 84 Ky. 386, 8 Ky. L. 366, 1 S. W. 604.

[9] Mahan v. Smith, 151 Ala. 482, 44 So. 375; Paton v. Robinson, 81 Conn. 547, 71 Atl. 730; Cyrus v. Holbrook, 32 Ky. L. 466, 106 S. W. 300; Becker v. Church, 115 N. Y. 562, 22 N. E. 748.

[10] Farnum v. Peterson, 111 Mass. 148; Huston v. Scott, 20 Okla. 142, 94 Pac. 512 35 L. R. A. (N. S.) 721n.

it so as to make it reasonable and just.[11] It is held that such statutes do not apply where real property thus held adversely was purchased at a judicial sale.[12]

It is not necessary that the title of the disseisor be valid to constitute an adverse possession under the rule. His title may be bad, or his original entry may have been by permission of the true owner.[13] But to render a deed void on account of adverse possession, the adverse claimant must have actual exclusive possession under claim of a specific title, and not under a general assertion of ownership;[14] he must have actual possession and claim adversely.[15] An entry by the disseisee, and delivery of a deed upon the land, purges the disseisin, and makes the deed effectual to pass all the title originally acquired and held by the grantor at the time of his conveyance.[16]

In a majority of the states, however, it is provided by statute that a person claiming title to real property in the adverse possession of another may transfer it with the same effect as if he were in actual possession.[17] The effect of the statutes removing the disability of the owner of land out of possession is simply to enable him to invest the grantee with all the rights of the owner precisely as he held them.[18] Whatever titles are deducible from the records must be shown in the abstract, and their validity and effect determined by applying the law of the jurisdiction to the admitted or known facts.

§ 315. Fraudulent conveyances. — Fraudulent conveyances may be either fraudulent in law or fraudulent in fact. They are fraudulent in law when they have been executed under such circumstances that the law itself conclusively infers a fraudulent intent from the intrinsic nature of the circumstances, without any inquiry into the actual intent of the parties to the transaction. They are fraudulent in fact where the circumstances are not such

[11] Webb v. Thompson, 23 Ind. 428; McMahan v. Bowe, 114 Mass. 140, 19 Am. Rep. 321.

[12] Vary v. Sensabaugh, 156 Ala. 459, 47 So. 196; Martin v. Turner, (Ky. App.), 115 S. W. 833.

[13] Barry v. Adams, 3 Allen (Mass.) 493; Pearce v. Moore, 114 N. Y. 256, 21 N. E. 419.

[14] Dawley v. Brown, 79 N. Y. 390.

[15] Sherwood v. Waller, 20 Conn. 262.

[16] Farnum v. Peterson, 111 Mass. 148; Betsey v. Torrance, 34 Miss. 132.

[17] Moore v. Sharpe, 91 Ark. 407, 121 S. W. 341, 23 L. R. A. (N. S.) 937n; King v. Sears, 91 Ga. 577, 18 S. E. 830; Torrence v. Shedd, 112 Ill. 466; Hovey v. Hobson, 51 Maine 62; Crane v. Reeder, 21 Mich. 24, 4 Am. Rep. 430; Cassedy v. Jackson, 45 Miss. 397.

[18] Shortall v. Hinckley, 31 Ill. 219.

as that the law conclusively infers a fraudulent intent from them, but where the parties have actually intended to delay, hinder, or defraud creditors or subsequent purchasers.[19]

As a general rule, fraud seldom appears on the face of a deed, so as to charge a subsequent purchaser with notice. It sometimes happens, however, that the provisions of a conveyance purporting to be a trust for the benefit of particular persons is framed so palpably in the interest of the grantor that a court of equity will not hesitate to pronounce it void, as having been executed for the purpose of delaying creditors. Thus where property of the value of $7,000 was conveyed in trust to secure a debt of $150, and several other small debts not yet due, the deed permitting the grantor, in the meanwhile, to remain in possession of the premises, the deed was held void on its face, and a remote purchaser thereunder charged with notice of the fraud.[20] Whether or not a conveyance is fraudulent is generally a question of consideration and intent to delay, hinder, or defraud creditors.[21] Where, however, a conveyance is gratuitous or without consideration, an actual intent to defraud is not necessary;[22] but it is always a question of fact whether under the circumstances of the case a conveyance was fraudulent.[23] If the grantee participate in the fraud, the conveyance is fraudulent though based upon a valuable consideration.[24] But where the grantor alone is guilty of an intent to defraud, a bona fide grantee, for valuable consideration, and without notice of the fraud, obtains a valid title.[25]

§ 316. Conveyances subject to incumbrance.—It not infrequently happens that a conveyance is made subject to an incumbrance, usually a mortgage. The clause in a deed referring to the existence of a prior mortgage is of much importance in other ways than in determining whether the grantee engages to pay the mortgage, or merely buys subject to it. In the first place it may qualify the grantor's liability upon the covenants of the deed

[19] Land v. Jeffries, 5 Rand. (Va.) 211, 599.

[20] Johnson v. Thweatt, 18 Ala. 741.

[21] Chandler v. Von Roeder, 24 How. (U. S.) 224, 16 L. ed. 633; Todd v. Nelson, 109 N. Y. 316, 16 N. E. 360.

[22] Wooten v. Steele, 109 Ala. 563, 19 So. 972, 55 Am. St. 947.

[23] Adams v. Kellogg, 63 Mich. 105, 29 N. W. 679; Todd v. Nelson, 109 N. Y. 316, 16 N. E. 360.

[24] Huffman v. Leslie, 23 Ky. L. 1981, 66 S. W. 822.

[25] Hughes v. Noyes, 171 Ill. 575, 49 N. E. 703; Parmenter v. Lomax, 68 Kans. 61, 74 Pac. 634; Russell v. Cole, 167 Mass. 6, 44 N. E. 1057, 57 Am. St. 432; Delavan v. Wright, 110 Mich. 143, 67 N. W. 1110.

against incumbrances by showing the existence of the mortgage, and that, as between him and his grantee, the latter is to pay it.[26] It may prevent, by a statement as to what the incumbrance upon the property is, any liability on the part of the grantor to the penalties imposed by statute upon one who sells incumbered property without disclosing the incumbrance. It may preclude the grantee from impeaching the validity of the mortgage existing upon the property conveyed.[27] It may subject the land to the burden of the mortgage without imposing upon the grantee any personal liability to pay it.[28] It may have an important bearing upon the liability of the grantor in case an extension of the mortgage is afterwards made without his consent.[29] It may render the grantee directly liable for the mortgage debt to the mortgagee, or it may make him liable merely to his grantor.[30] Moreover, under this clause arise questions of notice affecting others who may claim under the deed.[31]

The mode, therefore, in which this clause is expressed is of extreme importance, both in the abstracting of the instrument and in the interpretation of its effect. The abstract should contain a verbatim copy of the clause, together with any covenant which it may qualify. When land is conveyed "subject to" a mortgage, and the amount of it is deducted from the consideration, with the intention that it shall be paid by the grantee, it is important that the mortgage be excepted from the covenants of the deed; otherwise the grantor may be held to have covenanted against the incumbrance, and to have made himself liable for its payment.[32] The fact that the incumbrance is mentioned in the deed to which reference is made does not avail to qualify the covenants of a deed.[33] Oral evidence that the parties intended or agreed that the incumbrance should be excepted from the covenants is not admissible, because its effect would be to vary or control the deed.[34]

The mention of an existing mortgage for a certain amount

[26] Lippitt v. Thames Loan &c. Co., 88 Conn. 185, 90 Atl. 369; Collins v. Rowe, 1 Abb. N. Cas. (N. Y.) 97.

[27] McMurphy v. Adams, 67 N. H. 440, 39 Atl. 333; Ritter v. Phillips, 53 N. Y. 586.

[28] McConihe v. Fales, 107 N. Y. 404, 14 N. E. 285.

[29] Calvo v. Davies, 8 Hun (N. Y.) 222, aff'd 73 N. Y. 211, 29 Am. Rep. 130.

[30] Garnsey v. Rogers, 47 N. Y. 233, 7 Am. Rep. 440.

[31] Campbell v. Vedder, 3 Keys (N. Y.) 174, 1 Abb. App. Dec. (N. Y.) 295.

[32] King v. Kilbride, 58 Conn. 109, 19 Atl. 519.

[33] Harlow v. Thomas, 15 Pick. (Mass.) 66.

[34] Spurr v. Andrew, 6 Allen (Mass.) 420.

is only by way of description and identification of the mortgage, which, to the extent of all sums due thereon for principal or interest, is a single incumbrance. A covenant that the premises "are free from all incumbrances except the aforesaid" is not a covenant that there was no interest due upon the mortgage at the time of the conveyance.[35] A recital in a deed that it is made subject to a mortgage may give notice of the mortgage, but such recital must be sufficient to make it the duty of the purchaser to inquire and to lead to the discovery of the mortgage. In case the mortgage is not recorded, the recital must be sufficiently definite to put the purchaser in a way of discovering the unrecorded mortgage.[36] One who purchases land by a deed which expressly recites that the premises are subject to a mortgage has notice of the mortgage from the recital, and can not claim against it, although it be not recorded.[37] A condition for the payment of money to third persons by the grantee within a fixed time will be construed to be merely a charge upon the land, unless a different intent is apparent, or the language of the condition is so clear as to leave no room for construction or doubt.[38] A conveyance "subject to the purchase-money," and to an agreement concerning the same, creates an equitable lien upon the land conveyed.[39] A provision in a deed that the grantee shall assume and pay a mortgage upon the land conveyed does not constitute a condition upon the breach of which the title revests in the grantor.[40] But the payment of a mortgage upon the land may be made an express condition, and when so intended it will be enforced by forfeiture.[41] In like manner, and for stronger reasons, one who has purchased land subject to a mortgage, which he agrees to pay, takes a title subject to the mortgage, although it be not recorded, or be recorded in such a way that it is not notice.[42] When a mortgage is expressly excepted from a covenant of warranty in a deed, this exception charges the purchaser with notice of the mortgage, although the mortgage be not recorded.[43]

[35] Ayer v. Philadelphia &c. Brick Co., 157 Mass. 57, 31 N. E. 717, 159 Mass. 84, 34 N. E. 177.

[36] McCrea v. Newman, 46 N. J. Eq. 473, 19 Atl. 198.

[37] Hull v. Sullivan, 63 Ga. 126; Garrett v. Puckett, 15 Ind. 485; Westervelt v. Wyckoff, 32 N. J. Eq. 188.

[38] Wier v. Simmons, 55 Wis. 637, 13 N. W. 873.

[39] Hiestes v. Green, 48 Pa. St. 96, 86 Am. Dec. 569.

[40] Martin v. Splivalo, 69 Cal. 611, 11 Pac. 484.

[41] Fisk v. Chandler, 30 Maine 79, 50 Am. Dec. 612.

[42] Ross v. Worthington, 11 (Gil. 323) Minn. 438, 88 Am. Dec. 95.

[43] Morrison v. Morrison, 38 Iowa 73.

The principle of equity is well established that a grantee of land is chargeable with notice, by implication, of every fact affecting the title which would be discovered by an examination of the deeds, or other muniments of title of his grantor, and of every fact as to which the grantee, with reasonable prudence or diligence, ought to become acquainted. If there is sufficient contained in any deed or record, which a prudent purchaser ought to examine, to induce an inquiry in the mind of an intelligent person, he is chargeable with knowledge or notice of the facts so contained.[44] So the recital of an incumbrance to which a conveyance is subject must be sufficient to put the purchaser upon inquiry, and to lead to the discovery of the mortgage referred to.

§ 317. **Dedicatory deeds.**—We have seen that a writing is not requisite to the validity of a dedication. All that is required is the assent and intent of the owner of the property to appropriate it to a public use, and any act or acts clearly manifesting an intent to dedicate is sufficient. There are dedications, however, where the intent is expressly manifested, as much so as in ordinary deeds, and the intent of the dedication will be measured by the writing.[45] Deeds of streets to "the present and future owners of town lots," or to the "inhabitants" of a certain town, and the like, have been held to operate as a dedication to the public.[46] So, deeds by owners to individuals expressly dedicating streets and the like have often been held, as between the parties, to give the grantee the right to have the dedicated streets used as such,[47] and, indeed, to constitute an irrevocable dedication to the public when duly accepted.[48] It is only in the latter instance that the intent to dedicate must be unmistakable in purpose and decisive in character, and the recital thereof should be shown by a literal transcription.

We have said that where streets and highways are marked on a plat and lots are bought and sold with reference to the plat or map, all who buy with reference to the general plan or scheme disclosed by the plat or map acquire a right in all the public ways

[44] Corbitt v. Clenny, 52 Ala. 480; Stidham v. Matthews, 29 Ark. 650.

[45] Getchell v. Benedict, 57 Iowa 121, 10 N. W. 321.

[46] Mayo v. Wood, 50 Cal. 171; Browne v. Bowdoinham, 71 Maine 144; Corbin v. Dale, 57 Mo. 297.

[47] Booraem v. North Hudson County R. Co., 40 N. J. Eq. 557, 5 Atl. 106.

[48] Barney v. Lincoln Park, 203 Ill. 397, 67 N. E. 801.

designated thereon and may enforce the dedication.[49] These plats and maps are important to be considered in examining titles. It is often necessary to consult the original plats, and it is well to become familiar with the system of indexing and recording them, as well as the chief statutory requirements for platting and subdividing land.[50]

§ 318. **Deeds creating resulting trusts.**—It is a principle of law that where one buys real estate and pays the purchase money with his own funds, and has the title placed in the name of another person, or where a person standing in a fiduciary relation uses fiduciary funds to purchase the property, and takes the title thereto in his own name, a trust results in favor of the one whose funds were applied to the payment of the purchase-price. Such a trust is raised only from fraud in obtaining title, or from payment of the purchase-money when the title is acquired.[51] Such a trust does not arise out of any contract between the parties, but is an implication of law from the existence of facts necessary to justify the implication.[52] They are founded on the presumed intention of the parties.[53]

In an early day it was necessary that the deed set out the consideration, and that it was paid by the grantee. If the deed contained no such recital it was presumed that the grantee held the title in trust for the grantor, or other person who paid the consideration money. But the presumption now is that the person to whom the deed is made paid his own money for it. The grantor is estopped, by a recital of a consideration paid, to claim a resulting trust in his favor.[54] It may be presumed, however, in the absence of a statutory declaration to the contrary, that where the purchase-money is paid by one and the title taken in the name of another, the two being strangers to each other, a resulting trust arises, and the grantee named will be held to be a trustee for the person who parted with the consideration for which the deed was made.[55] But the mere fact that there was no consideration will

[49] Bartlett v. Bangor, 67 Maine 460; In re Pearl Street, 111 Pa. St. 565, 5 Atl. 430.

[50] See Chap. IX.

[51] In re Bickel's Appeal, 86 Pa. St. 204.

[52] Monson v. Hutchin, 194 Ill. 431, 62 N. E. 788.

[53] Cook v. Patrick, 135 Ill. 499, 26 N. E. 658, 11 L. R. A. 573.

[54] Bassett v. Bassett, 55 Maine 125; Wilkinson v. Scott, 17 Mass. 249.

[55] Union College v. Wheeler, 59 Barb. (N. Y.) 585, 5 Lans. 160; McGovern v. Knox, 21 Ohio St. 551, 8 Am. Rep. 80.

not in itself raise a resulting trust.[56] A voluntary conveyance to a wife or child, or to one to whom the grantor is under legal or moral obligation to support, will be presumed, as a rule, to carry the beneficial interest also, and no resulting trust arises.[57] An actual consideration will prevent a trust resulting;[58] and the consideration need not be expressed in the deed.[59] But the recital of a valuable consideration in a deed, even if the consideration is not paid, will prevent a resulting trust.[60]

[56] McClenahan v. Stevenson, 118 Iowa 106, 91 N. W. 925.

[57] Ripley v. Seligman, 88 Mich. 177, 50 N. W. 143; Gaylord v. Gaylord, 150 N. Car. 222, 63 S. E. 1028.

[58] Hogan v. Jaques, 19 N. J. Eq. 123, 97 Am. Dec. 644.

[59] Bank of U. S. v. Housman, 6 Paige (N. Y.) 526.

[60] Verzier v. Convard, 75 Conn. 1, 52 Atl. 255.

CHAPTER XIV

SPECIAL CLASSES OF PRIVATE CONVEYANCES

SEC.
320. Conveyances for the sole and separate use of married women.
321. Deed to husband and wife.
322. Conveyances for married women.
323. Conveyance between husband and wife.
324. Acknowledgment by married woman.
325. Release of dower.
326. Conveyances creating estates in common and in joint tenancy.
327. Voluntary partition deeds.
328. Conveyances to and by partnerships.
329. Conveyances to private corporations.
330. Acknowledgment of corporate deeds.
331. Conveyances by public and quasi corporations.
332. Conveyance by private corporations.
333. Conveyances by charitable or religious corporations.
334. Conveyance of an expectancy.
335. Conveyance by attorney in fact.
336. Power of attorney to convey.
337. Ratification and revocation of powers of attorney.
338. Conveyances in trust.
339. Declaration of trust in deeds.
340. Revocation of trust.
341. Death, resignation, or removal of trustee.

§ 320. **Conveyances for the sole and separate use of married women.**—Conveyances attempting to secure to a married woman, or to her and her children, the use and title to lands freed from the dominion and control of the husband and father are not uncommon. By statute in nearly all of the states a conveyance can be made to a married woman over which her husband will have no control; and the conveyance may, in some instances, be made to her directly, and in others by the aid of a trustee for her sole and separate use.[1] But if such a deed does not describe her as a married woman, and does not purport to be for her sole and separate use, the presumption is that it is a deed to the husband and wife in common. The separate estate of a married woman, being dependent upon the equitable doctrine of trusts—with the legal and equitable title separated—when a transfer is thus made directly to a married woman for her sole and separate use, her husband, in the absence of an express trust, is regarded in equity as taking the legal estate in trust for his wife for her

[1] Lippincott v. Mitchell, 94 U. S. 767, 24 L. ed. 315; Meyer v. Kinzer, 12 Cal. 247, 73 Am. Dec. 538.

separate use.[2] In order to create this equitable separate estate, the intention of the grantor to give the married woman the complete use of the property free from her husband's control must clearly appear from the words used in the deed.[3] And while the expression "sole and separate use" has been most frequently employed for this purpose, no special or technical form of words is necessary, if the intention to exclude the husband's marital rights is indicated. Words which might be necessary, however, to show such an intention when the grantor is a stranger are not always regarded as necessary in a conveyance by the husband to a trustee for the wife or in his conveyance directly to her.[4] A conveyance by the husband directly to the wife, without reservation, is necessarily a clear, unequivocal manifestation and declaration of the intention to relinquish his own rights, and to clothe the wife with them.[5]

In abstracting a deed of this character the granting clause and habendum should be shown quite fully. Where the deed contains any restrictions upon her power of disposition, either as to the mode of conveyance, or the purpose for which she may convey, such restrictions must be shown, as she can convey it only in the manner and for the purpose specified.

§ 321. **Deed to husband and wife.**—A conveyance to two persons who are husband and wife at the time the property vests in them, creates an estate by entireties. By reason of their legal unity by marriage, they together take the whole estate as one person. Neither has a separate estate or interest in the land, but each has the whole estate. Upon the death of one the entire estate and interest vests in the other, not by survivorship, but by virtue of a title that vested under the original limitation.[6] By reason of the unity of husband and wife, a conveyance or devise to them and to another vests one moiety of the land in such other, and only one moiety in the husband and wife together.[7] A tenancy by entireties arises upon the vesting of any kind of estate in hus-

[2] Jones v. Clifton, 101 U. S. 225, 25 L. ed. 908; Wood v. Wood, 83 N. Y. 575; Dezendorf v. Humphreys, 95 Va. 473, 28 S. E. 880.

[3] Richardson v. De Giverville, 107 Mo. 422, 17 S. W. 974, 28 Am. St. 426; Holliday v. Hively, 198 Pa. St. 335, 47 Atl. 988; Hackett v. Moxley, 68 Vt. 210, 34 Atl. 949.

[4] Hamilton v. Hubbard, 134 Cal. 603, 65 Pac. 321, 66 Pac. 860; Barnum v. Le Master, 110 Tenn. 638, 75 S. W. 1045.

[5] McMillan v. Peacock, 57 Ala. 127.

[6] Thornton v. Thornton, 3 Rand. (Va.) 179.

[7] Johnson v. Hart, 6 Watts & S. (Pa.) 319, 40 Am. Dec. 565.

band and wife, whether it be in fee, in tail, for life, or for years; whether it be in possession, reversion, or remainder. Such estate may be created by devise as well as by deed, and the title taken is always by purchase and not by descent.[8] And such an estate can be created only where the relation of husband and wife exists.[9] Upon the death of either during coverture the survivor does not take by right of survivorship, as in the case of a joint tenancy, but continues to hold the whole by virtue of the original title. Of course there can be neither curtesy or dower in an estate held by the entirety,[10] as the estate vests absolutely in the one upon the death of the other. For the same reason the homestead right which attaches to the land during the life of the husband does not survive to his wife; the whole estate vests in her absolutely.[11] Upon the death of both husband and wife the estate goes to the heirs of the one dying last; the heirs of the first one to die taking nothing.[12] In some states such estates have never been recognized, even in the absence of legislation on the subject.[13] No estate by the entirety is created by a deed in partition which, by direction of the coparcener, is made to himself and wife, or no title passes by a partition deed.[14] In some states it is held that the statutes enabling married women to hold property as if they were sole has had the effect to abrogate estates by entireties.[15] Such statutes do not affect estates by the entireties already existing, but prevent the creation of such estates afterward.[16] Neither spouse can sever this title so as to defeat or prejudice the right of survivorship in the other. Neither can alone make a valid conveyance to a third person. The husband

[8] Jones v. Chandler, 40 Ind. 588; French v. Mehan, 56 Pa. St. 286.

[9] Thornburg v. Wiggin, 135 Ind. 178, 34 N. E. 999, 22 L. R. A. 42, 41 Am. St. 422.

[10] Ames v. Norman, 4 Sneed. (Tenn.) 683, 70 Am. Dec. 269.

[11] Chambers v. Chambers, 92 Tenn. 707, 23 S. W. 67.

[12] Baker v. Stewart, 40 Kans. 442, 19 Pac. 904, 2 L. R. A. 434, 10 Am. St. 213; Jacobs v. Miller, 50 Mich. 119, 15 N. W. 42; Bains v. Bullock, 129 Mo. 117, 31 S. W. 342; Bertles v. Nunan, 92 N. Y. 152, 12 Abb. N. Cas. 283, 44 Am. Rep. 361; Long v. Barnes, 87 N. Car. 329.

[13] Whittlesey v. Fuller, 11 Conn. 337; Semper v. Coates, 93 Minn. 76, 100 N. W. 662; Kerner v. McDonald, 60 Nebr. 663, 84 N. W. 92, 83 Am. St. 550; Farmers' & Merchants' Nat. Bank v. Wallace, 45 Ohio St. 152, 12 N. E. 439.

[14] Harrison v. Ray, 108 N. Car. 215, 12 S. E. 993, 11 L. R. A. 722, 23 Am. St. 57; Taylor v. Birmingham, 29 Pa. St. 306; Yancey v. Radford, 86 Va. 638, 10 S. E. 972.

[15] Donegan v. Donegan, 103 Ala. 488, 15 So. 823, 49 Am. St. 53; Mittel v. Karl, 133 Ill. 25, 24 N. E. 553, 8 L. R. A. 655; Hoffman v. Stigers, 28 Iowa 302; Clark v. Clark, 56 N. H. 105.

[16] Almond v. Bonnell, 76 Ill. 536; Stilphen v. Stilphen, 65 N. H. 126, 23 Atl. 79.

may, however, convey his title in such an estate to his wife through a third person;[17] and where a husband may convey directly to his wife, his deed of land held by entirety to his wife is valid.[18] A husband and wife by their joint conveyance may destroy this estate, or they may mortgage the estate to secure the purchase-money of the land,[19] or to secure a loan to the husband.[20]

Where the granting clause in a deed to a husband and wife is silent as to the estate conveyed, but the deed recites the payment of the consideration by the wife out of the proceeds of the sale of her lands, and the habendum clause recites, "to have and to hold to the said husband and wife to them, her heirs and assigns forever," vests in them the use and joint occupancy of the land for life with the right to join in a sale thereof, but on the death of the wife without a sale, the land passes to her heirs.[21] It will thus be seen that the granting clause and the habendum may determine the nature of the estate conveyed, and for this reason they should be set out with great particularity where the deed purports to convey to husband and wife.

§ 322. **Conveyances by married women.**—By the common law a married woman could not convey her land either by her separate deed or by joining in a conveyance with her husband. This disability was an incident to her coverture. But the course of modern legislation has constantly tended toward giving her full control over her property without the assent or concurrence of her husband. This change has been gradual, extending over a series of years, and lacking uniformity among the states. In some states the husband's common-law rights in his wife's property has been substantially abolished, thus giving the wife full control over her property without the assent or concurrence of her husband. In others the common-law rule has only been modified by giving her the power to convey her land only with the assent and concurrence of her husband manifested by his joining with her in the conveyance. In spite of the influence of legislation in this country common-law doctrines, as to husband and wife, are not yet entirely obsolete, and in some states the husband's com-

[17] Donahue v. Hubbard, 154 Mass. 537, 28 N. E. 909, 14 L. R. A. 123, 26 Am. St. 271; Meeker v. Wright, 76 N. Y. 262, 7 Abb. N. Cas. 297.

[18] Enyeart v. Kepler, 118 Ind. 34, 20 N. E. 539, 10 Am. St. 94.

[19] McCoy v. Barns, 136 Ind. 378, 36 N. E. 134.

[20] Peoples Bldg. & Loan Assn. v. Billing, 104 Mich. 186, 62 N. W. 373.

[21] Hudson's Heirs v. Hudson's Admr. (Ky. App.), 121 S. W. 973.

mon-law marital rights are still recognized in respect to such of the wife's real property as is not her "separate estate."[22]

All the legislation on this subject is in derogation of the common law, inasmuch as it confers a capacity to contract and convey upon persons who formerly had no capacity at all; and therefore all the requirements of the enabling statutes, whether in regard to the execution or acknowledgment of the deed, must be strictly complied with.[23] It is only the precise mode prescribed by the statute that a married woman can make a valid conveyance of her lands, and the same mode may not apply alike to all the deeds in a chain of title. In the examination of a title based on the deed of a married woman counsel must see to it that the particular statute governing capacity and mode of conveyance in force at the time the deed was executed, has been strictly followed. In view of the many radical changes in the law respecting conveyances by married women, and the further fact that a rigid and literal compliance with the law is essential to vest title, greater vigilance and closer scrutiny on the part of counsel is required than in any other class of conveyances. Different formalities in regard to execution and acknowledgment were requisite at different periods, and counsel must be thoroughly familiar with the law applicable to the particular deed or deeds at the time of execution.

The relation which a married woman sustains to real property is an important factor in determining her capacity to sever that relation, and the mode of severance in case she has capacity. She may appear as having an interest in community property; as having an interest in the homestead; as having an interest in an estate by entireties; as having a dower or statutory interest; as having an equitable or statutory separate estate; or as having a general estate. The statutes should always be consulted regarding capacity and mode of disposition in the particular relation the married woman sustains to the property in question.

A provision requiring the joinder of the husband in a deed by the wife of her real estate is generally met by his expressing his assent thereto under his hand and seal without joining in the granting clause of the deed.[24] There are statutes in some states providing for the execution, in certain cases, of a separate deed

[22] Brasfield v. Brasfield, 96 Tenn. 580, 36 S. W. 384; Dietrich v. Hutchinson, 73 Vt. 134, 50 Atl. 810, 87 Am. St. 698.

[23] Good v. Zercher, 12 Ohio 364; Glidden v. Strupler, 52 Pa. St. 400.

[24] Schley v. Pullman Car Co., 25 Fed. 890.

by a married woman, as in case her husband is insane, or has deserted her, or is living separate from her; but where the statute enabling a married woman to convey her property by deed provides for the joinder of her husband in her deed of conveyance, her separate deed is void though her husband be insane, or has deserted her, or is living separate from her, unless special exceptions be made for these cases.[25] Where a married woman has capacity to convey her separate estate she may do so without specially referring to the instrument giving her the estate,[26] nor need the trustee join to render the conveyance valid generally in equity.[27]

A married woman is not, as a general rule, liable on her covenants in a deed made jointly by herself and husband, in the absence of a statute imposing such liability.[28] This rule has been affirmed by statute in some states, while in others, under statutes giving her the power to contract with reference to her separate estate as if she were sole, she has been held liable upon her covenants for title, and in still other states there are statutes which provide in terms that she shall be so liable. In several states it has been held that a married woman can not set up a subsequently-acquired title against her grantee, even though she can not be held liable on her covenants.[29]

Upon the principle that a grantor shall not, in equity, be permitted to repudiate his own deed, a married woman is as effectually estopped by her deed without covenants as if the deed contained them.[30] She is estopped from setting up her own title existing at the time of the conveyance; otherwise, the statutes permitting her to convey would be rendered nugatory.[31]

§ 323. **Conveyance between husband and wife.**—A conveyance by the husband to the wife or by the wife to the husband is void at common law and passes no title, because the legal existence of the wife is merged in the husband.[32] The statutes

[25] Richards v. McClelland, 29 Pa. St. 385.

[26] Porcher v. Daniel, 12 Rich. Eq. (S. Car.) 349.

[27] Ryland v. Banks, 151 Mo. 1, 51 S. W. 720.

[28] Menard v. Campbell, 180 Mich. 583, 147 N. W. 556, Ann. Cas. 1916A, 802n.

[29] Knight v. Thayer, 125 Mass. 25. But see Farley v. Eller, 29 Ind. 322.

[30] Graham v. Meek, 1 Ore. 325.

[31] King v. Rea, 56 Ind. 1; Wadleigh v. Glines, 6 N. H. 17, 23 Am. Dec. 705; Summerfield v. White, 54 W. Va. 311, 46 S. E. 154.

[32] Smith v. Seiberling, 35 Fed. 677; Kelley v. Dearman, 65 W. Va. 49, 63 S. E. 693.

and constitutional provisions empowering a married woman to convey as if she were unmarried are held to remove her disability and empower her to convey directly to her husband, and the husband to convey directly to her.[33] If the wife is under disability to convey her lands except by a deed in which her husband joins, she can not convey to him directly, but only through a third person, though in the same state the husband may convey directly to his wife.[34] The common-law disability of husband and wife to convey to each other directly is obviated by the intervention of a third person through whom the conveyance is made. The disability of husband and wife to convey the one to the other, has, however, been expressly removed by statute in some states. But even in the absence of such a statute, such a deed will be upheld in equity, especially in case of a voluntary settlement upon the wife, when the rights of creditors or other third parties are not in any way interfered with.[35] When the fact that such conveyance is intended as a settlement is declared in the deed, or otherwise clearly established, it will be sustained against the claims of creditors, if it does not deprive them of any existing rights.[36]

A conveyance directly by the husband to the wife creates in her a separate estate vesting in her the entire interest, without the use of technical words necessary to create a separate estate in conveyances to her from persons other than the husband.[37] A deed from the wife to the husband may be valid in equity where a consideration has been paid, or the husband is entitled to equitable relief for improvements made by him upon his wife's land.[38]

Where marriage would affect the grantor's title the facts must be ascertained by inquiries dehors the record, and should be embodied in an affidavit to be used in verifying the abstract. Conveyances of the character under discussion must be closely scrutinized by the abstracter as well as by counsel in his examination of the title upon which they depend. Local statutes must be consulted in each instance to ascertain the legal effect of the trans-

[33] Wells v. Caywood, 3 Colo. 487; Robertson v. Robertson, 25 Iowa 350; Allen v. Hooper, 50 Maine 371; Ransom v. Ransom, 30 Mich. 328.

[34] Rico v. Brandenstein, 98 Cal. 465, 33 Pac. 480, 20 L. R. A. 702, 35 Am. St. 192.

[35] Jones v. Clifton, 101 U. S. 225, 25 L. ed. 908.

[36] Moore v. Page, 111 U. S. 117, 4 S. Ct. 388, 28 L. ed. 373.

[37] Small v. Field, 102 Mo. 104, 14 S. W. 815; Pitts v. Sheriff, 108 Mo. 110, 18 S. W. 1071.

[38] Brooks v. Kearns, 86 Ill. 547; Winans v. Peebles, 32 N. Y. 423.

action, and a consideration should be made of such matters as, for example, which is grantor, the husband or the wife? What is the nature of the estate or interest sought to be disposed of? Is it separate property or is it some interest or estate growing out of the marriage relation, like curtesy or dower? Is it a homestead right? Or, is a joint conveyance of husband and wife ordinarily, in the particular jurisdiction, required?

§ 324. **Acknowledgment by married women.**—In treating the subject of acknowledgments in a former chapter we made brief mention of acknowledgments by married women. The subject is deemed of such importance as to warrant further treatment here. In the first place it is important as fixing the date of execution, which is a factor in determining the validity of such a deed. Again, the acknowledgment properly made is necessary, not only as an authentication of the deed for record, but as a part of the execution of the deed itself, without which it would be ineffectual to convey title. Hence the certificate of acknowledgment of a deed executed by a married woman requires the closest scrutiny on the part of both abstracter and counsel. What would be considered a sufficient acknowledgment of her deed to-day would most likely fall short of the requirement at the date of the attempted acknowledgment. Statutes requiring acknowledgments of married women to be taken upon a separate examination and explanation of the deed have been enacted for their protection against the undue influence of their husbands. In a conveyance of land by a married woman her acknowledgment, under such statutes, is an essential part of the execution; and unless her deed is acknowledged substantially in the mode prescribed by statute, it is absolutely void.[39] In the appendix of this work will be found a digest of the present statutes relating to the execution and acknowledgment of instruments of conveyance, but if it becomes important to know if the acknowledgment of a married woman was made in compliance with a statute in force at a particular date in the past, the statute in force at such time must be consulted. The provision of law, that a married woman in making a conveyance of her land should acknowledge the deed upon a private examination apart from her husband, was designed as

[39] Shryock v. Cannon, 39 Ark. 434; Muir v. Galloway, 61 Cal. 498; Coleman v. Billings, 89 Ill. 183; Grove v. Todd, 41 Md. 633, 20 Am. Rep. 76; Allen v. Lenoir, 53 Miss. 321.

a substitute for the proceeding at common law by fine and recovery, whereby the rights of the wife, on the one hand, should be guarded, and on the other a sure, indefeasible transfer of her right secured.[40]

Her examination must be personal; nor can she make the acknowledgment through an attorney.[41] The certificate must declare her identity in the same manner as if she were sole.[42] She need not acknowledge at the same time or place, or before the same officer taking her husband's acknowledgment. Nor is it necessary that their acknowledgments be certified by a single certificate.[43] It must clearly appear from the certificate that the married woman was examined separately and apart from her husband, and an examination "separate and apart" from her husband means that it took place out of his presence. But if the examination is "apart" it is "separate," the words having substantially the same meaning, and, therefore, a certificate is not rendered invalid by the omission of one of these words.[44] Compliance with the requirement of a separate examination from the husband must be substantially shown by the certificate.[45] A certificate of separate examination which fails to show that the deed was "fully explained" or "contents made known," as provided by statute, is fatally defective.[46] The words "willingly executed the same," or words of equivalent import, are essential to the validity of a certificate when required by statute.[47] The omission of the words "freely" and "voluntarily" is immaterial when the certificate shows that she acknowledged that she executed the deed "without any fear, threats, or compulsion."[48] The words "for the purposes therein expressed" are material when prescribed by statute.[49] The requirement may, however, be satisfied by the use of equivalent words.[50] Under a statute providing, as a part of the certificate, that she "does not wish to retract" her execution of the conveyance, the omission of this statement makes the

[40] Kerr v. Russell, 69 Ill. 666, 18 Am. Rep. 634.

[41] Wambole v. Foote, 2 Dak. 1, 2 N. W. 239.

[42] Lindley v. Smith, 46 Ill. 523.

[43] Lineberger v. Tidwell, 104 N. Car. 506, 10 S. E. 758.

[44] Belo v. Mayes, 79 Mo. 67.

[45] Tiffin v. Shawhan, 43 Ohio St. 178, 1 N. E. 581; First Nat. Bank v. Paul, 75 Va. 594, 40 Am. Rep. 740; Hockman v. McClannahan, 87 Va. 33, 12 S. E. 230.

[46] Roney v. Moss, 76 Ala. 491; Hutchinson v. Ainsworth, 63 Cal. 286.

[47] Laughlin Bros. & Co. v. Fream, 14 W. Va. 322.

[48] Allen v. Lenoir, 53 Miss. 321.

[49] Shryock v. Cannon, 39 Ark. 434.

[50] Davis v. Bogle, 11 Heisk. (Tenn.) 315.

certificate fatally defective, unless words of equivalent import are used.[51]

§ 325. **Release of dower.**—It is generally considered that the right of dower, inchoate or consummate, is an incumbrance, and care should be exercised to see that it is effectively released. This is usually accomplished only by a writing under seal, duly acknowledged.[52] Dower may also be released by the wife's quit-claim deed executed subsequent to the separate deed of her husband.[53] But her sole and separate deed, made after a deed by her husband, will not generally release her right, unless such a deed is expressly authorized by statute.[54] Generally where a wife joins her husband in a deed by signing it, it will operate as a valid relinquishment of her dower, although the body of the deed does not describe her as grantor, or name her or her dower.[55] When the wife's name nowhere appears in the body of the instrument, her signature and acknowledgment of the deed are sufficient to bar her dower right.[56]

A husband's conveyance, not joined in by the wife, is valid, but it has no effect on the wife's contingent right of dower.[57] This is generally true also of the statutory substitute for dower in those states where dower has been abolished or substantially modified. But where the husband alone makes a dedication by deed, the wife is not dowable in the land.[58] In a few states, though provision is made for a wife if she survive her husband, he may transfer his land during his life without her concurrence and it is relieved from all claims by her, provided the transaction is not merely colorable and a fraud on her.[59] In other states a non-resident wife need not join in the husband's conveyance, as she is entitled to dower only in the lands of which he died seised.[60] In still other states, while a resident married man whose wife is not, and never

[51] In re Bateman, 11 R. I. 585.

[52] Jarrell v. French, 43 W. Va. 456, 27 S. E. 263.

[53] Fowler v. Chadima, 134 Iowa 210, 111 N. W. 808, 120 Am. St. 433, 13 Ann. Cas. 141.

[54] So authorized in Alabama, Maine, Massachusetts and Michigan.

[55] Chicago & N. W. R. Co. v. Morrison, 195 Ill. 271, 63 N. E. 96.

[56] Peter v. Byrne, 175 Mo. 233, 75 S. W. 433, 97 Am. St. 576.

[57] Rodman v. Robinson, 134 N. Car. 503, 47 S. E. 19, 65 L. R. A. 682, 101 Am. St. 877.

[58] Duncan v. Terre Haute, 85 Ind. 104.

[59] Phillips v. Phillips, 30 Colo. 516, 71 Pac. 363; Flowers v. Flowers, 89 Ga. 632, 15 S. E. 834, 18 L. R. A. 75; Thayer v. Thayer, 14 Vt. 107, 39 Am. Dec. 211.

[60] Ligare v. Semple, 32 Mich. 438; Atkins v. Atkins, 18 Nebr. 474, 25 N. W. 724; Bennett v. Harms, 51 Wis. 251, 8 N. W. 222.

has been, a resident of the state, may convey his land without her concurrence, it is important for her to join in his conveyance if she has been at any time a resident of the state.[61]

While the wife's inchoate right of dower or statutory interest in her husband's land is an interest which may be released, it is held not subject to grant or assignment, nor is it in any sense an interest in real estate. It is only a right incident to the estate of her husband in land.[62] It is a right which may be released, relinquished, or barred, but until it becomes consummate by the death of the husband, it can not be bargained, sold, or conveyed in the ordinary sense. While, therefore, dower is not property, strictly speaking, it has nevertheless generally been considered such an interest as to require, under the statute of frauds, some instrument in writing for its release.[63] And, generally speaking, if the writing is anything short of a deed properly executed it will not bar her right.

Where the statute requires her acknowledgment, or her separate examination, these requirements must be complied with.[64] It is sometimes held that the deed should expressly state that she executes it for the purpose of releasing dower.[65] Where the release is by separate instrument the abstract should contain its important recitals, thus:

Ida C. Grove to Samuel Soloman.	Release of Dower. Dated Aug. 1, 1902. Recorded Aug. 20, 1902. Vol. 25, page 200. Consideration, $1,000.

Releases unto second party all her right, title, claim or demand of or to dower which she has or could claim in and to certain real estate described in a conveyance by "my husband," William Grove, to said second party, and recorded in Vol. 5, page 25 of the deed records of Preble County, Ohio. Acknowledged Aug. 1, 1902.

[61] Kennedy v. Haskell, 67 Kans. 612, 73 Pac. 913.

[62] Haggerty v. Wagner, 148 Ind. 625, 48 N. E. 366, 39 L. R. A. 384; Hoy v. Varner, 100 Va. 600, 42 S. E. 690.

[63] Carnall v. Wilson, 21 Ark. 62, 76 Am. Dec. 351; Davis v. Davis, 61 Maine 395.

[64] Maynard v. Davis, 127 Mich. 571, 86 N. W. 1051; Hand v. Weidner, 151 Pa. St. 362, 25 Atl. 38.

[65] Lothrop v. Foster, 51 Maine 367; Carter v. Goodin, 3 Ohio St. 75.

For convenience of council, this synopsis should immediately follow that of the husband's deed in the abstract.

Where the release of dower is in the acknowledgement of the wife this should be noted in the abstract in connection with the fact of acknowledgment.

§ 326. Conveyances creating estates in common and in joint tenancy.—By the common law, an estate acquired in any way except by inheritance, by two or more persons not husband and wife, created a join tenancy in them, the principal incident of which is the right of survivorship, by which the entire tenancy, on the decease of one tenant, remains to the survivors, and ultimately to the last surivor.[66] Until the policy of the law was changed by statute, it was essential to the creation of an estate in common that there should be something to show an intent that the grantees or devisees should hold by several and distinct titles, or that, instead of survivorship to one, there should be an inheritance from both or all.[67]

In recent times the doctrine of survivorship, except in a few cases, that of a grant or devise to trustees being the principal, is generally declared to be contrary to public policy. Title by joint tenancy has been destroyed by legislation except in a few instances, and now, with these exceptions, the law itself never creates a joint tenancy. It never comes through the steps of descent or distribution.[68] But where an estate in joint tenancy exists, upon the death of one joint tenant, the joint estate remains unimpaired with the survivors, and ultimately with the last survivor, instead of passing to the heirs of the deceased tenant.

It is provided by statute in some states that heirs shall take as parceners, thereby creating a tenancy in coparcenary, which lacks the chief characteristic of a joint tenancy, the right of survivorship. The coparceners are not seised, as are joint tenants, of the entirety of the estate, but only of undivided shares which descend to the heirs of the intestate tenant.[69] In nearly all the states the common law concerning estates in joint tenancy continued until the rule was changed by statute. In a few states, however, the

[66] Simons v. McLain, 51 Kans. 153, 32 Pac. 919.

[67] Webster v. Vandeventer, 6 Gray (Mass.) 428; Gilbert v. Richards, 7 Vt. 203.

[68] Stetson v. Eastman, 84 Maine 366, 24 Atl. 868.

[69] 1 Preston Estates 138.

judiciary, regarding the policy of the law as opposed to the notion of survivorship, declared that estates in joint tenancy did not exist.[70] In Arkansas, Colorado, Delaware, Idaho, Illinois, Indiana, Iowa, Maine, Massachusetts, Maryland, Michigan, Minnesota, Missouri, Mississippi, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Oklahoma, Rhode Island, South Dakota, Vermont and Wisconsin, joint tenancies are by statute turned into tenancies in common, unless the instrument creating the estate expressly states that it is to be held in joint tenancy; or unless it manifestly appears from the tenor of the instrument that it was intended to create a joint tenancy. In Alabama, Arizona, Colorado, Florida, Illinois, Kansas, Kentucky, North Carolina, Pennsylvania, South Carolina, Tennessee, Texas, Virginia, Washington, and West Virginia, survivorship is destroyed by a declaration in the statute that a joint tenancy is severed by the death of one of the joint tenants, whereupon the estate descends or vests and is subject to debts, curtesy, dower, or distribution, as if it were held in common.[71] In Georgia and Oregon the statutes abolish joint tenancy in general terms.

In many of these states, the statutes converting joint tenancies into tenancies in common, do not apply in case of conveyances to trustees, who continue to hold the legal estate in joint tenancy; nor do they apply in case of estates held by executors. In several states the statutes do not apply to conveyances in mortgage, or to conveyances to husband and wife, or in case of property held in partnership, or in case of property acquired as community property. Though all the joint tenants are for some purposes regarded as composing a single owner, each nevertheless has such a share that will entitle him to convey it. But his conveyance of his entire interest to a stranger severs the joint tenancy and it thereafter becomes a tenancy in common, so far as his grantee is concerned. In thus conveying to a stranger a joint tenant conveys in the ordinary manner and with the usual words of limitation of a fee where necessary, but in conveying to a co-tenant he conveys by release, in which case words of inheritance are not required to pass a fee even where they are required in ordinary

[70] Whittlesey v. Fuller, 11 Conn. 337; Sergeant v. Steinberger, 2 Ohio 305, 15 Am. Dec. 553.

[71] Parsons v. Boyd, 20 Ala. 112; Mette v. Feltgen (Ill.), 27 N. E. 911; Simons v. McLain, 51 Kans. 153, 32 Pac. 919; Rowland v. Rowland, 93 N. Car. 214; Jones v. Cable, 114 Pa. St. 586, 7 Atl. 791; Varn v. Varn, 32 S. Car. 77, 10 S. E. 829.

conveyances.[72] Where the tenancy is in common, one such tenant may convey his own undivided interest, and his grantee will become a tenant in common with the remaining tenants.[73]

Joint tenants and tenants in common should covenant severally,[74] and the covenants of each should be extended no further than the undivided share of each, as each is bound by it only to the extent of his interest.[75]

§ 327. **Voluntary partition deeds.**—The usual mode of effecting a voluntary partition of land held in common is for each co-tenant to take a conveyance from all the other part owners of the part of the land which all had agreed he should receive as his share of the common or joint property. All the deeds are construed together as one instrument. A partition may also be effected by a conveyance by all the co-tenants to a third person, followed by conveyances by the latter to the several co-tenants of the specific parts which they have agreed among themselves to accept as their shares.

After partition of land has been made among tenants in common, each owns in severalty an interest equal to that which he before held in common. The partition does not transfer the title of the parties so much as it assigns or apportions to each his share in severalty in the land.[76] It would seem, therefore, that such partition, or agreement for partition, need not be evidenced by deed, or even by a writing.[77] But the better opinion in reason and in law seems to be that the change in ownership involved in partition is within the statute of frauds and required to be in writing.[78]

In many states, however, a partition by mutual agreement may be by parol, followed by possession by the several tenants respectively of the portions assigned to them.[79]

The rule generally prevailing is that there is no implied warranty of title in voluntary partition deeds,[80] though an express

[72] Co. Litt. 273b.

[73] Fleming v. Katahdin Pulp &c. Co., 93 Maine 110, 44 Atl. 378; Banzer v. Banzer, 156 N. Y. 429, 51 N. E. 291.

[74] Coe v. Harahan, 8 Gray (Mass.) 198.

[75] Coster v. Monroe Mfg. Co., 1 Gr. Ch. (N. J.) 467.

[76] Moore v. Kerr, 46 Ind. 468.

[77] Mellon v. Reed, 114 Pa. St. 647, 8 Atl. 227.

[78] Berry v. Seawall, 65 Fed. 742, 13 C. C. A. 101; Woodhull v. Longstreet, 18 N. J. L. 405.

[79] Byers v. Byers, 183 Pa. 509, 38 Atl. 1027, 39 L. R. A. 537, 63 Am. St. 765.

[80] Dawson v. Lawrence, 13 Ohio 543, 42 Am. Dec. 210; Beardsley v. Knight, 10 Vt. 185, 33 Am. Dec. 193; Roundtree v. Denson, 59 Wis. 522, 18 N. W. 518.

warranty in such deeds is binding equally with a covenant of warranty in other conveyances.[81]

Where the parties to a partition deed derive their title by descent, the instrument should recite the facts upon which heirship is based. This recital should be included in the abstract, together with all other material matters and a minute description of the method of division. The synopsis may be in form similar to the following:

James Frable,	Partition deed.
	Dated May 1, 1914.
to and with	Recorded May 20, 1914.
John Frable.	Vol. 25, page 150.

Recites that said parties are now seised by right of inheritance as the heirs and only heirs of Lee Frable, deceased, of the N. E. ¼ and the S. E. ¼ of the N. W. ¼ of Sec. 6, Tp. 25 N. R. 8 E., in Grant county, state of Ind., and have agreed to make partition thereof between them by James Frable taking the said N. E. ¼ and the said John Frable taking the said S. E. ¼ of said N. W. ¼ of said Sec. Tp. & R., so that their respective portions may henceforth be held in severalty. And the said James Frable gives, grants, sets over, releases and confirms to said John Frable the S. E. ¼ of said described ¼ Sec. to have and to hold in severalty, as his full share. And John Frable gives, grants, etc., to James Frable, the S. E. ¼ of said described ¼ Sec. to have, etc. Each of said parties warrants to the other, his heirs and assigns the quiet and peaceful enjoyment of the parcel allotted as their respective shares against all lawful claimants or claims from and under them respectively and their respective heirs, assigns and personal representatives. Signed and acknowledged by both parties May 1, 1914.

§ 328. **Conveyances to and by partnerships.**—Real estate held by persons constituting a firm is held by them as tenants in common, though such title may be subject to partnership equities.[82] Real estate becomes partnership assets when the title to

[81] Gittings v. Worthington, 67 Md. 139, 9 Atl. 228.

[82] Blanchard v. Floyd, 93 Ala. 53, 9 So. 418; McCauley v. Fulton, 44 Cal. 355; Murray Ferris & Co. v. Blackledge, 71 N. Car. 492; Morse v. Carpenter, 19 Vt. 613.

it, though nominally in two or more persons, is equitably merged in the joint ownership of a firm.[83]

A conveyance to two persons, their heirs and assigns, prima facie vests the title in them as tenants in common, though they may be partners; and on the death of one of them his interest descends to his heirs, and is not subject to sale and conveyance by the surviving partner.[84] Some courts have taken the distinction that a deed to a partnership by the partnership name alone does not pass the legal title to the land, but only an equitable title.[85] But by implication the deed vests in the members of the firm the power to convey.[86] But one partner or member of a firm has no implied authority to execute a deed binding upon the other members.[87] A joint deed by individual partners in whom the legal title is vested is not always necessary to convey the firm title. One partner executing a deed in behalf of the firm binds his co-partners, if there be either a previous parol authority or a subsequent parol adoption of his act.[88] A partner holding the legal title to land for the firm has the same power over it as over firm personalty, and his conveyance for firm purposes passes the title free of the firm's equities.[89]

A deed to a partnership should not generally be made in the firm name, but to the individual partners jointly as tenants in common. If a deed be made to a partnership designated as "A. B. & Co.," the title will pass to A. B. alone.[90] But the legal title to land bought by a firm, may be conveyed in trust to one of the members.[91] The widow of a deceased partner has her dower only after the debts of the firm have been paid, and each surviving partner has received his full interest on winding up the affairs of the firm. When such debts and partner's interests are adjusted, the surplus real estate, if any, will descend as real estate, and not as personal estate.

[83] Sikes v. Work, 6 Gray (Mass.) 433.

[84] Southern Cotton Oil Co. v. Henshaw, 89 Ala. 448, 7 So. 760.

[85] Perciful v. Platt, 36 Ark. 456; Townshend v. Goodfellow, 40 Minn. 312, 41 N. W. 1056, 3 L. R. A. 739, 12 Am. St. 736.

[86] Dunlap v. Green, 60 Fed. 242, 8 C. C. A. 600.

[87] Skinner v. Dayton, 19 Johns. (N. Y.) 513, 10 Am. Dec. 286.

[88] McGahan v. National Bank, 156 U. S. 218, 15 Sup. Ct. 347, 39 L. ed. 403.

[89] McGahan v. National Bank, 156 U. S. 218, 15 Sup. Ct. 347, 39 L. ed. 403.

[90] Beaman v. Whitney, 20 Maine 413; Arthur v. Weston, 22 Mo. 378.

[91] Allison v. Perry, 130 Ill. 9, 22 N. E. 492.

A deed by a partnership should be signed by the individual members of the firm. One partner has no right to execute a conveyance in the name of the partnership unless the other partners are standing by and give their consent to confer power upon him to convey by an instrument under seal. In such case the matter is left open for proof.[92]

As a general rule the same formalities are required in the conveyance of partnership real estate as that of individuals.[93] The certificate of acknowledgment of a deed by a firm, in the firm name, should show by which member of the firm the signature was made and acknowledged. An acknowledgment purporting to have been made by the firm in the firm name is not sufficient to entitle the instrument to be recorded.[94] But the certificate need not state that the signing partner was authorized by the others to sign his name to the instrument.[95]

§ 329. **Conveyances to private corporations.** — Private business corporations in nearly every state may acquire, hold, and convey so much real estate as may be necessary or proper for the transaction of their business. The statutes of the several states are not precisely alike in their terms, some designating the real estate which corporations may hold as "necessary," others as "proper," or "necessary and convenient," or "required" for the purposes of the incorporation. A deed to a corporation which is forbidden by its charter to purchase and hold real estate is void.[96] It is held, however, that such conveyance is only voidable, and the state alone can object.[97]

A corporation de facto may take a conveyance of land, and its corporate existence and right to hold the land can be questioned only by the state in direct proceedings to inquire into its right to exercise corporate functions.[98] The corporation must have a legal existence and be capable of taking title. A qualification of this rule is to be noted as regards corporations which have a de facto existence. But a conveyance to an unincorporated company

[92] McGahan v. Bank, 156 U. S. 218, 15 S. Ct. 347, 39 L. ed. 403.

[93] Butts v. Cooper, 152 Ala. 375, 44 So. 616.

[94] Sloan v. Owens &c. Co., 70 Mo. 206.

[95] National Bank v. Scriven, 63 Hun 375, 18 N. Y. S. 277, 44 N. Y. St. 331.

[96] St. Peter's Roman Catholic Congregation v. Germain, 104 Ill. 440.

[97] Puget Sound Nat. Bank v. Fisher, 52 Wash. 246, 100 Pac. 724, 17 Ann. Cas. 526.

[98] Doyle v. San Diego Land Co., 46 Fed. 709.

which is shortly afterwards duly organized as a corporation and goes into possession under the deed, passes a title to such corporation as against one not holding a superior title.[99]

A corporation, when made a grantee, should be described by its official name. A grant to a corporation is good, however, if it clearly appears from the deed itself what corporation was intended, though an omission or mistake may have been made in the corporate name. The corporation must have a legal existence and be capable of taking a conveyance.[1] A deed to the trustees or officers by name of an unincorporated association is good, for in such case the title vests in such trustees or officers as individuals. The words naming the association are regarded merely as words descriptive of the persons.[2] The misnomer of a corporation intended to be the grantee does not invalidate the deed when the true name of the corporation appears in the covenant of warranty or other part of the deed,[3] or when it appears in any way from the deed itself what corporation was intended.

If there are two corporations of the same name, and a conveyance is made to one of them, the grantee may be identified by evidence aliunde, as, for instance, by evidence as to which corporation paid the purchase money and received delivery of the deed.[4] Where the corporation was organized under a special act of the legislature, a conveyance to it should be supplemented by the act or some portion of it; but this need not be done where the corporation was organized under a general law, as a reference to the local statutes will generally supply the desired information.

The manner in which the corporate seal is recorded should be noted in the abstract. Thus if the seal is recorded, "Corporate Seal," these words will suffice for the abstract, a fac simile of the seal as it appears on the deed not being necessary unless the statute requires it.

§ 330. **Acknowledgment of corporate deeds.**—We have heretofore alluded to acknowledgments of deeds by corporations, but a further consideration of this important act is deemed proper in this place. The statutes of some states require the officers of a corporation executing a conveyance to make oath that they are

[99] Clifton Heights Land Co. v. Randell, 82 Iowa 89, 47 N. W. 905.
[1] Douthitt v. Stinson, 63 Mo. 268.
[2] Brown v. Combs, 29 N. J. L. 36.
[3] Centenary M. E. Church v. Parker, 43 N. J. Eq. 307, 12 Atl. 142.
[4] Asheville Division v. Aston, 92 N. Car. 578, 16 Am. & Eng. Corp. Cas. 94.

the officers named in the instrument and that they executed it on behalf of the corporation, and by authority of its directors; but the failure to do this will not render the instrument invalid as between the parties or as against a trustee in bankruptcy.[5] The acknowledgment should be by the person or officer who was properly authorized to, and who did, execute the instrument.[6] It is also the rule that an acknowledgment can not be taken by an interested party; and it is generally provided by a statute that a person who is an officer and a stockholder in a corporation or in a bank, can not act as a notary public in matters in which his corporation is interested.[7] In the absence of statutory provision relating to the acknowledgment of deeds by a corporation, the officer affixing the corporate seal has been held to be the party executing the deed.[8] But where a corporate deed was executed by the president and countersigned by the secretary, it was held that the secretary was not the officer who executed the instrument, but was merely the attesting witness who proved its execution before the proper officer.[9]

The statutes in many jurisdictions require a peculiar form of certificate in the case of the execution and acknowledgment of deeds by corporations; and it must affirmatively appear from the certificate itself that the requirements of such statutes have been substantially complied with.[10] The statutes in many jurisdictions require not only an acknowledgment on the part of the corporation by the proper officer, but also an oath or form as to the authority and identity of such officer. More particularly such requirements are that the officer or agent of the corporation must be first sworn or affirmed by the magistrate taking the acknowledgment, and he must under oath say: (a) That he is the officer or agent of the corporation described in the particular writing, giving the date or other sufficient description for the purpose of identification; (b) that he is duly authorized by the corporation to execute and acknowledge the deeds and writings of such corporation; (c) that the seal affixed to said writing is the corporate

[5] Murray v. Beal, 23 Utah 548, 65 Pac. 726.

[6] Lovett v. Steam Saw Mill Assn., 6 Paige (N. Y.) 54.

[7] Smith v. Clark, 100 Iowa 605, 69 N. W. 1011; Wilson v. Griess, 64 Nebr. 792, 90 N. W. 866.

[8] Kelly v. Calhoun, 95 U. S. 710, 24 L. ed. 544.

[9] Johnson v. Bush, 3 Barb. Ch. (N. Y.) 207.

[10] Jocoway v. Gault, 20 Ark. 190, 73 Am. Dec. 494; Bryan v. Ramirez, 8 Cal. 461, 68 Am. Dec. 340.

seal of the corporation; (d) that the deed or writing was signed and sealed by him on behalf of said corporation and by its authority duly given. After such deposition is given, the officer or agent must acknowledge the deed to be the act and deed of the corporation. All these facts must appear in the certificate of the certifying officer, before the instrument can be legally admitted to record. Under these requirements a failure to show that the acknowledging party was duly sworn and that he deposed to the facts contained in the certificate, was held to be fatal.[11] In many and perhaps most jurisdictions a simple acknowledgment in the ordinary form of that made by individuals will be sufficient. It has been held that the authority to execute the instrument is sufficient authority to acknowledge the execution.[12]

§ 331. Conveyances by public and quasi-public corporations.—The power of a corporation to alienate its property depends very much upon its character, whether it is public, quasi-public, or strictly private. Thus, public municipal corporations can not alienate property of a public nature, such, for instance, as a public square or street, in violation of the trusts, express or implied, upon which it is held, except under legislative authority. They may, however, dispose of their lands which are of a private nature, unless restrained by charter or by statute. Neither is a quasi-public corporation allowed to divest itself of its lands necessary for the exercise of its franchise, without legislative permission.[13]

It is held that, in the absence of statutory authority, a municipal corporation has no power to execute a deed with covenants of warranty, such power not being essential to the purposes and objects of the corporation.[14] In the case of a grant of land by a state or other government, an agent authorized to make the conveyance may properly execute the deed by signing his name, instead of the name of the state; for the state may grant without any deed, and in fact the title passes by the resolve rather than by the deed.[15] A conveyance in this form may also be supported on the ground of the practice of a state continued for many years in

[11] Abney v. Ohio Lumber &c. Co., 45 W. Va. 446, 32 S. E. 256.

[12] Wright v. Lee, 2 S. Dak. 596, 51 N. W. 706.

[13] Pennsylvania Co. v. St. Louis &c. R. Co., 118 U. S. 290, 6 Sup. Ct. 1094, 30 L. ed. 83.

[14] Harrison v. Palo Alto Co., 104 Iowa 383, 73 N. W. 872.

[15] Thompson v. Carr, 5 N. H. 510.

conveying lands in this manner.[16] Also a deed which purports to be the deed of a county or town may be executed by the proper officer or agent by signing his own name.[17] Where trustees of a town are made a body corporate and are authorized to sell land, they may execute the conveyance in their own name and not in the name of the town.[18]

A conveyance of land by a municipal corporation should be in its corporate name and under its corporate seal. Such a conveyance, when regular upon its face, made by a corporation having power to dispose of its real estate, is presumed to have been executed in pursuance of that power. It is not essential to recite the authority in the deed, and a purchaser claiming under such conveyance need not produce the special ordinance authorizing its execution. The seal of the corporation affixed to the deed is prima facie evidence that it was so affixed by the authority of the corporation. The execution of a power conferred by a municipal corporation upon a public officer to convey land must be in strict pursuance of the power, or no title is conveyed.[19] The officers of such corporation are not in the position of trustees acting under special powers, and required in their deeds to recite the power and show that the contingency has arisen which authorizes a sale.[20] While a person claiming under such conveyance need not produce the special ordinance authorizing its execution, it is necessary that such authority should appear in the abstract in connection with the conveyance authorized by it.[21] Examples of municipal ordinances and resolutions affecting title to real estate will appear in a subsequent chapter of this work.[22]

§ 332. **Conveyance by private corporations.**—Every private corporation having no public functions has the absolute right to dispose of its property in the same manner that an individual has. It may convey its real property acting by a majority of its stockholders; and this right is not limited as to objects, circumstances, or quantity, unless restrained by statute or by public policy.[23] The technical mode of executing the deed of a

[16] Cofran v. Cockran, 5 N. H. 458.
[17] Decker v. Freeman, 3 Maine 338.
[18] De Zeng v. Beekman, 2 Hill (N. Y.) 489.
[19] Still v. Lansingburgh, 16 Barb. (N. Y.) 107.
[20] Henry v. Atkison, 50 Mo. 266; Haseltine v. Donahue, 42 Wis. 576.
[21] Ward v. Necedah Lumber Co., 70 Wis. 445, 35 N. W. 929.
[22] See ch. 21.
[23] Treadwell v. Salisbury Mfg. Co., 7 Gray (Mass.) 393, 66 Am. Dec. 490.

corporation is for the proper officer to sign the corporate name, adding his own signature and official title as the agent by whom the act is done, and affixing the corporate seal. Of course the testimonium clause should recite the mode of execution, and especially the name of the officer authorized to sign the corporate name and affix its seal. It is essential that the deed on its face should purport to be executed by the corporation, and that its seal should in fact be affixed by a duly authorized officer or agent. But an execution of a deed by affixing the corporate seal is good though the officer signs his own name instead of the name of the corporation, especially if the tesimonium clause duly recites a signing and sealing by the corporation by the agency of such officer.[24] When, however, the deed on its face purports to be the deed of the officer or agent who executed it, instead of the corporation, it is inoperative to pass any title to the land of the corporation.[25]

Abstracters and counsel should pay particular attention to conveyances of corporate property, and all statutory and charter provisions as to the authority of officers to convey, and as to the mode of conveyance should be inquired into in order to see that they have been liberally and rigidly followed. In abstracting a deed by a corporation all the important recitals should be stated, and testimonium clause, together with the signatures of the officers should be literally transcribed. The following example is submitted:

Globe Investment Co., a private corporation, existing under and by virtue of the laws of South Dakota, to John J. Peers.	Warranty Deed. Dated Jan. 1, 1890. Recorded Jan. 20, 1890. Book 6, Deeds, page 473. Consideration, $6,000.

Conveys N. W. ¼ of S. E. ¼ of Sec. 32, Tp. 128 N, Range 7 West 5th P. M. "In witness whereof, said corporation has caused its corporate seal to be hereto affixed, and these presents to be signed, executed, acknowledged and delivered, in its name

[24] Haven v. Adam, 4 Allen (Mass.) 80.

[25] Commonwealth v. Reading Sav. Bank, 137 Mass. 431.

and behalf, by its president and attested by its secretary, this 1st day of Jan., 1890.

[Seal] (Signed) "ROLAND PHILLIPS, President.

(Attest) GEORGE TURTON, Secretary."

Acknowledged by said president and secretary as the free and voluntary act of said Globe Investment Company on the 1st day of Jan., 1890.

The mode of execution is usually prescribed by statute, but where the charter or by-laws prescribe a mode it should be appended to the above synopsis.

§ 333. **Conveyances by charitable or religious corporations.**—A charitable or religious corporation may be under an obligation to discharge its corporate duties, and may be compelled to appropriate its property to the specific uses for which it was allowed by its charter or by statute to acquire it. Particular modes are often prescribed by special or general laws for disposing of the property of such corporations.

The property of an incorporated religious society belongs to the corporation, and not to the church at large.[26] The legal title to the property held by such corporations is often vested in trustees, and conveyances by such corporations are generally made by the trustees. When the method of conveyance is prescribed by statute—and there are often requirements not found in other cases—that method must be strictly followed.[27] Hence, great care should be exercised by both abstracter and counsel where a conveyance of the character under discussion appears in the chain of title. Many incidents which would be unimportant in other deeds must not be overlooked here. Numerous cases will be found in the reports where such societies have mortgaged their property to raise funds for improvements, and afterwards have taken advantage of some technicality to escape payment of the debt.[28]

§ 334. **Conveyance of an expectancy.**—The conveyance of a mere possibility or expectancy of an heir in the estate of another, although for a valuable consideration, is void, and can not

[26] Trustees of Presbytery of New York v. Westminster Presbyterian Church, 67 Misc. 317, 122 N. Y. S. 309.

[27] Lombard v. Chicago Sinai Cong., 64 Ill. 477.

[28] Scott v. Trustees First M. E. Ch., 50 Mich. 528, 15 N. W. 891.

be enforced in equity by the grantee.[29] This is upon the principle that a contract of bargain and sale is invalid unless there is a thing or subject-matter to be contracted for. This is absolutely essential to the validity of the contract. Some courts have held, however, that a mere possibility or expectancy is assignable in equity, for a valuable consideration, and equity will enforce the contract when the possibility or expectancy has changed into a vested interest or possession.[30] While such deed is inoperative as a conveyance, it may operate as an estoppel springing from the covenants in the deed.[31] In a comparatively recent case it was held that the contract of an expectant or presumptive heir by which he "releases, remises, and forever quitclaims his undivided portion that he may be entitled to" of certain described real estate of his mother will be enforced in equity.[32] In considering a similar conveyance the supreme court of Indiana held that such a conveyance will not be enforced unless made with the knowledge and consent of the person from whom the inheritance is to come.[33] In case a child, in consideration of money or property advanced to him by his parent, execute a writing releasing his right as prospective heir and distributee of the estate of such parent, he is thereby estopped from asserting any claim to the estate against the other heirs and distributees.[34]

An expectant estate may be conveyed, but a conveyance of it is always viewed with suspicion. It is never presumed, and, to render it valid, it must be shown that the conveyance was in good faith, that there was no fraud practiced upon either the heir or the ancestor, and that a full value was paid.[35]

§ 335. Conveyance by attorney in fact.—A deed can not be executed by a third person for the grantor in his absence unless authorized by a power under seal.[36] A recital of the attorney's au-

[29] McCall's Admr. v. Hampton, 98 Ky. 166, 32 S. W. 406, 17 Ky. L. 713, 33 L. R. A. 266, 56 Am. St. 335.

[30] East Lewisburg Lumber & Mfg. Co. v. Marsh, 91 Pa. St. 96.

[31] Habig v. Dodge, 127 Ind. 31, 25 N. E. 182; Johnson v. Johnson, 170 Mo. 34, 70 S. W. 241, 59 L. R. A. 748; Steele v. Friarson, 85 Tenn. 430, 3 S. W. 649.

[32] Clendening v. Wyat, 54 Kans. 523, 38 Pac. 792, 33 L. R. A. 278.

[33] McClure v. Raben, 125 Ind. 139, 25 N. E. 179, 9 L. R. A. 477.

[34] Squires v. Squires, 65 W. Va. 611, 64 S. E. 911, 32 L. R. A. (N. S.) 284n.

[35] Layton v. Herr, 45 Ind. App. 203, 90 N. E. 645.

[36] Young v. Sheldon, 139 Ala. 444, 36 So. 27, 101 Am. St. 44; Videau v. Griffin, 21 Cal. 389; Rowe v. Ware, 30 Ga. 278; Heath v. Nutter, 50 Maine 378; Cadell v. Allen, 99 N. Cas. 542, 6 S. E. 399.

thority in the deed is proper and desirable, but it has of itself no effect as showing authority,[37] though such recital, coupled with a long delay of the principal to assert an adverse claim, affords presumption of the existence of the power.[38] A prima facie showing of the attorney's authority to make the conveyance is made by the recital in his deed and letters, that he was attorney in fact for his principal, supported by the testimony of one who saw the lost power of attorney.[39]

If the deed is not made in the name of the principal, it is not his deed, but the deed of the agent alone. It is not sufficient, as is the case with unsealed contracts, that the fact of agency can be gathered from the whole instrument. The attorney may execute the deed by signing the name of the principal alone, without signing his own.[40] The recitals in the body of the deed should show that it is the act of the principal, and the deed should be signed as well with the name of the principal as with that of the attorney, thus, "John Jones, by his attorney in fact, William Smith." The deed should purport throughout to be the deed of the principal, and the principal's name should be signed, together with his own name as attorney. This is the common-law form of executing a deed under a power of attorney, and this form is proper though a statute provides that a person executing a deed as attorney for another shall describe himself in and sign the deed as attorney.[41]

A deed executed by an attorney under a power should be acknowledged by the attorney as the deed of his principal, and the certificate should recite that the attorney appeared and acknowledged the instrument to be the deed of his principal. If the acknowledgment of such a deed is insufficiently executed, no title passes.[42] It seems that a grantor, executing a deed in his own proper person, may acknowledge it through an attorney in fact.[43]

Counsel should be careful to see that the deed was executed by a person having power and authority to make the conveyance. The nature and extent of such power should be ascertained, and the required formalities of execution and acknowledgment should

[37] Waggener v. Waggener, 3 T. B. Mon. (Ky.) 542.

[38] Folts v. Ferguson (Tex. Civ. App.), 24 S. W. 657.

[39] Mulford v. Rowland, 45 Colo. 172, 100 Pac. 603.

[40] Devinney v. Reynolds, 1 Watts & S. (Pa.) 328.

[41] Posner v. Bayless, 59 Md. 56.

[42] McKinney v. Rodgers (Tex. Civ. App.), 29 S. W. 407.

[43] Elliott v. Osborn, 1 Harr. & McH. (Md.) 146.

be looked into. The delegated authority to make the deed should be shown in the abstract, together with the fact that it was acknowledged by the attorney as the act of his principal. The testimonium clause should be copied verbatim. The synopsis of a deed executed by one person as attorney in fact for another under a power previously executed may be in form thus:

John Harrell, by Edgar Phillips, his attorney in fact, to Elias Johnson.	Warranty Deed. Dated Oct. 5, 1903. Recorded Oct. 7, 1903. Deed Record 45, page 175.

Recites that, [same recitals as in deeds by grantor in person] "In witness whereof, Edgar Phillips, attorney, by virtue of a power of attorney, under the hand and seal of the above named John Harrell, dated January 1st, 1903, and to be recorded herewith, has hereunto subscribed the name and set the seal of said John Harrell, party of the first part, this 5th day of October, 1903."

Acknowledged June 10, 1917, by Edgar Phillips as the act and deed of John Harrell.

§ 336. **Power of attorney to convey.**—It is provided by statute in nearly all the states, though in somewhat varying terms, that a power of attorney to convey real estate must be executed, acknowledged, and recorded in the same manner that conveyances are.[44] A power of attorney for the execution of a deed should be as certain as the deed itself.[45] The same formalities, moreover, of signing, sealing, and acknowledging, should be observed in its execution.[46] If two subscribing witnesses are required for the execution of the deed, two witnesses should be required for the execution of the power.[47] Where the deed of a married woman is invalid unless her husband joins with her in the execution of it, the husband should join in the execution of a power of attorney given by his wife for the conveyance of her land.[48] If it is

[44] See digest of statutes of various states in appendix.

[45] Gage v. Gage, 30 N. H. 420; Lumbard v. Aldrich, 8 N. H. 31, 28 Am. Dec. 381.

[46] Cadell v. Allen, 99 N. Car. 542, 6 S. E. 399.

[47] Stone v. Ashley, 13 N. H. 38.

[48] Heinlen v. Martin, 53 Cal. 321.

required that a married woman in acknowledging a deed shall be examined apart from her husband, the same formality is requisite in her acknowledgment of a power of attorney for the conveyance of her land.[49]. The lands to be conveyed under the power must be sufficiently identified.[50]

One who is capable of making a deed may execute it by an attorney constituted such by a writing under his hand and seal. Of course the same disabilities that prevent the owner's making a conveyance prevent his appointing an attorney to make it. The power of attorney of a married woman whose common-law disabilities have been removed may be made in the same manner and with the same legal effect as the power of a feme sole.[51]

In construing a power of attorney the intention of the parties is to be regarded. Though the power to sell is not expressly given, it may be implied from the terms of the instrument.[52] The authority of the attorney must be ascertained from the language of the instrument which confers the authority,[53] though the practical interpretation put upon it by the parties themselves by their acts may serve to show the extent of the authority they intended to confer.[54] The attorney's authority, as expressed in the terms of the power, can not be extended further than is necessary and proper for carrying the authority expressly conferred into full effect. In construing the power reference may be had to the purpose of the appointment, and the powers specifically declared may properly be enlarged or limited by a due consideration of the object intended to be accomplished.[55] An unrestricted power to sell gives the attorney the right to sell in bulk or in parcels.

Whether an attorney can bind his principal by covenants, without express or implied authority to convey with covenants, is a question upon which the cases can hardly be reconciled. The cases which hold that such express authority is necessary are perhaps the most numerous.[56] But there are well considered cases holding that a power which authorizes an attorney to convey, in as full and ample a manner as the principal himself could, au-

[49] Butterfield v. Beall, 3 Ind. 203.
[50] Bradley v. Whitesides, 55 Minn. 455, 57 N. W. 148.
[51] Knapp v. Smith, 27 N. Y. 277.
[52] Marr v. Given, 23 Maine 55, 39 Am. Dec. 600.
[53] Blum v. Robertson, 24 Cal. 127.
[54] Marr v. Given, 23 Maine 55, 39 Am. Dec. 600.
[55] Martin v. Harris (Tex. Civ. App.), 26 S. W. 91.
[56] Heath v. Nutter, 50 Maine 378; Howe v. Harrington, 18 N. J. Eq. 495; Nixon v. Hyserott, 5 Johns. (N. Y.) 58.

thorizes him to make a deed with full covenants of warranty.[57] Ordinarily a party who relies on a grant of land under a power of attorney, must show the authority of the attorney.[58]

Powers of attorney authorizing the execution of deeds for the conveyance of real estate must be recorded in the office of the recorder of the county in which the lands are situated, previous to the sale or execution of the deed by virtue of the power. A synopsis of such power should immediately follow the abstract of the deed purporting to be made by virtue of the power. All matters reciting the scope of the attorney's power should be noted, together with any reservation of the right of revocation or substitution that may be contained in the power. The recital of the power should be transcribed literally. The following example of such synopsis is given:

James Terrell,	Power of Attorney.
	Dated June 10, 1903.
to	Recorded June 11, 1903.
Lewis Williams.	Deed Record 45, page 160.

Know all men by these presents, that I, the undersigned, James Terrell, have this day made, constituted, and appointed, and do by these presents make, constitute and appoint Lewis Williams my true and lawful attorney, for me and in my name to sell and dispose of absolutely, in fee simple, the following described real estate (here describe land) for such price or sum of money, and to such person or persons as he shall think fit and convenient; and also for me and in my name, as my act and deed, to sign, execute, and acknowledge, and deliver such deed or deeds of conveyance, for the absolute sale and disposal thereof, with such clause or clauses, covenant or covenants, conditions and restrictions, to be therein contained, as my said attorney shall think fit and expedient.

Full power to revoke and substitute.

Acknowledged June 10, 1903.

Where an unexecuted power of attorney appears of record it need not be abstracted, a mere reference thereto in the proper connection being sufficient.

[57] Le Roy v. Beard, 8 How. (U. S.) 451, 12 L. ed. 1151; Peters v. Farnsworth, 15 Vt. 155, 40 Am. Dec. 671.

[58] Hager v. Spect, 52 Cal. 579.

§ 337. Ratification and revocation of powers of attorney. —While many authorities hold that a deed executed by an attorney having no previous authority may be ratified by parol,[59] others hold to the rule that such unauthorized act, of an attorney in fact, can be confirmed only by an instrument under seal.[60] But even this rule does not prevent a ratification by acts which operate as an estoppel in pais.[61] A power of attorney is revocable at any time, though it is expressly declared irrevocable, unless the attorney has an interest in the property on which the power is to be exercised.[62]

The death of the principal terminates a power to convey, and a deed made by the attorney after such death is void even if he was ignorant of the fact of the death;[63] though, if the power be coupled with an interest, it survives and may be executed after the death of the donor. The marriage of the donor of a power of attorney operates as a revocation of the same, so far as concerns the rights which the wife of the donor may acquire in the property by marriage, such as the rights of dower and homestead.[64] The insanity of the principal after the execution of a power of attorney operates as a revocation, or suspension for the time being, of the authority of the agent to act under it.[65] A conveyance by the principal before the attorney has acted upon the authority given him, operates to revoke the power.[66]

A provision in the instrument creating the power, to the effect that the principal may not revoke the power at will, serves to prevent such revocation on the part of the principal. It would seem that the recording of the power of attorney prevents its revocation except by a revocation duly recorded.[67] The recording of the revocation is constructive notice of the fact. Where there appears of record a revocation of a power which has not been executed, the abstract need not contain any reference either to

[59] McIntyre v. Park, 11 Gray (Mass.) 102, 71 Am. Dec. 690; McDonald v. Eggleston, 26 Vt. 154, 60 Am. Dec. 303.

[60] Spofford v. Hobbs, 29 Maine 148, 48 Am. Dec. 521; Despatch Line Co. v. Bellamy Mfg. Co., 12 N. H. 205, 37 Am. Dec. 203.

[61] Borel v. Rollins, 30 Cal. 408; Alexander v. Jones, 64 Iowa 207, 19 N. W. 913.

[62] Hunt v. Rousmanier, 8 Wheat. (U. S.) 174, 5 L. ed. 589; Brown v. Pforr, 38 Cal. 550.

[63] Davis v. Windsor Sav. Bank, 46 Vt. 728.

[64] Henderson v. Ford, 46 Tex. 627.

[65] Davis v. Lane, 10 N. H. 156.

[66] Walker v. Denison, 86 Ill. 142.

[67] Weile v. United States, 7 Ct. of Cl. (U. S.) 535.

the power itself or to the instrument revoking it. But in case it is desired to show the transaction, a brief reference to the power followed immediately by the revocation will suffice. It may be presented as follows:

James Terrell to Lewis Williams.	Revocation of Power of Attorney. Dated, Sept. 12, 1903. Recorded Sept. 12, 1903. Deed Record 45, page 285.

Stating particulars of power of attorney shown as No. 12 of this abstract, and revokes and makes void all and singular the powers and authorities thereby given to said Lewis Williams. Acknowledged Sept. 12, 1903. Where the rule prevails that the death of the principal, whether known or unknown to the attorney, terminates the power, it is important to know if the principal was alive at the time a conveyance was made under the power. If the abstracter has any knowledge of the facts, his notation thereof in the abstract would be proper.

§ 338. Conveyances in trust.—There is a well-settled distinction between a deed of trust proper and a deed of trust in the nature of a mortgage; the one being for the trust purposes unconditional and indefeasible, while the other is conditioned and defeasible, in the same way that a mortgage is.[68] Our treatment here will be confined to conveyances made in trust for the benefit of a person or persons named therein as beneficiaries, and not such as are made to secure the payment of a debt or the performance of an obligation. Conveyances of the character under discussion are not as frequent as formerly. Where they are still employed the statutes sometimes provide that the cestui que trust takes both the legal title and the beneficial interest.[69]

These are what are termed "passive" or "simple" trusts, and impose no duty upon the trustee except to make a conveyance of the property when requested by the cestui que trust. Where, however, the deed imposes some active duty on the part of the trustee, such as to care for the land, to pay taxes, to collect rents,

[68] Fox v. Fraser, 92 Ind. 265; Hoffman Burneston & Co. v. Mackall, 5 Ohio St. 124, 64 Am. Dec. 637.

[69] Roth v. Michalis, 125 Md. 325, 17 N. E. 809.

to make sale, and the like, he will take the fee, without words of limitation or inheritance, when necessary to carry out the trust.[70] Thus, a deed to trustees and their successors in trust to sell and convey in fee simple absolute, without the word "heirs" in either the habendum or granting clause, conveys to the trustees an estate in fee simple. The trust required an estate in fee simple for its execution, and consequently a legal estate commensurate with this requirement; and therefore the trustees took such an estate without the use of the usual words of limitation.[71] A trustee, however, takes no greater estate than the purposes of the trust require,[72] even though the grant to him is in fee.[73] In most cases, the object or purpose for which the trust was created being executed, the trustee's estate, if greater than was required, terminates, and the legal title becomes vested in the beneficiary.[74]

Inasmuch as conveyances in trust are allowed only to a limited extent in this country, every part of the instrument necessary to bring it within the permitted class should be shown in the abstract. The habendum clause is most frequently employed to define the trusts imposed on the person taking the legal estate under the deed, and its recitals should be shown. Also any power of appointment, reservation, or any special matter of inducement contained in any part of the deed must be noted.

No technical terms or expressions are necessary for the creation of a trust, any words being sufficient for the purpose if the intention to create a trust clearly appears.[75] It is usually created in the habendum by language similar to the following: "To have and to hold unto the said ——, as trustee, his successors and assigns forever, upon the trusts, and to and for the uses, interests and purposes, hereinafter limited, described and declared."

Persons dealing with a trustee must take notice of the scope of his authority; and even a third person taking a title which comes through a trustee, and having notice of facts which should put him

[70] Lord v. Comstock, 240 Ill. 492, 88 N. E. 1012; Packard v. Old Colony R. Co., 168 Mass. 92, 46 N. E. 433.

[71] Neilson v. Lagow, 12 How. (U. S.) 98, 13 L. ed. 909; Ewing v. Shannahan, 113 Mo. 188, 20 S. W. 1065.

[72] Allen v. Hughes, 106 Ga. 775, 32 S. E. 927; Olcott v. Tope, 115 Ill. App. 121.

[73] Young v. Bradley, 101 U. S. 782, 25 L. ed. 1044; Brillhart v. Mish, 99 Md. 447, 58 Atl. 28.

[74] Brown v. Reeder, 108 Md. 653, 71 Atl. 417; Temple v. Ferguson, 110 Tenn. 84, 72 S. W. 455, 100 Am. St. 791.

[75] Estate of Smith, 144 Pa. St. 428, 22 Atl. 916, 27 Am. St. 641.

upon inquiry whether the trustee was acting within the scope of his authority, is not protected.[76]

§ 339. Declaration of trust in deeds.—A trust in real property can be created only by a writing in which the objects and nature of the trust is clearly indicated, the parties designated, their relation to each other defined, the proportions in which they are to take specified, and in general, all the material elements of the settlement set forth.[77] But no particular form of such writing is required. The deed may be absolute in form, and the trust declared in a note at the end of the deed,[78] or in a separate instrument, such as a memorandum or affidavit,[79] or even a letter, though addressed to some third party, if properly signed and adequately expressing what the trust is.[80] Where a trust is created by deed the declaration is usually found in the habendum, but it is sufficient if from the whole instrument an intention appears to create a trust.[81] The trust may be manifested or proved by any writing signed by the party to be charged, or by the party who is entitled to declare the trust, provided the fiduciary relations are set forth in the writing with sufficient certainty.[82]

The declarations of trust in a deed should be transcribed literally, and require the closest attention of counsel. These declarations advise the purchaser that he is dealing with a person who has not the beneficial ownership, and who can convey no title except by a deed made in strict conformity with the terms of the trust. The terms of the trust may not authorize the trustee to sell at all, or not to sell except upon conditions which have been complied with. With respect to the authority of the trustee to sell, the only guide is the declaration of the trust. With respect to the matter of compliance with conditions, the purchaser is obliged to resort to facts outside the record.

In abstracting a deed of trust the declaration creating the trust, or so much thereof as will show the full intention of the parties

[76] Kirsch v. Tozier, 143 N. Y. 390, 38 N. E. 375, 42 Am. St. 729.

[77] Finley v. Isett, 154 U. S. 561, 14 S. Ct. 1164, 19 L. ed. 273; Emerson v. Galloupe, 158 Mass. 146, 32 N. E. 1118; Hutchins v. Van Vechten, 140 N. Y. 115, 35 N. E. 446; Martin v. Baird, 175 Pa. St. 540, 34 Atl. 809.

[78] Preston v. Preston, 202 Pa. St. 515, 52 Atl. 192.

[79] Pinney v. Fellows, 15 Vt. 525.

[80] Larrabee v. Hascall, 88 Maine 511, 34 Atl. 408, 51 Am. St. 446; Tusch v. German Sav. Bank, 20 Misc. 571, 46 N. Y. S. 422; Roberts' Appeal, 92 Pa. St. 407.

[81] Taft v. Taft, 130 Mass. 461; Toms v. Williams, 41 Mich. 552, 2 N. W. 814; In re Smith's Estate, 144 Pa. 428, 22 Atl. 916, 27 Am. St. 641.

[82] Kintner v. Jones, 122 Ind. 148, 23 N. E. 701.

as indicated in the deed, must appear. An example of such synopsis is appended:

Joseph Wolf, Trustee,	Declaration of Trust.
to	Dated Oct. 1, 1917.
Whom it may concern.	Recorded Oct. 2, 1917.
	Record 75, page 200.

Recites that the purchase money for the within described real estate was provided and paid by Julia Eklund, and that she is the actual purchaser and the conveyance was made to said Joseph Wolf, as a trustee for the purchaser: "Now know all men by these presents that I, the said Joseph Wolf, do hereby declare that I stand seised of said land and premises within described in trust for the said Julia Eklund, her heirs and assigns, and hereby agree to convey the same at her request and at her cost to her or to such person or persons at such time or times and in such manner, as she, the said Julia Eklund, shall direct or appoint."

§ 340. **Revocation of trust.**—A trust can not be revoked by the donor after its acceptance actual or presumed, unless the declaration reserves a power of revocation, and in that case the power to revoke must be strictly pursued.[83] And the absence of a power of revocation from a voluntary deed of trust is not prima facie evidence of a mistake, where such power was not inconsistent with the purposes of the trust and was neither intended nor desired by the grantor at the time of the execution of the trust.[84] But a completed trust, without reservation of power of revocation, can be revoked by the consent of all the beneficiaries.[85] In some states it is held that when the settler reserves for his own benefit an absolute power to revoke the trust, he is still deemed the absolute owner of the property conveyed, so far as the rights of creditors and purchasers are concerned.[86] A power of revocation in a trust deed is not inconsistent with the creation of a valid trust.[87] Except where the rights of creditors are involved, such a power is valid and consistent with the idea of a

[83] Spence v. Widney (Cal.), 46 Pac. 463.

[84] Wallace v. Industrial Trust Co., 29 R. I. 550, 73 Atl. 25.

[85] Ewing v. Shannahan, 113 Mo. 188, 20 S. W. 1065.

[86] Von Hesse v. MacKaye, 136 N. Y. 114, 32 N. E. 615.

[87] Seaman v. Harmon, 192 Mass. 5, 78 N. E. 301.

trust.[88] Where no particular form for such revocation is required, any language clearly expressing an intention to revoke is sufficient. If the power to revoke is not exercised during the life of the settler the trust continues until the purpose for which it was created is accomplished. Where a deed of trust contains a power of revocation, and the trust remains unexecuted, the reservation should be set out in full in the abstract.

§ 341. Death, resignation, or removal of trustee.—Upon the death of a trustee holding the legal title to land, such title vests in his heirs subject to the trust,[89] and his executors become clothed with his duties and responsibilities as such trustee.[90] When a trust exists and all the trustees are dead, the court will appoint other trustees and direct the execution of the trust.[91] But in the absence of a provision to the contrary persons holding under a conveyance as trustees hold as joint tenants, and upon the death of one the trust obligations devolve upon the survivor, and do not pass to the heir or personal representative of the deceased trustee.[92] Persons creating a trust may provide for the selection of trustees and their successors.[93] But where an instrument creating a trust provides that if the appointed trustee is unwilling to act, the cestui que trust shall appoint another trustee "under their hand and seal," an appointment made without some sort of a seal confers no authority.[94]

A trustee, by his resignation, can not divest himself of the legal title to property vested in him by the instrument creating the trust.[95] Where lands are conveyed in trust, and the trustee enters into possession of the property under the deed, he is bound to observe the terms and conditions of the instrument under which he receives a conveyance of property; and if he fails to discharge his duty as trustee, and attempts to divert the property to a use not contemplated by the deed, or appropriates it to his own use, a court of equity will remove him and appoint another trustee to take his place.[96]

[88] Schreyer v. Schreyer, 91 N. Y. S. 1065.

[89] Lawrence v. Lawrence, 181 Ill. 248, 54 N. E. 918.

[90] Anderson v. Northrop, 30 Fla. 612, 12 So. 318.

[91] Spence v. Widney (Cal.), 46 Pac. 463.

[92] Reichert v. Missouri & Illinois Coal Co., 231 Ill. 238, 83 N. E. 166, 121 Am. St. 307.

[93] Stahl v. Mitchell, 41 Minn. 325, 43 N. W. 385.

[94] Sharpely v. Plant, 79 Miss. 175, 28 So. 799, 89 Am. St. 588.

[95] Simpson v. Erisner, 155 Mo. 157, 55 S. W. 1029.

[96] Guilfoil v. Arthur, 158 Ill. 600, 41 N. E. 1009.

CHAPTER XV

OFFICIAL CONVEYANCES

SEC.
345. Official conveyances generally.
346. Recitals in official deeds.
347. Sheriff's deed on execution sale.
348. Description of premises sold on execution.
349. Acknowledgment of sheriff's deed.
350. Construction and operation of sheriff's deeds.
351. Statutory sheriff's deeds.
352. Sheriff's deed in execution of decree.
353. Deeds by masters, commissioners and referees.
354. Powers and duties of trustees to make conveyances.
355. Trustee's conveyance of legal title.
356. Testamentary trust distinguished from power, charge, and estates on condition subsequent.
357. Trustees' deeds.
358. Mortgagee's deed under power of sale.
359. Executor's deed.
360. Administrator's deed.
361. Administrator with the will annexed.
362. Guardian's deed.
363. Fiduciaries purchasing at their own sales.
364. Caveat emptor as applied to judicial and ministerial sales.

§ 345. **Official conveyances generally.**—Under the title of official conveyances we propose to group such transfers of real property as are effected by judicial sales; sales under execution; sales by executors, administrators or other personal representatives under judicial license; sales by executors and administrators under power conferred by will; sales by trustees and mortgagees; sales by tax collectors, and generally any sale in which the grantor acts not in his own right, but in an official, fiduciary or ministerial character. Such conveyances are made without the co-operation of the owner, and often against his will. Statutes very generally provide that under certain circumstances the interest of one incapable of conveying, or of one capable of conveying but unwilling to do so, may be transferred to another by a judicial or other proceeding. A judicial sale is had in cases in which there is a proceeding in rem affecting definite property; while a sale under execution is based on a general judgment for so much money. A conveyance made under an order or decree of court is executed by an agent or officer of the court legally appointed and commissioned for that purpose; while a conveyance based on an execution to make funds to satisfy a judgment for

money is made by a ministerial officer of the law.[1] In either case the officer executing the conveyance acts only in pursuance of a naked power conferred upon him by statute or order of court, passing only such a title as the judgment debtor, deceased person, etc. had, without covenants for title. In this class of conveyances the doctrine of caveat emptor applies, in the sense that the purchaser will be deemed to have entered into the contract with the understanding that he is to take the title, such as it is, without an express contract to that effect. A judicial sale is a sale of the interest of the defendant in the action, and nothing more.[2] No warranty is given or implied.[3] A person executing a conveyance in a representative capacity, such as administrator, guardian, or trustee, can not bind the estate he represents by covenants for title, nor is the estate bound by covenants implied from the use of the words "grant, bargain, and sell."[4] The mode of acquiring title to real property by official conveyances is regulated by the law of the state where the land is situated, and the validity of such conveyances depends upon the substantial conformity of the proceedings to that law.[5]

In abstracting deeds of the character under discussion every material part should be set forth with such fullness that no reasonable inquiry shall remain unanswered. It is important that every recital be stated, because they are always notice to the purchaser of the facts recited, and of everything to which, if followed up by reasonable inquiry, they naturally lead. The recitals should show whether or not the officer had authority to make the conveyance.

§ 346. Recitals in official deeds.—Official deeds usually contain one or more formal recitals setting forth the authority under which the officer acts, and briefly giving a narrative of the proceedings leading up to the conveyance. Such deeds are often required by statute to contain recitals of certain facts, and it being thus the duty of the officer to make such recitals, they are, when made, taken as prima facie true.[6] But such recitals have been

[1] Norton v. Reardon, 67 Kans. 302, 72 Pac. 861, 100 Am. St. 459.

[2] O'Neal v. Wilson, 21 Ala. 288; McLouth v. Rathbone, 19 Ohio 21.

[3] Brackenridge v. Dawson, 7 Ind. 383; King v. Gunnison, 4 Pa. St. 171.

[4] Foote v. Clark, 102 Mo. 394, 14 S. W. 981, 11 L. R. A. 861.

[5] Buell v. Cross, 4 Ohio 327.

[6] Williamson v. Mayer, 117 Ala. 253, 23 So. 3; Bray v. Adams, 114 Mo. 486, 21 S. W. 853; Miller v. Miller, 89 N. Car. 402.

held not sufficient to dispense with proof of the facts recited, as against third persons.[7]

Recitals in an executor's deed are not competent to establish the testator's will, the probate thereof, and the proceedings ending in the execution of the deed, as against persons not in privity with the grantor.[8] A deed by an executor, administrator, guardian, or other person acting in like capacity, should contain recitals of the power under which the grantor acts in making the conveyance. If a person in such representative capacity executes a deed without such recitals, and signs it with addition merely of the words indicating the capacity in which he intends to act, as, for instance, "administrator," etc., the deed is strictly his own personal deed.[9]

Also a sheriff's deed should contain recitals sufficient to show the authority under which he acted in making the sale. They should show the authority to sell, and a sale made substantially according to law.[10] All the facts which constitute the foundation of title, and without which the sale would be void, must be recited.[11] But recitals other than those which show the sheriff's authority, and his acts in executing it, are not necessary, and may be omitted even when required by statute.[12] The deed need not recite the amount of the judgment and the names of the parties, if the execution is valid.[13] A misrecital of facts authorizing a sale by the sheriff does not avoid his deed, if the necessary facts actually exist.[14]

In the case of a sale by a tax collector the deed must show by its recitals that the statute has been strictly complied with.[15] The abstract should show every recital which the statute requires if they are contained in the deed, even though they are regarded as matters of inducement.

§ 347. **Sheriff's deed on execution sale.**—A certificate of sale on execution is usually issued to the purchaser, and this may

[7] Lawless v. Stamp, 108 Iowa 601, 79 N. W. 365.

[8] Miller v. Miller, 63 Iowa 387, 19 N. W. 251.

[9] Bobb v. Barnum, 59 Mo. 394.

[10] Martin v. Bonsack, 61 Mo. 556.

[11] Armstrong v. McCoy, 8 Ohio 128, 31 Am. Dec. 435.

[12] Bettison v. Budd, 17 Ark. 546, 65 Am. Dec. 442; Perkins v. Dibble, 10 Ohio 433, 36 Am. Dec. 97.

[13] Perkins v. Dibble, 10 Ohio 433, 36 Am. Dec. 97.

[14] Martin v. Wilbourne, 2 Hill (S. Car.) 395, 27 Am. Dec. 393.

[15] Brooks v. Rooney, 11 Ga. 423, 56 Am. Dec. 430.

be assigned to another, entitling the assignee to the deed from the sheriff.[16] But a deed to a person other than the one to whom the certificate was issued, or an assignee thereof, is void.[17] A sheriff's certificate of purchase does not operate to pass any title to the purchaser in the absence of the execution of a deed by him after the expiration of the period allowed for redemption.[18]

The legal title remains in the judgment debtor until the execution and delivery of the sheriff's deed.[19] But where one entitled to receive the deed dies, the subsequent execution of it to him, although void, does not affect the title of those claiming under him.[20]

Where the deed was made to a person other than the purchaser at the sale, the certificate of purchase together with the assignment thereof to the grantee should be shown in the abstract, or its absence noted.

It is generally provided by statute that the sheriff selling land under a writ of execution, shall make to the purchaser as good and sufficient deed of conveyance of the land sold as the execution defendant could have made at, or any time after he became liable on the judgment; that the deed shall be sufficient evidence of the legality of such sale, and the proceedings therein, until the contrary is proved, and shall vest in the purchaser as good and as perfect an estate in the property as was vested in the judgment defendant at the time of the rendition of the judgment; that such deed shall recite the execution, the names of the parties, and the amount and date of the rendition of the judgment; and that the deed shall be executed, acknowledged and recorded as is provided by law to perfect the conveyance of real estate in other cases. In order that the sale may be effective to divest the title of the judgment debtor, and to vest it in the purchaser, it must have been made under a judgment rendered by a court having jurisdiction of the subject-matter and the parties. The form prescribed by statute should be followed in deeds of this character, but in the absence of a statutory form any language showing an intention to pass title to the purchaser will suffice. The deed should always

[16] Oliver v. Dougherty, 8 Ariz. 65, 68 Pac. 553; Conger v. Babcock, 87 Ind. 497.

[17] Carpenter v. Sherfy, 71 Ill. 427.

[18] Hill v. Swihart, 148 Ind. 319, 47 N. E. 705.

[19] Paxton v. Heron, 41 Colo. 147, 92 Pac. 15, 124 Am. St. 123.

[20] Diamond v. Turner, 11 Wash. 189, 39 Pac. 379.

contain apt and proper words of grant, release or conveyance.[21] The recitals prescribed by statute to be inserted in sheriff's deeds have been held to be no part of the deed, and an omission to recite or a misrecital of the judgment or execution under which the sale was made, does not invalidate the deed.[22] In case the deed does not show on its face the essential requirements of a valid sale, these may be shown by the return on the execution,[23] but some courts have held that where there is a material variance between the sheriff's return and the deed executed by him, the deed is invalid.[24]

§ 348. **Description of premises sold on execution.**—Like all other deeds purporting to convey land, a sheriff's deed which does not describe or designate the lands, is invalid for uncertainty.[25] The land sold is required to be described with sufficient certainty to enable a person of common understanding to identify it.[26] If by reason of a failure to give a proper description of the land, a sale is invalid, the purchaser, it is held, is subrogated to the lien of the judgment.[27] Equity will correct a mistake in a sheriff's deed, where a part of the premises are omitted from the description, when a case of mistake is established by competent evidence.[28] If the purchaser at a sale on execution receives a deed which is invalid for want of proper description of the property, he is entitled to another correct in form.[29] Where the description is accurate but general, the land conveyed may be clearly located and identified by extrinsic evidence.[30] So the description will be sufficient if, with the aid of extrinsic evidence, the land can be located and identified.[31] A defective description in a sheriff's deed may be remedied by a new deed ordered from the court issuing the process, and a new deed may be executed to take the place of one that has been lost before registration.[32]

[21] Johnson v. Bantock, 38 Ill. 111.

[22] Wilson v. Campbell, 33 Ala. 249, 70 Am. Dec. 586; Clark v. Sawyer, 48 Cal. 133; Hill v. Reynolds, 93 Maine 25, 44 Atl. 135, 74 Am. St. 329.

[23] Stinson v. Ross, 51 Maine 556, 81 Am. Dec. 591.

[24] Landreaux v. Foley, 13 La. Ann. 114; Pfeiffer v. Lindsay, 66 Tex. 123, 1 S. W. 264.

[25] Driver v. Spence, 1 Ala. 540; Swift v. Lee, 65 Ill. 336; Stewart v. Perkins, 110 Mo. 660, 19 S. W. 989.

[26] Herrick v. Ammerman, 32 Minn. 544, 21 N. W. 836.

[27] Jones v. Smith, 55 Tex. 383.

[28] Zingsem v. Kidd, 29 N. J. Eq. 516.

[29] Thornton v. Miskimmon, 48 Mo. 219.

[30] Smith v. Crosby, 86 Tex. 15, 23 S. W. 10, 40 Am. St. 818.

[31] Anderson v. Casey-Swasey Co. (Tex. Civ. App.), 120 S. W. 918.

[32] McMillan v. Edwards, 75 N. Car. 81.

§ 349. **Acknowledgment of sheriff's deed.**—Sheriffs' deeds are usually required to be acknowledged before the clerk of the court of the county where the land is situated, and the certificate of acknowledgment to be indorsed thereon by the clerk.[33] In some jurisdictions an acknowledgment in the manner prescribed by statute is essential to the validity of a sheriff's deed;[34] while in others its validity does not depend upon its being acknowledged at all, and hence, any defect in the certificate can have no effect on the validity of the deed.[35] The language of the deed itself may be referred to, to aid a defective certificate of acknowledgment.[36] The acknowledgment of a sheriff's deed before a proper officer raises a presumption of delivery.[37]

§ 350. **Construction and operation of sheriff's deeds.**—The sheriff's deed clothes the purchaser with such title as the judgment defendant had, and, where the proceedings were regular, relates back to the date of the acquisition of the lien.[38] He takes title subject to the equities and rights of third parties acquired prior to the judgment under which the property was sold,[39] and to the judgment defendant's right to be relieved from the effect of any fraud practiced in making the sale.[40] A mere irregularity in the issuance of the execution is not usually fatal,[41] but an irregularity in a transcript upon which the execution is issued has a more serious effect.[42] The title of the purchaser does not depend on the return of the writ,[43] and the rights acquired at the sale are not affected by the subsequent loss of the writ.[44] The general rule is that a sheriff's deed is of itself prima facie evidence that the grantee therein took the same title that the execution defendant had at the time the judgment was rendered,[45] and

[33] Fail v. Goodtitle, 1 Ill. 201; Cavender v. Smith, 5 Iowa 157; Hammond v. Gordon, 93 Mo. 223, 6 S. W. 93; Terrell v. Martin, 64 Tex. 121.

[34] Adams v. Buchanan, 49 Mo. 64; Boal v. King, 6 Ohio 11; In re De-Haven's Appeal, 38 Pa. St. 373.

[35] Stephenson v. Thompson, 13 Ill. 186; Ogden v. Walters, 12 Kans. 282; In re Smith, 4 Nev. 254, 97 Am. Dec. 531.

[36] Owen v. Baker, 101 Mo. 407, 14 S. W. 175, 20 Am. St. 618.

[37] Robisson v. Miller, 158 Pa. St. 177, 27 Atl. 887.

[38] San Domingo Gold Min. Co. v. Grand Pac. Gold Min. Co., 10 Cal. App. 415, 102 Pac. 548.

[39] National Broadway Bank v. Denny, 133 Ga. 227, 65 S. E. 412.

[40] Bowling v. Bowling (Ky. App.), 118 S. W. 923.

[41] McKeithen v. Blue, 149 N. Car. 95, 62 S. E. 769, 128 Am. St. 654.

[42] Schmitt v. Weber, 239 Ill. 377, 88 N. E. 268.

[43] Weldon v. Rogers, 157 Cal. 410, 108 Pac. 266.

[44] Miller v. Goodin (Ky. App.), 124 S. W. 818.

[45] Montgomery v. Robinson, 49 Cal. 258; Hadden v. Johnson, 7 Ind. 394;

is prima facie evidence of the validity of the judgment itself.[46] Where a deed executed by the sheriff to a purchaser at a sale on execution contains all the recitals required by the statute, and was duly made and executed, acknowledged and recorded, as required by law, such deed is prima facie evidence of the legality and regularity of the sale.[47] As a general proposition, any error in the proceedings leading up to the execution of the deed will not affect the title of the purchaser, where he is not culpable. His title can not be attacked collaterally.[48]

§ 351. Statutory sheriff's deeds.—In many states a form for sheriff's deeds is prescribed by statute. These statutes are generally, but not universally, declared to be directory merely.[49] But these statutes declare the legal effect of the form prescribed, and, where used in a deed, make it sufficient evidence of the legality of the sale, and the proceedings therein, until the contrary is proved. By adherence to the prescribed form there is little danger of misrecitals, and small ground for collateral impeachment. By their use the purchaser becomes vested with as good and perfect an estate in the premises as was vested in the execution defendant at, or after, the time when the property became liable to the satisfaction of the judgment. These statutory forms are usually limited to a recital of the judgment, execution, sale, and the authority of the officer making the sale. The granting clause of such deeds is usually confined to the most apt and simple words of grant or transfer. In fact, little else is usually contained in such forms than what is required in a synopsis thereof in an abstract. An example of such synopsis is appended:

John Williams, Sheriff of Grant County, Ind., to Samuel Blinn.	Sheriff's Deed. Dated July 12, 1893. Recorded July 15, 1893. Deed record No. 75, page 36.

Recites that whereas, on the 12th day of January, 1893, Ephriam

[46] Everson v. State, 66 Nebr. 154, 92 N. W. 137.

[47] Webster v. Daniel, 47 Ark. 131, 14 S. W. 550; Kimmel v. Meier, 106 Ill. App. 251.

[48] Moore v. Neil, 39 Ill. 256, 89 Am. Dec. 303; Bray v. Adams, 114 Mo. 486, 21 S. W. 853; Wilkins v. Huse, 9 Ohio 154.

[49] Wright v. Young, 6 Ore. 87; Bludworth v. Poole, 21 Tex. Civ. App. 551, 53 S. W. 717.

Creviston recovered a judgment against William Gaines, defendant therein, for $500.00, and costs of suit, upon which an execution was issued on the 10th day of April, 1893, directed to the sheriff of the county and state aforesaid to execute, and which execution was, on the 12th day of April, 1893, levied on the premises hereinafter described; and having advertised the time and place of sale of same according to law, said premises were struck off and sold to Samuel Blinn for the sum above mentioned, that being the highest and best bid received. Therefore, said sheriff, in consideration of the premises, and the sum of $——, "do hereby grant and convey" unto said Samuel Blinn, the following described real estate [describing same]. Acknowledged July 12, 1893.

§ 352. **Sheriff's deed in execution of decree.**—As a court of equity has, in the absence of statute, no power to create or transfer title, a decree for that purpose must direct the making of a conveyance, and the title passes by virtue of the conveyance and not by virtue of the decree alone. The conveyance made under the decree is ordinarily by a master commissioner or referee appointed by the court for that purpose, but not infrequently the conveyance is made by the sheriff either through special appointment or by virtue of his office. But a sale made by a sheriff under a decree is a judicial sale, or a sale made by the court through the sheriff acting as a ministerial officer only. In those states where the older mode of selling under a decree of a court of equity has been superseded by the "special execution" or "mortgage execution," the deed which vests the title in the buyer under judgment or decree is also a "sheriff's deed," made by the officer who conducted the sale. A deed by a sheriff under a decree differs but little from a deed made by that officer under execution. In the former case his conveyance must always be reported to the court for confirmation. Whether the deed made to the purchaser at a decretal sale be called a sheriff's or commissioner's deed, it has the same effect—that of vesting in the purchaser the title of all the parties to the cause, plaintiff's as well as defendants, such as they had at the sale or before it, since the commencement of the suit.[50] The sheriff is usually appointed to make the sale and conveyance where there is no master.[51] And

[50] Young v. Brand, 15 Nebr. 601, 19 N. W. 494.

[51] Childs v. Alexander, 22 S. Car. 169.

where the sheriff is appointed the sale may be made by his deputy.[52]

§ 353. **Deeds by masters, commissioners and referees.**—Deeds under decretal sales are executed by a person who receives his appointment from the court rendering the decree,[53] and the defendant whose property is sold need not join in the conveyance.[54] Aside from the sheriff or clerk, who are sometimes appointed to make the deed, they are usually made by masters, commissioners, or referees. The deed made by such officer should contain recitals sufficient to show the authority under which he acted in making the sale, and where confirmation is required a deed made without it is a nullity and passes no title.[55]

The proceedings leading up to the order of sale need not be set forth at length; but where the conveyance is offered in evidence in support of title, it must be accompanied by enough of the record of the proceedings to show that the parties holding title affected by the deed, and also the land itself, were before the court, and that it was sold under a decree by the person authorized to make the sale, and that the sale was confirmed by the court rendering the decree and order.[56] The deed passes to the purchaser all the title had by the parties to the suit, and all the title of those who have derived their interest from any of such parties during the pendency of the suit.[57]

In abstracting a deed of the character under discussion, all that is necessary is a condensed statement of the proceedings authorizing the officer's act, his compliance with the decree and order of sale, and the confirmation. The synopsis of the deed should come directly after the statement of the court proceedings leading up to the sale and the officer's certificate of sale. The following example of synopsis is submitted:

George Anderson, Commissioner, to Henry Hall. } Commissioner's deed under foreclosure. Dated, etc. * * * * * * * * * * * * * * * *

Recites that said George Anderson was duly appointed commis-

[52] Craig v. Fox, 16 Ohio 563.

[53] Peake v. Young, 40 S. Car. 41, 18 S. E. 237.

[54] Miller v. Sherry, 2 Wall. (U. S.) 237, 17 L. ed. 827.

[55] Rawlings v. Bailey, 15 Ill. 178; Johnson v. Hines, 61 Md. 122; Valle v. Fleming, 19 Mo. 454, 61 Am. Dec. 566.

[56] Ronk v. Higginbotham, 54 W. Va. 137, 46 S. E. 128.

[57] Harryman v. Starr, 56 Md. 63.

sioner by the Circuit Court of Marion County, Indiana, in a suit in said court pending wherein —— was plaintiff, and —— defendant, and was authorized by said court to sell and make conveyance of the real estate hereinafter described. That on the —— day of ——, 19—, said court entered a decree in said cause ordering and directing a sale of said premises to satisfy and pay the mortgage thereon as described in the petition in said action. That in pursuance of said decree, and, by virtue of the authority conferred on him by said court, the said commissioner did, on the —— day of ——, 19—, offer said premises for sale to the highest bidder, whereupon said Henry Hall, bid therefor the sum of $——, and that being the highest and best bid received, the same was struck off and sold to said Henry Hall on the —— day of ——, 19—. And whereas said Henry Hall thereupon paid said commissioner the sum bid therefor, whereupon said commissioner made and issued to him the usual certificate in duplicate in due form of law, and caused a copy thereof to be filed in the recorder's office of said county. And, whereas, more than twelve months having elapsed, and no redemption having been made of the premises, the said commissioner granted, bargained and sold to said Henry Hall, his heirs and assigns, forever the following described real estate [description same as in mortgage and petition in said suit]. Acknowledged, etc.

§ 354. Powers and duties of trustees to make conveyances.—A trustee is one in whom an interest, power or legal estate is vested under an express or implied agreement to administer or exercise it for the benefit or to the use of another.[58] The powers of a trustee are either general or special. The general powers of a trustee are those such as are deemed by law incident to the office of trustee. Special powers are those conferred by the settler himself by the express provisions of the instrument whereby he creates such trust. A trustee is bound by the directions contained in the trust instrument. His powers do not depend on a rule of law but on the interpretation of the trust instrument with the settler's intention.[59] The power so conferred is strictly construed. Consequently a power to sell does not include a power to mortgage.[60] Generally speaking, a trustee has such

[58] Ogden City St. R. Co. v. Wright, 31 Ore. 150, 49 Pac. 975.

[59] Merchants' Loan & Trust Co. v. Northern Trust Co., 250 Ill. 86, 95 N. E. 59, 45 L. R. A. (N. S.) 411n.

[60] Hamilton v. Hamilton, 149 Iowa 321, 128 N. W. 380.

powers over the subject-matter of a trust as will enable him to carry out the legal purposes and intent of the settler as indicated by the directions, nature and purpose of the settlement.[61] At law the trustee is regarded as the legal owner of the estate,[62] and upon his death the estate descends to his heirs burdened with the same duties and responsibilities as when held by the ancestor.[63] But where the trust estate is held by two or more persons jointly, and one of them dies, the title remains in the survivor or survivors to the exclusion of any interest by the heirs of the deceased trustee.[64] By statute in some states, however, the title vests in the courts of equity until a successor is appointed.[65] A power to sell land given to two persons jointly can be exercised only by both joining in the conveyance, but if such power is coupled with an interest, a separate sale will pass only the interest of the party selling.[66] Upon the appointment of a successor to a retiring trustee it is not necessary for the latter to make a conveyance of his title to the new trustee to enable the latter to execute the trust.[67]

§ 355. **Trustee's conveyance of legal title.**—The holder of the legal title should make the deed under a power of sale in a deed of trust. If such title be in a trustee the grantee becomes vested with the same title and estate as the trustee had. The trustee is not required to enter into any personal covenants himself against general incumbrances,[68] though he usually covenants against such as are done or suffered by himself. The purchaser is bound to know that there can be no personal warranty of title. He is also bound to take notice of the title as it stands in the trustee with all its defects as it appears of record.[69] It would seem, however, that if the conveyance to the trustee contains covenants for title, the benefit of them will pass to the purchaser at the trustee's sale, and he may maintain an action thereon against the grantor.[70] And where the trustee, selling at public

[61] Murphy v. Delano, 95 Maine 229, 49 Atl. 1053, 55 L. R. A. 727.

[62] Martin v. Poague, 4 B. Mon. (Ky.) 524.

[63] Lawrence v. Lawrence, 181 Ill. 248, 54 N. E. 918.

[64] Reichert v. Missouri &c. Coal Co., 231 Ill. 238, 83 N. E. 166, 121 Am. St. 307.

[65] Lecroix v. Malone, 157 Ala. 434, 47 So. 725; Dwenger v. Geary, 113 Ind. 106, 14 N. E. 903; Royce v. Adams, 123 N. Y. 402, 25 N. E. 386.

[66] Smith v. Glover, 50 Minn. 58, 52 N. W. 210, 912.

[67] Reichert v. Missouri &c. Coal Co., 231 Ill. 238, 83 N. E. 166, 121 Am. St. 307.

[68] First Nat. Bank v. Pearson, 119 N. Car. 494, 26 S. E. 46.

[69] Barnard v. Duncan, 38 Mo. 170, 90 Am. Dec. 416.

[70] Taylor v. Lane, 18 Tex. Civ. App. 545, 45 S. W. 317.

auction announces that the land is sold free and clear of all incumbrances, and it afterward appears that incumbrances exist, it has been held that the purchaser will be relieved.[71]

It has long been the established rule that, where a power is executed, the person taking under it takes under him who created the power, and not under him who executes it. The doctrine that a purchaser from a trustee with notice of the trust shall be charged with the same trust, has no application to sales of trust estates at public auction under the terms of the power contained in the trust deed.[72] A purchaser of trust property is not bound to see to the proper application of the proceeds of sale where it appears that the donor of the power confided the application of the purchase-money to the judgment and discretion of the trustee.[73] Nor is a bona fide purchaser who pays the purchase-money to the trustee bound to see that it is properly applied to trust the purpose.[74]

One who purchases from a trustee who had authority to sell acquires a title to the property sold, and the title thus acquired is not affected by the subsequent conduct of the purchaser, in knowingly aiding the trustee in misapplying the proceeds of the sale, unless such misappropriation be the result of an arrangement between the purchaser and the trustee prior to the sale, or the purchaser knew that the trustee was selling for the purpose of misappropriating the proceeds.[75] The trust may be of such a character as to oblige the purchaser to become responsible that the trustee properly applies the purchase-money in accordance with the terms of the trust. It is a question of the intention of the creator of the trust, to be gathered from the whole instrument; and if any doubt arises, a verbal copy of the material parts of the instrument should be set out in the abstract. An intention to make the purchaser responsible is deemed to exist where the terms of the trust imperatively requires the proceeds of the sale to be paid to a person in being, and competent to bind himself by his receipt.

§ 356. Testamentary trust, distinguished from power, charge, and estates on condition subsequent.—In the nature

[71] Schaeffer v. Bond, 70 Md. 480.
[72] Wood v. Augustine, 61 Mo. 46.
[73] Franklin Savings Bank v. Taylor, 131 Ill. 376, 23 N. E. 397.
[74] Claiborne v. Holland, 88 Va. 1046, 14 S. E. 915.
[75] Tapley v. Tapley, 115 Ga. 109, 41 S. E. 235.

of things, there is a wide distinction between a power and a trust created by will. In the former, the party may or may not act in his discretion; in the latter, the trust will be executed, notwithstanding his omission to act.[76] The Supreme Court of the United States says: "One of the tests as to a trust or a power is that a naked power to sell may be exercised or not by the executors, and is discretionary, while an imperative direction to sell and dispose of the proceeds is a power coupled with a trust."[77]

A charge on real estate is distinguished from a trust thereof, in that in case of the former the real estate is devised generally for the beneficial enjoyment of the devisee, subject, however, to the payment by him of a sum of money or the performance of a duty, while in the case of a trust the devise is limited to some particular purpose, with no beneficial interest in the devise.[78]

An estate in trust created by will is distinguished from an estate on condition subsequent in that in the former the proper person to secure the performance of the trust are not the heirs of the testator, but the beneficiaries of the trust property; while in the latter estate the breach of the condition gives the testator and his heirs, or perhaps his devisees, a right of entry on the land, which is the legal right, enforcible only in an action at law.[79]

§ 357. **Trustees' deeds.**—Where an instrument creating a trust confers on the trustee power to convey the property, and he afterwards carries out or executes such power, the deed by which he does so ought regularly to indicate not only the capacity in which he executes it, but also should show by recital the facts which warrant its execution. Such recitals may prove to be of value to the grantee, for should his title be attacked on the ground that the conveyance was not authorized by the existing circumstances, a recital of those circumstances showing that it was proper for the trustee to make the conveyance, will be, in many jurisdictions, regarded as prima facie evidence that the proper circumstances did exist.[80] It is also sometimes provided in deeds of trust that the recitals contained in the trustee's deed of sale under the power shall be prima facie evidence of the facts stated

[76] Chew v. Hyman, 7 Fed. 7, 10 Biss. (U. S.) 240.

[77] Taylor v. Benham, 5 How. (U. S.) 233, 12 L. ed. 130.

[78] Lang v. Everling, 3 Misc. 530, 23 N. Y. S. 329, 52 N. Y. St. 489.

[79] Stanley v. Colt, 5 Wall. (U. S.) 119, 18 L. ed. 502.

[80] Savings & Loan Soc. v. Deering, 66 Cal. 281, 5 Pac. 353; Tartt v. Clayton, 109 Ill. 579; Beal v. Blair, 33 Iowa 318.

in it.[81] In an action at law, however, the trustee's deed made under a power in a trust deed is conclusive evidence of the sale under the power, and can not be contradicted, and shown to have been executed in violation of law, and therefore fraudulent and void.[82] The recital in a trustee's deed is conclusive, where the deed of trust empowers the trustee to make it, and in the absence of fraud of which the purchaser at the trustee's sale had notice.

In jurisdictions where a deed of trust to secure the payment of a debt does not vest the legal title in the trustee, it is generally held that the instrument of conveyance under the power should be executed in the name of the grantor by the trustee as attorney in fact.[83]

Where two or more persons are appointed to execute a power of sale and no authority is given to a less number than the whole to act, all must join in the conveyance.[84] It must be executed by all who accept the trust.[85] But upon the death of one of two or more trustees to whom property has been deeded, the survivor or survivors may execute a valid conveyance.[86] A trustee, whether vested with the legal title or having only a naked power to sell, should execute the conveyance in his own name. The power is one of personal trust and confidence, and can not be delegated.

Where a trust deed forms a link in the chain of title, the declaration of trust should be copied verbatim in the synopsis of that instrument and a reference thereto made in abstracting the trustee's deed. Should the trust deed be omitted from the abstract the conditions of the trust as recited in the trustee's deed may be noted as in the following example:

Andrew Baker, trustee,
to
William Zeigler.

Trustee's deed.
Dated, etc.
* * * * * * * *
* * * * * * * *

Recites that whereas, John Davis, by his last will and testament bearing date the —— day of ——, 19—, devised the lands hereinafter described to said

[81] Swain v. Mitchell, 27 Tex. Civ. App. 62, 66 S. W. 61.

[82] Savings & Loan Soc. v. Deering, 66 Cal. 281, 5 Pac. 353; Ensley v. Page, 13 Colo. App. 452, 59 Pac. 225.

[83] Moseley v. Rambo, 106 Ga. 597, 32 S. E. 638; Dendy v. Waite, 36 S. Car. 569, 15 S. E. 712.

[84] Shaw v. Canfield, 86 Mich. 1, 48 N. W. 873.

[85] Pennsylvania Co. for Ins. v. Bauerle, 143 Ill. 459, 33 N. E. 166.

[86] McCallister v. Ross, 155 Mo. 87, 55 S. W. 1027.

Andrew Baker, in trust to hold the same during the minority of his son, George Davis, and on his attaining his majority, or on his death, if it should sooner occur, to sell and convert the same into money for the purposes in said will specified, with power in such case to sell in such manner as he should deem proper. And whereas, the said George Davis died on ——, before attaining his majority, now this indenture witnesseth: That the said Andrew Baker, by virtue of the power and authority to him given in and by said last will and testament, and in consideration of the sum of $——, does grant, sell and convey to William Zeigler, his heirs and assigns, the following described real estate, to wit: [description]. Acknowledgment dated the — day of ——, 19—.

When the trustee's deed is delivered to the purchaser, whether he be the mortgagee, his assignee, or an outside party, the title passes to him at once, and all right of foreclosure or redemption is barred.[87]

§ 358. **Mortgagee's deed under power of sale.**—Deeds of trust are in legal effect mortgages, and where they are regarded as conveyances of the legal estate the trustee takes such estate, but in jurisdictions where mortgages are regarded as a mere lien, and not a conveyance of the legal estate, the deed of trust is sometimes held to have only the same effect as a mortgage.[88] The power of sale in a deed of trust is sometimes expressly given to the mortgagee or his assignee, in which case he, or his assignee, by a valid execution of the power, may transfer the legal title to another. So long as the mortgagee retains the mortgage the power must be exercised by him; and when it has been wholly assigned the assignee must exercise it.[89]

In some jurisdictions a power of sale may be exercised by any person entitled to the mortgage debt.[90] When the mortgage itself expressly confers a power of sale upon the mortgagee or his legal representatives, the executor or administrator of such mortgagee, upon the death of the latter, may exercise the power.[91] The

[87] Koch v. Briggs, 14 Cal. 256, 73 Am. Dec. 651.

[88] Newman v. Samuels, 17 Iowa 528; Lenox v. Reed, 12 Kans. 223; Webb v. Hoselton, 4 Nebr. 308, 19 Am. Rep. 638; First Nat. Bank v. Kreig, 21 Nev. 404, 32 Pac. 641; McLane v. Paschal, 47 Tex. 365.

[89] Woodruff v. Adair, 131 Ala. 530, 32 So. 515.

[90] Harton v. Little, 176 Ala. 267, 57 So. 851.

[91] Stevens v. Shannahan, 160 Ill.

power of sale given to the mortgagee is a power coupled with an interest, and is therefore irrevocable.[92]

The deed of the mortgagee made in the exercise of a power expressly given in a power of sale mortgage or deed of trust differs in no material respect from a trustee's deed. It should recite the power by virtue of which the sale is made, though perhaps such a recital is not necessary as a matter of law. But the deed should contain all the recitals required by the statute. Recitals in a deed made by a mortgagee under a power of sale, of the giving of due notice of the sale, in conformity with the requirements of the statute and in pursuance of the provisions of such mortgage, giving the particulars of the notice, are prima facie evidence of such notice.[93] The mortgagee's recitals in such deed bind not only the mortgagee but as well the mortgagor, equally as if the deed were executed by him in person, for the mortgagee is his attorney in fact.[94] If the deed be made by an attorney of the mortgagee, his authority should be evidenced by a writing under seal, although the power of sale expressly authorizes the mortgagee, his legal representatives or attorney, to convey.[95] The mortgagee can not sell a greater interest than his mortgage gives him authority to sell. He can sell only what was conveyed to him.[96]

What we said about showing in the abstract such recitals as will disclose a compliance with the conditions of a trust and the due execution of a power by a trustee, applies as well to deeds made by mortgagees under power of sale.

§ 359. **Executor's deed.**—If a testator directs by will that his real estate be sold without declaring by whom the sale shall be made, the power to sell, if no contrary intention appear from the will, shall vest in the executor.[97] Where a will, by its terms, so disposes of the proceeds to be derived from a sale of the real estate as to blend and mix them with the personal estate, the executor has, by implication, power to sell such real estate.[98] And

330, 43 N. E. 350; Sulphur Mines Co. v. Thompson, 93 Va. 293, 25 S. E. 232.

[92] Bradley v. Chester Valley R. Co., 36 Pa. St. 141.

[93] Tartt v. Clayton, 109 Ill. 579.

[94] Simson v. Eckstein, 22 Cal. 580.

[95] Watson v. Sherman, 84 Ill. 263.

[96] Dearnaley v. Chase, 136 Mass. 288.

[97] Munson v. Cole, 98 Ind. 502.

[98] Lippincott v. Lippincott, 19 N. J. Eq. 121; Mott v. Ackerman, 92 N. Y. 539; Council v. Averett, 95 N. Car. 131.

a direction in the will to convert the whole estate into money without specifying who shall do it, or how it shall be done, confers upon the executor, by implication, the power to sell the real estate.[99] But the making of certain items charges upon lands which have been devised, or directing that the lands be sold for the payment of debts, does not authorize an executor to sell such lands without an order of court.[1]

Any expression in the will showing an intention to confer upon the designated person the power to dispose of the testator's property by deed will be sufficient. A devise and direction to divide and pay over the shares to legatees, where a division is impracticable, implies a power to sell. A mere direction to divide is not enough. There must be some further active duty to perform.[2] But when the will confers upon the executor the power to sell and convey the lands of his testator, he may sell and make conveyance thereof without first procuring from the court an order for such sale.[3] The power of sale may be given to an executor appointed by a will which makes no direct disposition of property.[4] An executor's power and right to act is derived from his testamentary appointment; his powers, under the law, are as great as those of an administrator, and by the terms of the will may be made greater.[5] He does not take title to real estate, or acquire any power or right of possession therein, unless conferred by statute or testamentary provision.[6] His duties and powers are to be ascertained from an inspection of the will, and the statutes, if any, which are applicable.[7]

In construing wills the courts have made a distinction between a devise to the executor of real estate, with directions to sell the same and make distribution of the proceeds, and a devise which directs that real estate be sold and the proceeds distributed but without passing the legal title to the executor. In the one case it is held that the executor is the custodian of the title until divested by the sale, while in the other the title is held to be in the bene-

[99] Putnam v. Story, 132 Mass. 205; Collier v. Grimesey, 36 Ohio St. 17.

[1] Duncan v. Gainey, 108 Ind. 579, 9 N. E. 470.

[2] Harris v. Ingalls, 74 N. H. 339, 68 Atl. 34.

[3] Bailey v. Rinker, 146 Ind. 129, 45 N. E. 38.

[4] Barber v. Barber, 17 Hun (N. Y.) 72.

[5] Scott v. West, 63 Wis. 529, 24 N. W. 161, 25 N. W. 18.

[6] Austin v. Chambers, 33 Okla. 40, 124 Pac. 310.

[7] Murphy v. Delano, 95 Maine 229, 49 Atl. 1053, 55 L. R. A. 727.

ficiary or the heirs until the sale is made.[8] An executor selling his testator's property under a power in the will should recite the power and execute the deed in his own name.[9] Where an executor undertakes to pass title by statutory modes it must appear that those modes have been followed, or the deed will be a nullity. But where the will gives the executor full power to convey without applying to the probate court for an order, a recital of the probate of the will and lawful proceedings ending in the execution of the deed is all that is necessary. Deeds of executors, as well as others acting in a fiduciary capacity, usually contain one or more formal recitals setting forth the authority under which the grantor acts and briefly giving a history of the proceedings culminating in a conveyance. Such deeds are often required by statute to contain recitals of certain facts, and it being thus the duty of the grantor to make such recitals, they are, when made, prima facie evidence of the truth of the facts stated.

§ 360. **Administrator's deed.**—An administrator takes no title to or interest in the real estate of his decedent, but only a naked power to sell, and this power is conditioned upon the insufficiency of the personal estate to pay the debts of the decedent.[10] The title to the real estate, at the death of the ancestor intestate, vests at the instant of his death in his heirs, and they take and retain such title with all the rights and incidents belonging thereto, until the administrator of the ancestor's estate effectively asserts his right thereto for the purposes provided in the statute.[11] An administrator can not sell real estate of his decedent without an order of court previously obtained therefor. The power conferred upon an administrator is purely statutory and can legally be exercised only under an order of court.[12] The order of sale should comply with the statute, and should as a rule follow the petition, and should so describe the land to be sold that it can be identified, and should specifically show what part is to be sold.[13] The order must precede the sale, and should specify

[8] Smith v. Hunter, 241 Ill. 514, 89 N. E. 686, 132 Am. St. 231; Brumfield v. Drook, 101 Ind. 190.

[9] Wolfe v. Hines, 93 Ga. 329, 20 S. E. 322.

[10] Moore v. Moore, 155 Ind. 261, 57 N. E. 242.

[11] Beckett v. Selover, 7 Cal. 215, 68 Am. Dec. 237; Shaw v. Hoadley, 8 Blackf. (Ind.) 165; Overturf v. Dugan, 29 Ohio St. 230.

[12] Tippecanoe Loan & Trust Co. v. Carr, 40 Ind. App. 125, 78 N. E. 1043.

[13] Gelstrop v. Moore, 26 Miss. 206, 59 Am. Dec. 254.

how and upon what terms the sale shall be made; and the administrator in making the sale, should follow the order and the provisions of the statute authorizing the sale.[14] Until the sale has been reported to the proper court and confirmed, it is incomplete and no title, either legal or equitable, passes to the purchaser.[15]

Four things are necessary to vest the estate in the purchaser: (1) A sale by the administrator; (2) a confirmation of the sale by the proper court; (3) an order for the making of the conveyance, and (4) the execution of such conveyance. Such conveyance, when executed and delivered, relates back to the time when the sale was confirmed and the deed ordered, and vests the same rights in the purchaser as if the deed had been executed and delivered, and, perhaps, even to the time of the sale.[16]

The statutes usually prescribe the form of the deed to be used, and often provide that it shall not be necessary to set out in the instrument of conveyance all the proceedings preliminary to the deed. The recitals in such deeds are said to be not of the essence, but only of the form of the deed, and while the purchaser is entitled to have in the deed all the recitals required by the statute, yet their omission does not vitiate the deed.[17] But the recitals in an administrator's deed of the acts required by statute in making a sale are prima facie evidence of their performance. The administrator is an officer of the law, acting under the obligations of his oath of office, and it is presumed that he does his duty, and fulfills the requirements of the statute, until the contrary is proved.[18] This is particularly the case after a lapse of time which makes the instrument an ancient deed.[19] The deed should contain recitals of the power under which the administrator acts in making the conveyance. If he executes the deed without such recitals, and signs it with the addition merely of the words indicating the capacity in which he intends to act, as, for instance, "administrator," etc., the deed is strictly his own personal deed.[20]

Where an administrator's deed appears in the chain of title the

[14] Stuart v. Allen, 16 Cal. 473, 76 Am. Dec. 551; Clark v. Hillis, 134 Ind. 421, 34 N. E. 13.

[15] Smith v. Wert, 64 Ala. 34; Apel v. Kelsey, 47 Ark. 413, 2 S. W. 102; Henry v. McKerlie, 78 Mo. 416

[16] Landes v. Brant, 10 How. (U. S.) 348, 13 L. ed. 449; Bellows v. McGinnis, 17 Ind. 64.

[17] Allison v. Kurtz, 2 Watts (Pa.) 185; Jones v. Taylor, 7 Tex. 240, 56 Am. Dec. 48n.

[18] Doe v. Henderson, 4 Ga. 148, 48 Am. Dec. 216.

[19] Stevenson v. McReary, 12 Sm. & M. (Miss.) 9, 51 Am. Dec. 102.

[20] Bobb v. Barnum, 59 Mo. 394.

abstract should show the proceedings leading up to the sale, the sale, the report thereof to the proper court, the court's approval of the sale and its order for conveyance, and all other material matters tending to show a compliance with the court's orders and the statutory requirements. An example of such synopsis is as follows:

Elias S. Yohn, administrator of the estate of James C. Yohn, deceased, to William Tron.	Administrator's deed. Dated Sept. 16, 1893. Recorded Sept. 16, 1893. Record 229, page 180. Sets forth that the Probate Court of Marion County, Indiana, on September 11, 1893, in a certain cause brought by petition filed by said Elias S. Yohn, as administrator of the estate of James C. Yohn, then deceased, against Mary E. Yohn et al. did by order duly entered, empower and direct said Elias S. Yohn, as such administrator, to sell at public auction the real estate belonging to the estate of James C. Yohn, deceased, to pay debts of said estate. All of said defendants answered, consenting to said such sale. The realty was appraised according to law and for the sum of $5,000.00. Sale ordered by court at public auction for not less than two-thirds of said appraised values, after notice given. Proof of notice filed. Report of sale filed September 16, 1893, showing public sale to said William Tron, for the sum of $5,000.00 cash. Sale confirmed and administrator directed to make deed to purchaser conveying title in fee simple. Order book 102, pages 400-405. Said administrator, in consideration of the premises and $5,000.00, grants, bargains and sells to William Tron lot numbered 182 in Stout's Vermont Street Addition to the city of Indianapolis, Indiana, being the same real estate described in said petition above referred to. Acknowledged September 16, 1893.

§ 361. **Administrator with the will annexed.**—Whenever a person dies testate there must be an executor or an administrator with the will annexed. No administrator can be appointed when there is a will. If there is an executor named in the will, he must be appointed, if he be qualified and willing to serve; otherwise, an administrator with the will annexed must be appointed. The only difference between an executor and an admin-

istrator with the will annexed consists in their mode of appointment. The one is designated by the testator, and qualified by the court; the other is both appointed and qualified by the court. There can not be in the same estate both an executor, or an administrator with the will annexed, and an administrator. The executor is succeeded by the administrator with the will annexed, and the administrator with the will annexed is succeeded by the administrator de bonis non with the will annexed. They all act under and in pursuance of the will.[21] An administrator with the will annexed has no power over his decedent's real estate except what may be given him by statute or by the will. Where the will makes no provision for the sale of the real estate the administrator with the will annexed has only a naked power to make sale of the real estate in case it becomes necessary to pay debts. But in case the testator directs by will that his real estate be sold without declaring by whom the sale shall be made, the power to sell, if no contrary intention appears from the will, shall vest in the administrator with the will annexed. The scope of the powers of an administrator with the will annexed, in the absence of statutory or testamentary provisions extending or limiting them, is similar to those of an administrator.

§ 362. **Guardian's deed.**—A guardian is defined to be a person who is, in some legal way, appointed to the care and management of the person or estate, or of both, of a person under legal disability, such as minors, lunatics, idiots, or habitual drunkards. Guardians are ordinarily created by statute, but in most states testamentary guardians are recognized to the extent of giving them the preference of a statutory appointment. Statutes usually prescribe the powers and duties of a guardian with reference to the estate of his ward.

The guardian may be authorized to sell the real estate of his ward for the purpose of making a better investment of the proceeds. Courts have no inherent original jurisdiction to order or direct the sale of the real estate of a person under legal disability. Where such jurisdiction exists, it will be found to rest altogether upon statutory enactments. The guardian's authority to sell depends upon the grant expressly from the court under whose jurisdiction he acts, and such authority, when granted by the court,

[21] Davis v. Hoover, 112 Ind. 423, 14 N. E. 468.

can only be granted in strict conformity to the statute regulating the guardianship upon such matters.[22] From this it can be seen that there is no inherent power in the guardian to sell the ward's land. Before he can sell he must have the power to do so conferred by a court of proper jurisdiction acting under authority of the statute. A sale of an infant's real estate, made by a guardian without the sanction and order of the court, properly obtained, would be void.[23]

The purchaser of land at a guardian's sale takes only the title which is in the ward at the time of the sale. There is no warranty in such sale, and the guardian has no power to bind his ward by covenants in the deed; he only has power to sell and convey under the order of the court. The deed of conveyance is, in effect, only a quitclaim, and passes the interest of the ward in the land sold. The title does not pass to the purchaser until after the sale has been reported and confirmed by the court.[24] After the sale has been duly reported it is the duty of the court to enter an order confirming same, and directing the guardian to execute and deliver to the purchaser a deed for the premises. The deed should be in the form required by statute, but it is held that if it does not clearly identify by reference the book and page of the record where the order is entered, it will nevertheless be valid.[25] To perfect the title not only must the sale be reported and confirmed, but a deed executed in accordance with the court's direction and in conformity with the statutory requirements. No title will pass until these things have been done.[26]

The abstract should show the appointment of the guardian, the authority obtained by him from the court to make the sale, the sale, the report thereof, its confirmation and order for conveyance, and the guardian's deed in full compliance with law and the court's directions.

§ 363. Fiduciaries purchasing at their own sales.—Persons holding property in a fiduciary character are not competent to purchase it, either directly or indirectly. This rule applies to

[22] Morris v. Goodwin, 1 Ind. App. 481, 27 N. E. 985.

[23] Morrison v. Kinstra, 55 Miss. 71; Doty v. Hubbard, 55 Vt. 278.

[24] Maxwell v. Campbell, 45 Ind. 360.

[25] Hammann v. Mink, 99 Ind. 279; Menage v. Jones, 40 Minn. 254, 41 N. W. 972.

[26] Doe v. Jackson, 51 Ala. 514; Ordway v. Smith, 53 Iowa 589, 5 N. W. 757; In re Dickerson, 111 N. Car. 108, 15 S. E. 1025.

sales made by executors and administrators,[27] but such sales have been held voidable only at the instance of any one interested in the estate who moves within a reasonable time to set aside the sale.[28] Also where a commissioner appointed to sell land owned by an estate, directly or indirectly, becomes the purchaser at his own sale, the sale is void.[29] Persons holding real estate in trust are not competent to purchase it, either directly or indirectly. The cestui que trust can insist upon a reconveyance from the purchasing trustee, or from a third person who purchased with knowledge of the trustee's sale for his own benefit.[30] However, the trustee may purchase from his cestui que trust, or with his full knowledge and consent. The extent of the estate taken by the trustee is to be determined by the terms of the instrument creating the trust.[31] The same principle which prevents an administrator, executor or other trustee from purchasing the property which he holds in trust applies to a sale by a guardian.[32] It is a well-settled rule of law that a purchase by one who represents another of particular property owned by such other, of which he has the sale, carries fraud on the face of it.[33]

§ 364. **Caveat emptor as applied to judicial and ministerial sales.**—The doctrine of caveat emptor (let the buyer beware) applies to all judicial and execution sales.[34] In all such sales the presumption is that the purchaser will examine the title with the same care that a person does who receives a conveyance by a simple quitclaim deed. When the purchaser knows there are no covenants to resort to in case he acquires no title, prudence will dictate a careful examination before parting with his money. It is the policy of the law to invest the officer making the sale with a mere naked power to sell such title as the debtor had, without warranty, or any terms except those imposed by law.[35] At a

[27] Nelson v. Hayner, 66 Ill. 487; Stobaugh v. Irons, 243 Ill. 55, 90 N. E. 272; Morgan v. Wattles, 69 Ind. 260.

[28] Crawford County Bank v. Bolton, 87 Ark. 142, 112 S. W. 398; Moore v. Carey, 116 Ga. 28, 42 S. E. 258; Comegys v. Emerick, 134 Ind. 148, 33 N. E. 889, 39 Am. St. 245; McGary v. McGary (Ky. App.), 105 S. W. 891.

[29] Penn v. Rhoades, 124 Ky. 798, 100 S. W. 288.

[30] Morse v. Hill, 136 Mass. 60.

[31] Hawkins v. Chapman, 36 Md. 83; Paddock v. Wallace, 117 Mass. 99.

[32] Gaylord v. Goodell, 173 Mass. 140, 53 N. E. 275.

[33] Michoud v. Girod, 45 U. S. 502, 11 L. ed. 1076; Kazebeer v. Nunemaker, 82 Nebr. 732, 118 N. W. 646.

[34] Tonopah Banking Corp. v. McKane Min. Co., 31 Nev. 295, 103 Pac. 230.

[35] Bishop v. O'Conner, 69 Ill. 431.

judicial sale the purchaser buys at his peril, as in ordinary sales under execution, the only difference being that in sales by the chancellor through his commissioner the purchaser may have relief for defective title before the sale is confirmed, but not after.[36] But it would seem that the doctrine of caveat emptor does not apply to cases in which the court ordering the sale had no jurisdiction, and that in such cases the purchaser may have restitution of the purchase-money even after confirmation of the sale.[37]

It has been said that the maxim caveat emptor applies in all its strictness to sales by executors and administrators.[38] The doctrine embodied in the maxim, caveat emptor, applies in sales under deeds of trust and other instruments containing a power of sale, and the purchaser at such sale must see that the trustee has complied strictly with the directions in the instrument conferring the power.[39] The rule has been generally applied to sales by executors and administrators under judicial authority, whether in respect to inherent defects in the title or to those which result from errors and irregularities in the proceedings whence the authority to sell is derived. The sale is of the title such as it is, good or bad, and the purchaser is conclusively presumed to have purchased with that understanding.[40] The rule of caveat emptor also applies to sales by guardians.[41] In fact, the doctrine of caveat emptor applies to any sale in which the grantor acts not in his own right, but in a fiduciary or ministerial character, and from whom the grantee has no right to require general covenants for title.

[36] Humphrey v. Wade, 84 Ky. 391, 8 Ky. L. 384, 1 S. W. 648.

[37] Boggs v. Fowler, 16 Cal. 559, 76 Am. Dec. 561.

[38] Altgelt v. Mernitz, 37 Tex. Civ. App. 397, 83 S. W. 891; Matson v. Johnson, 48 Wash. 256, 93 Pac. 324, 125 Am. St. 924.

[39] Sheridan v. Schimpf, 120 Ala. 475, 24 So. 940; Mashburn v. Dannenberg Co., 117 Ga. 567, 44 S. E. 97; Hosmer v. Campbell, 98 Ill. 572; Scott v. Austin, 36 Minn. 460, 32 N. W. 89, 864.

[40] Bolling v. Jones, 67 Ala. 508; Jones v. Warnock, 67 Ga. 484; Tilley v. Bridges, 105 Ill. 336; Riley v. Kepler, 94 Ind. 308.

[41] Manternach v. Studt, 240 Ill. 464, 88 N. E. 1000, 130 Am. St. 282.

CHAPTER XVI

ASSIGNMENTS AND BANKRUPTCY

SEC.
370. Assignments generally.
371. Voluntary assignments for the benefit of creditors.
372. Validity of assignments.
373. Formal requisites of assignments.
374. Assignee's title.
375. Construction, operation, and effect of assignments.
376. What laws govern.
377. Bankruptcy and insolvent laws.
378. Jurisdiction and procedure prior to adjudication.
379. Voluntary and involuntary bankruptcy.
380. The petition, process, etc.
381. Effect of adjudication in bankruptcy.
382. Procedure after adjudication.
383. Abstracting bankruptcy proceedings.
384. Deed of trustee in bankruptcy.
385. Discharge in bankruptcy.

§ 370. **Assignments generally.**—"The word 'assignment' has several meanings. In a broad sense it is used to signify the act by which one person transfers to another, or causes to vest in such other, the entire right, interest, or property which he has in any realty or personalty, in possession or in action, or some share, interest, or subsidiary estate therein. It is more particularly applied to a written transfer, as distinguished from a transfer by mere delivery."[1] When applied to real property it signifies a transfer of some particular estate or interest in land.[2] The term is commonly applied to the transfer of a chattel interest in land, such as an estate for life or for years.[3] But in this connection the term will be employed to designate that class of conveyances wherein the assignor or grantor transfers his real estate, either voluntarily or under legal compulsion, to an assignee or assignees, in trust, to apply the same or the proceeds thereof to the payment of his debts.

A transfer of the title to and the possession and control of the property of the debtor to an assignee in trust to convert it into money and distribute it among the creditors of the assignor is usually essential to constitute an assignment for the benefit of

[1] Johnson v. Brewer, 134 Ga. 828, 68 S. E. 590, 31 L. R. A. (N. S.) 332n.

[2] Ball v. Chadwick, 46 Ill. 28.

[3] 2 Blk. Comm. 327.

creditors,[4] and a conveyance of his property by a debtor directly to his creditors for their benefit does not constitute a general assignment because it raises no trust.[5] No instrument is held to constitute an assignment for the benefit of creditors unless it clearly appears either that the grantor intended it should so operate or that such was the necessary legal effect. A mere trust in which the creditors have no vested interest does not constitute an assignment for the benefit of creditors.[6]

§ 371. Voluntary assignments for the benefit of creditors. —It is generally conceded that an owner of property has the right to transfer the same for a good and valuable consideration; and the general disposition of all friendly governments is to give effect to such transfers when not opposed to some great considerations of public policy, or which are manifestly injurious to their own citizens. This is especially true of the several states of the union, which, though foreign in some respects, are closely united in many others.[7] In most states the distinction between involuntary assignments, such as work by operation of law, and voluntary conveyances, is recognized. The reason for the distinction is that a voluntary transfer, if valid where made, ought generally to be valid everywhere, being the exercise of the personal right of the owner to dispose of his own, while an assignment by operation of law has no legal operation outside the state in which the law was enacted.[8]

In determining whether an assignment is voluntarily or involuntarily made it is important to remember that one who voluntarily takes advantage of a bankrupt act, that is to say, a statute which provides that the assignor may be discharged from his debts as a part of the proceedings under such assignment upon compliance with the provisions of the act, is deemed to have done so in invitum and the assignment is governed by the principles applicable to involuntary assignments.[9] A voluntary assignment may result from acts done or suffered to be done in respect to his property by a debtor in failing circumstances, although he did not

[4] Griffin v. Dutton, 165 Fed. 626.
[5] Missouri-American Elec. Co. v. Hamilton-Brown Shoe Co., 165 Fed. 283.
[6] Ives v. Sanguinetti, 10 Ariz. 83, 85 Pac. 480.
[7] Jewell v. Knight, 123 U. S. 426, 31 L. ed. 190, 8 Sup. Ct. 193.
[8] Cole v. Cunningham, 133 U. S. 107, 10 Sup. Ct. 269, 33 L. ed. 538.
[9] Townsend v. Coxe, 151 Ill. 62, 37 N. E. 689.

intend such acts to operate as an assignment.[10] Under some statutes, however, it is necessary that there should be an actual intention on the part of the debtor to make the assignment.[11] In some states it is provided by statute that every assignment in contemplation of insolvency, and with the design to prefer one creditor to the exclusion of others, shall operate as an assignment of all the property of the debtor for the benefit of his creditors.[12] Whether a given transfer of property constitutes an assignment for the benefit of creditors must be determined by construction.[13] The appropriation of the property by the debtor for his creditors must be absolute, and not a mere surrender of possession and control thereof, nor the creation of a lien or revocable power. He must completely divest himself of title to and surrender his control of the property to his assignee, who thereupon becomes his representative in respect to the property assigned. A direct assignment to creditors without the intervention of a trustee has been held not a voluntary assignment for the benefit of creditors.[14]

§ 372. **Validity of assignments.**—An assignment for the benefit of creditors is allowed by law as a means for a distribution of the property of an insolvent debtor among his creditors.[15] Where all of the assignor's property not exempt from attachment and execution is conveyed to be divided pro rata among all creditors who should assent thereto, and reasonable time for such assent is given, it is, if bona fide, a valid assignment of the property described as conveyed therein.[16] If an assignment is made in good faith and provides that the proceeds be divided ratably among all creditors it will not be illegal,[17] nor is the mere endeavor by creditors, and the common-law assignee to uphold the

[10] Lehman-Durr Co. v. Griel Bros. Co., 119 Ala. 262, 24 So. 49; Penzel Co. v. Jett, 54 Ark. 428, 16 S. W. 120; Sabichi v. Chase, 108 Cal. 81, 41 Pac. 29; Burchinell v. Koon, 25 Colo. 59, 52 Pac. 1100; Bates v. Coe, 10 Conn. 280; Johnson v. Adams, 92 Ga. 551, 17 S. E. 898; Wright v. Hutchison, 156 Ill. 575, 41 N. E. 172; Ouerbacker v. Claflin, 96 Ky. 235, 16 Ky. L. 436, 28 S. W. 506.

[11] Roberts v. Press, 97 Iowa 475, 66 N. W. 756; Crow v. Beardsley, 68 Mo. 435.

[12] Fawcett v. Mitchell, 133 Ky. 361, 117 S. W. 956.

[13] Johnson v. Brewer, 134 Ga. 828, 68 S. E. 590, 31 L. R. A. (N. S.) 332n.

[14] Wood v. Kerkeslager, 227 Pa. 536, 76 Atl. 425.

[15] In re Rutaced Co., 137 App. Div. 716, 122 N. Y. S. 454.

[16] Thompson v. Shaw, 104 Maine 85, 71 Atl. 370.

[17] Roth Grocery Co. v. Hotel Monticello Co., 148 Mo. App. 513, 128 S. W. 542.

assignment as against a bankruptcy petition, necessarily unlawful, if involving no collusion with the bankrupt, and no use of funds belonging to the estate.[18] An assignment may operate as a common-law assignment, and yet not be valid as a statutory assignment.[19] But where the assignment purports to be made under the statute, its validity depends upon a compliance with the statutory requirements.[20] In the absence of statutory formalities the rules relating to the formal requisites of other conveyances must be applied.[21]

As a general rule an assignment which is void in part is entirely void, and where it is fraudulent in fact it is void in toto.[22] But it has been held that a fraudulent intent on the part of the debtor alone is not sufficient to avoid an assignment when no preferences are made, and neither the creditors nor the assignee participated in the fraud.[23] A conveyance by a grantor of all his property to a trustee for the benefit of creditors is not invalidated by a failure of the grantor to deliver all his property to such trustee.[24]

§ 373. Formal requisites of assignments.—A deed of assignment to be valid must be executed in substantial accordance with the assignment laws,[25] and the phraseology of the law must be looked to as to the form and contents of the instrument, as well as the manner of its execution. But, as we stated in the preceding section, the rules relating to other conveyances will be applicable where the statute does not prescribe a form. A statutory provision requiring the deed to be verified by the assignor's affidavit is mandatory, and a failure to comply with it renders the assignment void.[26] In the several states statutes have been enacted for the express purpose of regulating voluntary assignments for the benefit of creditors. These statutes vary somewhat, both

[18] In re Lewis F. Perry & Whitney Co., 172 Fed. 745.

[19] Johnson v. Robinson, 68 Tex. 399, 4 S. W. 625; Hall v. Denison, 17 Vt. 310.

[20] Milligan v. O'Conor, 19 Ill. App. 487.

[21] Shackelford v. Planters' &c. Bank, 22 Ala. 238; Forbes v. Scannell, 13 Cal. 242.

[22] W. P. Noble Mercantile Co. v. Mt. Pleasant Co-op. Inst., 12 Utah 213, 42 Pac. 869.

[23] Billings v. Parsons, 17 Utah 22, 53 Pac. 730.

[24] Hurst v. Leckie, 97 Va. 550, 34 S. E. 464, 75 Am. St. 798.

[25] Box v. Goodbar, 54 Ark. 6, 14 S. W. 925.

[26] Jaffray v. McGehee, 107 U. S. 361, 2 Sup. Ct. 367, 27 L. ed. 495; Williams v. Crocker, 36 Fla. 61, 18 So. 52; Coggins v. Stephens, 73 Ga. 41; Mather v. McMillian, 60 Wis. 546, 19 N. W. 440.

in their scope and detail; being in some states confined to the mere prohibition of preferences by the debtor; in others, extending to the prohibition of all general assignments in trust; in others, compelling the conveyance of all the debtor's property under the obligation of an oath; and in still others, providing more effectually for the security of creditors as against assignees by requiring them to give bond. A simple form of a deed of assignment for the benefit of creditors would contain: (1) The commencement clause, (2) the recitals, (3) the consideration, (4) the transfer, (5) the description of the property, (6) the habendum, (7) the declaration of trust, or directions to the assignee, (8) the reservation to the assignor, (9) the power of attorney to the assignee, (10) covenants, (11) the concluding clause. Statutes also prescribe a form of attestation and acknowledgment for such instruments. Any deviation from the form and manner of execution, attestation, or acknowledgment prescribed by statute should be noted in the abstract. Also the synopsis of the instrument should contain a compliance with the statute with respect to acceptance of the trust by the assignee, the filing of his bond, the notice to creditors, etc., together with the operative parts of the instrument of transfer, including the trust. Where an inventory or schedule of the assignor's property is required, such portion thereof as cover the real estate transferred should also be shown.

§ 374. **Assignee's title.**—An assignee stands in the place of the insolvent debtor, and, in the absence of fraud takes the latter's estate subject to all equities, liens and incumbrances, whether created by operation of law or by the act of the assignor which had a valid existence against the property in the hands of the assignor.[27] The assignee acquires no better title to the property than the assignor himself had,[28] and can convey no better title.[29] He has such title as will enable him to foreclose a mortgage given to his assignor,[30] or set aside a fraudulent conveyance of his assignor.[31]

§ 375. **Construction, operation, and effect of assignments.**—Such a construction will be given to an assignment as will carry

[27] Laughlin v. Reed, 89 Maine 226, 36 Atl. 131.

[28] Aetna Ins. Co. v. Thompson, 68 N. H. 20, 40 Atl. 396, 73 Am. St. 552; Grube v. Lilienthal, 51 S. Car. 442, 29 S. E. 230.

[29] Lockwood v. Noble, 113 Mich. 418, 71 N. W. 856.

[30] Thompson v. Browne, 10 S. Dak. 344, 73 N. W. 194.

[31] Applegarth v. Wagner, 86 Md. 468, 38 Atl. 940.

into effect the intention of the parties.[32] The rules of construction applicable to other conveyances will generally be applied to deeds of assignment.[33] Where it is ambiguous in its terms and admits of two constructions, that interpretation will be given which will render it legal and operative rather than that which will render it void.[34]

Some of the earlier cases hold that an assignee is a bona fide purchaser for value;[35] but the later authorities generally take a contrary view.[36] There must be some consideration passing at the time of the assignment, some new responsibility incurred, or some right given up, to invest the assignee with the character of a bona fide purchaser for value.[37] Although the legal title passes to the assignee, he is not an assignee for value, but is regarded as the agent of the assignor to distribute the proceeds of the property among the latter's creditors.[38] The agency of the assignee is, however, limited to the purposes declared in the instrument of assignment.[39] From another point of view the assignee holds the property assigned as trustee for the benefit of creditors.[40]

The assignor can not amend an assignment which he has properly executed and which has been accepted by the assignee.[41] Nor will a valid prior assignment be affected by a subsequent assignment.[42] Likewise a duly executed and accepted assignment is irrevocable,[43] except as against subsequent creditors.[44]

No more property will pass to the assignee than is specified in the instrument; but if there be nothing in the instrument or schedule annexed to it, to limit or qualify its operation, a general assignment by a debtor, of all his estate and effects, will pass every-

[32] Coverdale v. Wilder, 17 Pick (Mass.) 178.

[33] Bank of Mobile v. Dunn, 67 Ala. 381; Hall v. Farmers' Nat. Bank, 53 Md. 120; Crook v. Rindskopf, 105 N. Y. 476, 12 N. E. 174.

[34] Grover v. Wakeman, 11 Wend. (N. Y.) 187.

[35] Gates v. Labeaume, 19 Mo. 17.

[36] Fechheimer v. Hollander, 21 D. C. 76; Mayer v. Wilkins, 37 Fla. 244, 19 So. 632; Todd v. Johnson, 99 Ky. 548, 18 Ky. L. 354, 36 S. W. 987, 33 L. R. A. 399; Peet v. Spencer, 90 Mo. 384, 2 S. W. 434.

[37] Frow v. Downman, 11 Ala. 880.

[38] In re Farrell, 176 Fed. 505.

[39] In re Lewis F. Perry & Whitney Co., 172 Fed. 745.

[40] Burnes v. Daviess County Bank & Trust Co., 135 Ky. 355, 122 S. W. 182, 25 L. R. A. (N. S.) 525n, 135 Am. St. 467.

[41] Ingram v. Kirkpatrick, 41 N. Car. 463, 51 Am. Dec. 428.

[42] Drake v. Ellman, 80 Ky. 434, 4 Ky. L. 269.

[43] Daner v. Brewer, 69 Ala. 191; Mackellar v. Pillsbury, 48 Minn. 396, 51 N. W. 222.

[44] Small v. Sproat, 3 Metc. (Mass.) 303.

thing owned by the debtor which is in its nature assignable at the time of the assignment,[45] except such property as may be specially exempted by law, or excepted by the terms of the deed, where such exception is allowed. But property acquired by the debtor after the assignment does not pass.[46]

§ 376. **What laws govern.**—A deed of assignment for the benefit of creditors is ineffectual to transfer title to real estate of the insolvent situated in other states.[47] But where an assignment for the benefit of creditors is made in a state other than that wherein the land is situated by a resident of such other state, and the assignment is not repugnant to the laws of the state where the land is situated, or the laws of the state where made, it will pass title to such land if the deed of assignment is executed as deeds of conveyance are required to be executed by the laws of the state where the land is situated.[48] A voluntary assignment, valid in the state where made, which includes real estate situated in another state, if sufficient in form to operate as a conveyance of land in the latter state will be upheld by its courts, on the principle of comity, against nonresident attaching creditors, even though the effect of the assignment is contrary to the policy and laws of the state where it is sought to be enforced; but this rule can not be invoked as against resident creditors.[49]

§ 377. **Bankruptcy and insolvent laws.**—Bankruptcy and insolvent laws are of comparatively recent origin. There is no practical difference between a bankrupt law and an insolvent law, except that the former affords relief upon the application of the creditor, and the latter upon the application of the debtor. Our present federal bankrupt law is both a bankrupt law and an insolvent law, for it affords relief upon the application of either the

[45] Pollak Co. v. Muscogee Mfg. Co., 108 Ala. 467, 18 So. 611, 54 Am. St. 165; Freydendall v. Baldwin, 103 Ill. 325.

[46] Lorenz v. Orlady, 87 Pa. St. 226.

[47] Security Trust Co. v. Dodd, 173 U. S. 624, 19 Sup. Ct. 545, 43 L. ed. 835; Townsend v. Coxe, 151 Ill. 62, 37 N. E. 689; Franzen v. Hutchinson, 94 Iowa 95, 62 N. W. 698; Barth v. Backus, 140 N. Y. 230, 35 N. E. 425, 23 L. R. A. 47, 37 Am. St. 545; Adams v. Hartzell, 18 N. Dak. 221, 119 N. W. 635; Weider v. Maddox, 66 Tex. 372, 1 S. W. 168, 59 Am. Rep. 617.

[48] Thompson v. Ellenz, 58 Minn. 301, 59 N. W. 1023.

[49] Heyer v. Alexander, 108 Ill. 385; Chafee v. Fourth Nat. Bank, 71 Maine 514, 36 Am. Rep. 345; Eddy v. Winchester, 60 N. H. 63; Pemberton v. Klein, 43 N. J. Eq. 98, 10 Atl. 837; Williams v. Kemper, &c. Co., 4 Okla. 145, 43 Pac. 1148.

debtor or creditor under the heads of voluntary and involuntary bankruptcy.[50] Hence a bankrupt law may contain those regulations which are generally found in insolvent laws, and an insolvent law may contain those which are found in a bankruptcy law.[51]

A number of states have from time to time enacted what have been termed "insolvent laws," the purpose of which is to exonerate the person or property of a debtor and to relieve him from the pressure of creditors.[52] These insolvency laws practically cover the same scope within their own territorial limits as the federal bankruptcy laws. But the prevailing rule is that a conveyance under a state insolvent law operates only upon property within the territory of that state, and that with respect to property in other states it is given only such effect as the laws of such states permit, and that, in general, it must give way to claims of creditors pursuing their remedies there. It passes no title to real estate situated in another state.[53] Where the operation of state insolvent laws conflict with the operation of the federal bankruptcy law the former will be superseded by the latter.[54] State insolvency laws remain operative, however, upon any subject-matter expressly or impliedly excepted from the operation of the national act.[55] It is only, however, to the extent that congress has legislated upon the subject that the statutes of the several states are suspended by its legislation. The state laws will remain operative in all cases which are not within the provisions of the bankruptcy law. A bankrupt or insolvent law, viewed as operating on the rights of creditors, is a system of remedy. It is the policy and purpose of the national bankruptcy acts to secure an equal and a speedy distribution of the property of the bankrupt among his creditors. A further object is to relieve the honest debtor from legal proceedings for his debts, and to enable him to have a fresh start in business life; but the distribution of

[50] Martin v. Berry, 37 Cal. 222.

[51] Hanover Nat. Bank v. Moyses, 186 U. S. 181, 22 Sup. Ct. 857, 46 L. ed. 1113, 8 A. B. R. 1.

[52] Cook v. Rogers, 31 Mich. 391; Haijek v. Luck, 96 Tex. 517, 74 S. W. 305.

[53] Security Trust Co. v. Dodd &c. Co., 173 U. S. 624, 19 Sup. Ct. 545, 43 L. ed. 835.

[54] Harbaugh v. Costello, 184 Ill. 110, 56 N. E. 363, 75 Am. St. 147; Old Town Bank v. McCormick, 96 Md. 341, 53 Atl. 934, 60 L. R. A. 577, 94 Am. St. 577; Parmenter Mfg. Co. v. Hamilton, 172 Mass. 178, 51 N. E. 529, 70 Am. St. 258.

[55] R. H. Herron Co., v. Superior Court, 136 Cal. 279, 68 Pac. 814, 89 Am. St. 124.

the property is the principal object to be attained—the discharge of the debtor being incidental and subordinate.[56] The federal bankruptcy law now in force was enacted on July 1, 1898, and amended in various respects on February 5, 1903; June 15, 1906, and June 25, 1910.

§ 378. Jurisdiction and procedure prior to adjudication.—By the bankruptcy act of 1898, the district courts of the United States and of the Territories, the Supreme Court of the District of Columbia, and the United States court of the Indian Territory and of Alaska are made courts of bankruptcy, and are invested, within their respective territorial limits, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings.[57] The jurisdiction of these courts covers the entire subject of bankruptcy proceedings. Their jurisdiction is absolute and exclusive to adjudicate the question of bankruptcy, to adjust all matters and determine all questions arising in bankruptcy proceedings touching the persons and property of bankrupts, their relation to their creditors, and the rights of creditors in and to the bankrupt's estate, from the commencement of the proceedings to their close.[58]

Under the terms of our federal bankruptcy law bankruptcy courts are invested with the designated jurisdiction "within their respective territorial limits as now established, or as they may be hereafter changed." The criterion of jurisdiction is the existence of either place of business, residence, or domicile of the bankrupt, and if he does not have either his principal place of business, his residence, or his domicile within the district, the court has no power to obtain jurisdiction over him by any service of process otherwise than in accordance with the rule.[59] In other words, bankruptcy courts have jurisdiction to adjudge as bankrupt a person who has, for the greater portion of the preceding six months, had his principal place of business, or his residence, or his domicile within their respective territorial jurisdictions.[60] Jurisdiction of particular proceedings ordinarily attaches upon

[56] In re Swofford Bros. Dry Goods Co., 180 Fed. 549, 25 A. B. R. 282.

[57] Bankr. Act. (1898), § 2.

[58] In re Standard Fuller's Earth Co., 186 Fed. 578; Bank of Dillon v. Murchison, 213 Fed. 147, 31 A. B. R. 740.

[59] In re Lemen, 208 Fed. 80, 30 A. B. R. 638.

[60] In re Pennsylvania Consol. Coal Co., 163 Fed. 579.

the filing of the petition;[61] and upon the filing of the petition, all property held by or for the bankrupt is brought within the custody of the court of bankruptcy.[62]

A proceeding in bankruptcy is a proceeding in rem,[63] equitable in its nature,[64] and the filing of the petition operates as an injunction restraining all persons from intermeddling with the bankrupt's property.[65] Proceedings in bankruptcy are governed by the rules and practice in equity where the acts of congress and general orders are silent.[66]

§ 379. **Voluntary and involuntary bankruptcy.**—Our federal bankrupt law affords relief upon the application of either the debtor or creditor under the heads of voluntary and involuntary bankruptcy. The right to file a voluntary petition in bankruptcy is accorded to all persons within the bankruptcy law, and can not be limited or affected by any pending proceeding in state courts.[67] An involuntary petition may be filed only by creditors who have provable, existing, unsecured claims, and who are not estopped, or by an assignee in good faith for a valid consideration, of one who is not himself estopped to petition.[68] Any person, except corporations, owing debts provable under the act, is entitled to the benefits of the law as a voluntary bankrupt. But it would seem that where a corporation in failing circumstances has signified its willingness to be adjudged a bankrupt, and has induced its creditors to file an involuntary petition, such petition is in effect a voluntary one and an invasion of the act.[69] An involuntary petition in bankruptcy may be instituted against any natural person, except a wage-earner or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company, and any corporation engaged principally in manufacturing, trading, printing, publishing, or mercantile pursuits, owing debts to the amount of one thousand dollars or over, and upon default or an impartial trial may be adjudged an involuntary bankrupt. The effect of an ad-

[61] Staunton v. Wooden, 179 Fed. 61.
[62] Thomas v. Woods, 173 Fed. 585, 26 L. R. A. (N. S.) 1180n, 19 Ann. Cas. 1080.
[63] Johnson v. United States, 163 Fed. 30, 18 L. R. A. (N. S.) 1194n.
[64] Missouri-American Elec. Co. v. Hamilton-Brown Shoe Co., 165 Fed. 283.
[65] Dittemore v. Cable Mill Co., 16 Idaho 298, 101 Pac. 593, 133 Am. St. 98n.
[66] In re Irwin, 177 Fed. 284.
[67] In re Kepecs, 123 N. Y. S. 872.
[68] In re Lewis F. Perry & Whitney Co., 172 Fed. 745.
[69] In re Bates Mach. Co., 91 Fed. 625.

judication in bankruptcy on the property of the bankrupt is the same whether the proceedings were voluntary or involuntary.

§ 380. The petition, process, etc.—A petition in bankruptcy must prima facie show that the alleged bankrupt is within a class subject to adjudication,[70] and must sufficiently set out the particular act of bankruptcy sought to be availed of.[71] All facts essential to the exercise of jurisdiction should be alleged with definiteness and certainty.[72] It must sufficiently state the claims of the petitioning creditors,[73] and must definitely allege some act of bankruptcy specified in the bankruptcy law,[74] as general averments in respect to such acts are insufficient.[75] The nature of the claims of petitioning creditors should be clearly stated.[76] The petition and schedule in voluntary cases must be drawn and verified in triplicate; while in involuntary cases they must be drawn and verified in duplicate. The petition must be filed with the clerk of the bankruptcy court, and jurisdiction begins from the moment of such filing.[77] The condition at the time of the filing of the petition measures the extent of the estate, and the rights of all creditors of the bankrupt and all parties interested in the property. No process is required in voluntary cases, but on the filing of an involuntary petition the clerk must at once issue a subpœna which must be served in the same manner that service of similar process is had in suits of equity in the United States courts. And where personal service may not be made, notice must be given by publication.

§ 381. Effect of adjudication in bankruptcy.—Without further proceedings, the adjudication in bankruptcy is a seizure by the court and a transfer to it of the possession of all the property of the bankrupt in which his creditors are entitled to share.[78] Bankruptcy, like death, divests the owner of title to his property and places it in custodia legis.[79] Immediately upon and by virtue of the adjudication, all the property of the bankrupt wherever situated passes into the custody of the court, and upon the ap-

[70] In re De Lancey Stables Co., 170 Fed. 860.
[71] Exporation Mercantile Co. v. Pacific &c. Steel Co., 177 Fed. 825.
[72] Clark v. Henne, 127 Fed. 288, 62 C. C. A. 172.
[73] Conway v. German, 166 Fed. 67.
[74] In re Tupper, 163 Fed. 766.
[75] In re Mason-Seaman Transportation Co., 235 Fed. 974.
[76] In re White, 135 Fed. 199.
[77] Shute v. Patterson, 147 Fed. 509.
[78] Wright Dalton-Bell-Anchor Store Co. v. St. Louis &c. R. Co., 142 Mo. App. 50, 125 S. W. 517.
[79] In re Frazin, 174 Fed. 713.

pointment of a trustee it becomes vested in him.[80] The trustee takes the property of the bankrupt subject to the rights, liens, and equities existing against it in the hands of the bankrupt.[81] The court has jurisdiction to determine all liens and interests affecting the title to the property.[82] The adjudication acts both in personam and in rem.[83] As to all parties named in the schedule as creditors, and all persons in any way interested in the res, the adjudication is conclusive to the extent of the matters necessarily determined in making the adjudication.[84]

§ 382. Procedure after adjudication.—After filing of the petition and schedule of assets and liabilities, and the adjudication made, the court usually appoints a receiver whose duty it is to preserve the estate. The receiver is not invested with the title to the property of the bankrupt,[85] but is a mere custodian of such property is an asset of the estate.[86] But the appointment of a receiver is authorized only in cases where it is absolutely necessary for the preservation of the estate.[87]

Section 44 of the federal bankruptcy law provides that "the creditors of a bankrupt estate shall, at their first meeting after the adjudication or after a vacancy has occurred in the office of trustee, or after an estate has been reopened, or after a composition has been set aside or a discharge revoked, or if there is a vacancy in the office of the trustee, appoint one trustee or three trustees of such estate. If the creditors do not appoint a trustee or trustees as herein provided, the court shall do so." Upon his appointment the trustee becomes vested with the title of the bankrupt to all property for the purpose of administration and distribution of the estate among the bankrupt's creditors.[88]

The court may order the trustee to sell the bankrupt's property to make funds with which to pay creditors. The sale may be ordered made subject to existing liens thereon, or, in a proper case, discharged of such liens, but in the latter event the lien is transferred to the proceeds. The sale should be held in the man-

[80] In re Peacock, 178 Fed. 851.
[81] Smith v. Godwin, 145 N. Car. 242, 58 S. E. 1089.
[82] Thomas v. Woods, 173 Fed. 585, 26 L. R. A. (N. S.) 1180n, 19 Ann. Cas. 1080.
[83] Carter v. Hobbs, 92 Fed. 594.
[84] In re Ulfelder Clothing Co., 98 Fed. 409.
[85] In re Rubel, 166 Fed 131.
[86] In re Ghazal, 163 Fed. 602.
[87] T. S. Faulk & Co., v. Steiner, 165 Fed. 861.
[88] Bracklee Co. v. O'Connor, 67 Misc. 599, 122 N. Y. S. 710.

ner authorized by the court. The sale is governed by the rules applicable to judicial sales generally, under which the order of confirmation exhausts the jurisdiction of the court over the property, and the validity of the title passed depends upon the validity of the order of confirmation.[89] Recitals in the trustee's deed do not prove facts set forth therein, but the conveyance must be supported by enough of the record of the proceedings in bankruptcy to vouch authority for its execution from a court having jurisdiction of the person and the subject-matter.

§ 383. **Abstracting bankruptcy proceedings.**—Proceedings in bankruptcy cases will be found in the rolls of the courts where the proceedings were held, and where they affect the title of the real estate being examined these records must be resorted to in order to determine whether the proceedings were conducted in conformity with the law. It is not necessary to set out in the abstract more than a brief synopsis showing the apparent regularity of the steps taken in the course of the procedure. The court's confirmation of a sale by the trustee or assignee binds all the parties and their privies and forever precludes any attack upon the sale except for fraud, or some other circumstance for which equity would give relief if the sale had been made by the parties instead of by the court. In this respect a sale by a trustee or assignee in bankruptcy stands in the situation as other sales under a decree in chancery. The following synopsis of a proceeding in bankruptcy is submitted as an example:

In the matter of John Doe in bankruptcy.	In the District Court of the United States for the —— district of ——. Case No. ——. Petition filed Sept. 1, 1916.

Schedule of assets and liabilities mentions the real estate described in the caption of the abstract [if real estate not mentioned that fact should be stated]. Adjudication entered on September 20, 1916. Richard Roe appointed trustee November 1, 1916.

[89] West Lumber Co. v. Lyon, 53 Tex. Civ. App. 648, 116 S. W. 652.

Petition by trustee to sell property at public auction filed November 10, 1916.

November 12, 1916, sale ordered as prayed for in petition after notice by publication for three weeks, and ten days' notice by mail to creditors.

Trustee's report of sale, with proof of publication and notice of sale attached, filed January 1, 1917, showing sale of [here describe property sold if included in real estate described in caption of abstract] to John Jones for $5,000.

Report of sale approved and sale confirmed January 10, 1917.

§ 384. Deed of trustee in bankruptcy.—The deed of a trustee in bankruptcy should recite enough of the record of the court of bankruptcy, upon which it is founded, to vouch the authority for its execution from a court having jurisdiction of the person whose property is conveyed by its order, and having jurisdiction of the subject-matter involved. Such deeds are often long and tedious, and the abstracter should confine his synopsis to those particulars only which in any way affect the title to the property in question. The following example is deemed sufficient for the purpose:

John F. Wise, trustee in bankruptcy of the estate of William Hanson, bankrupt,
to
Emmett Gardner.

Trustee's deed.
Dated Aug. 1, 1916.
Recorded Aug. 5, 1916.
Deed record 75, page 12.

Sets forth that whereas, a petition in involuntary bankruptcy was filed in the District Court of the United States for the —— district of —— on the 10th day of January, 1916, against said William Hanson, and whereas, said William Hanson was duly adjudged a bankrupt on said petition on the 12th day of January, 1916, and the said John F. Wise thereafter was duly appointed trustee of the estate of said bankrupt on the 15th day of January, 1916, and thereafter duly qualified as such trustee, and whereas, said John Wise, as trustee in bankruptcy of the estate of said William Hanson, bankrupt, was duly authorized after notice to the creditors and lienholders, by an order of George R. Scott, referee in bankruptcy, dated January 25, 1916, to sell and convey the property hereinafter mentioned at public auction, free and clear of liens except taxes, and

the said sale having been duly held at —— on the 1st day of April, 1916, and the said sale having thereafter been confirmed by an order of said referee, dated April 5, 1916. Therefor said trustee, by virtue of the power and authority vested in him, as aforesaid, and in consideration of the sum of $5,000.00 paid by said Emmett Gardner, granted, bargained and sold to said Emmett Gardner, his heirs and assigns, the following described real estate, to wit: (here describe real estate.) Acknowledged August 1, 1916. The title acquired by the grantee under a trustee's deed is the same as that held by the bankrupt at the time of the adjudication.

§ 385. **Discharge in bankruptcy.**—We have seen that the effect of an adjudication in bankruptcy is to vest in the trustee the title to the bankrupt's property.[90] It terminates the right of the bankrupt to dispose of his property.[91] But the trustee takes such title only for the purpose of administration, and the bankrupt retains an interest in the property which becomes absolute where it is not needed to pay his debts, or when, for any reason, the trustee is discharged without having used it for that purpose, and this interest the bankrupt may convey to another.[92]

Property transferred by the bankrupt within four months prior to the filing of the petition, with the intent to hinder, delay or defraud creditors, passes to the trustee, except as against purchasers in good faith for a present consideration.[93] Property not owned by the bankrupt but acquired before the adjudication,[94] and surely property acquired after adjudication and before discharge,[95] does not vest in the trustee, but becomes the bankrupt's, free from the claims of creditors, save those after the commencement of the proceedings or those who, for statutory reasons, are not affected by the discharge.[96]

As the power of a bankrupt to make conveyances of his property during the time intervening between the filing of the petition and the discharge is limited as explained above, it is important that the abstract should show his discharge where he appears as grantor or grantee in any instrument in the chain of title. The

[90] In re Thomas, 199 Fed. 214.
[91] In re Dillard, 2 Hughes (U. S.) 190, Fed. Cas. No. 3912.
[92] Robertson v. Howard, 82 Kans. 588, 109 Pac. 696.
[93] Shelton v. Price, 174 Fed. 891.
[94] In re Harris, 2 Am. B. R. 359.
[95] In re Stoner, 105 Fed. 752.
[96] In re West, 128 Fed. 205.

discharge restores his power to take and convey real property as freely as he could before the proceedings in bankruptcy were instituted against him, and such property will not be subjected to the claims of creditors scheduled in the proceedings, or the claims of creditors who had notice or actual knowledge of the proceedings.

The discharge in bankruptcy may be shown in the abstract by a simple notation of the fact, as:

In the matter of John Doe in bankruptcy. } In the District Court of the United States for the —— district of ——. Case No. ——. Voluntary petition. Discharge entered and issued to said bankrupt on the —— day of ——, 19—.

CHAPTER XVII

CONTRACTS TO SELL AND CONVEY REAL ESTATE

SEC.
390. Land contracts and bonds for deed.
391. Relation of vendor and vendee under contract or bond for deed.
392. Title or interest of vendor and vendee.
393. Formal requisites.
394. Record of contract of sale.
395. Construction of the contract.
396. Abstracting the contract.
397. Assignment of contract.
398. Agreement as to title and its performance.
399. Forfeiture of contract of sale.
400. Title bond.
401. Agreement to devise real estate.

§ 390. **Land contracts and bonds for deed.**—It is not an uncommon thing for the vendor and purchaser of real estate to reduce their agreement to writing and have it recorded. The agreement is sometimes put in the form of a bond for a deed, but it generally takes the form of a simple executory contract whereby the vendor agrees, for a consideration paid, or to be paid, to convey to the vendee the real estate described therein. When a deed of conveyance is delivered and accepted as performance of such contract, the contract becomes merged in the deed, and the rights of the parties rest thereafter solely on the deed.[1]

Where a merger has thus taken place only a mere mention of the contract and its execution need be made in the abstract; but if the contract remains unexecuted its provisions must be set out in detail. Although the terms of the deed made in pursuance of the contract may vary from those contained in the contract, still the deed must be looked to alone to determine the rights of the parties. There may be cases, however, where a stipulation in a contract, instead of becoming merged in the deed, survives it and confers an independent cause of action. Thus where, in a contract for the purchase of land, there was a provision that if the purchaser did not build a factory on the land he should reconvey to the vendor. The purchaser took possession, made payment, and obtained a deed, but failed to construct the factory in accordance with the terms of the contract. It was held that the pro-

[1] Slocum v. Bracy, 55 Minn. 249, 56 N. W. 826, 43 Am. St. 499.

vision relating to the construction of the contract was not merged in the deed.[2] Also where, by mutual mistake of the parties, the deed fails to embody the clearly expressed terms of the contract, and the deed does not effect what both parties intended by their contract, a court of equity will reform the deed in accordance with their manifest intention.[3] So where the deed does not show a substantial compliance with the terms of the contract, or where there are any unusual stipulations therein, a full synopsis of the instrument should be given.

§ 391. Relation of vendor and vendee under contract or bond for deed.—The relation of vendor and vendee under a contract or bond for a deed bears a strong similitude to that of equitable mortgagee and mortgagor, the vendee holding an equity which is subject to foreclosure by the vendor.[4] When the legal title remains in the vendor, the vendee has merely an equity of redemption. The vendor's title, by the terms of the contract, is his security; and he can not in any way be divested of his title, except the vendee fulfills his contract, and by that act becomes entitled to a conveyance. The position of the vendor being regarded substantially as that of a mortgagee, the possession of the vendee is not adverse to the vendor.[5]

§ 392. Title or interest of vendor and vendee.—The legal effect of a title bond or agreement for a deed is sometimes said to be like a deed by the vendor and a mortgage back by the vendee.[6] There can be no sensible distinction between the case of a legal title conveyed to secure the payment of a debt, and a legal title retained to secure payment.[7] The vendor holds the legal title, and all persons must necessarily take notice of it; and although the vendee enter into possession, this will, of course, convey only his equitable title.[8] The equitable estate of the vendee may be alienated or devised as real estate, and upon his death it will descend to his heirs; while on the other hand, although the vendor holds the legal title, upon his death the securities he has taken for the

[2] Doty v. Sandusky Cement Co. 46 Ind. App. 400, 91 N. E. 569.

[3] Elliott v. Sackett, 108 U. S. 132, 2 S. Ct. 375, 27 L. ed. 678.

[4] Hardin v. Boyd, 113 U. S. 756, 5 S. Ct. 771, 28 L. ed. 1141; Moses v. Johnson, 88 Ala. 517, 7 So. 146, 16 Am. St. 58.

[5] Burnett v. Caldwell, 9 Wall. (U. S.) 290, 19 L. ed. 712.

[6] Hardin v. Boyd, 113 U. S. 756, 5 Sup. Ct. 771, 28 L. ed. 1141; Wells v. Francis, 7 Colo. 396, 4 Pac. 49.

[7] Lowery v. Peterson, 75 Ala. 109.

[8] New York &c. Gas Coal Co. v. Plumer, 96 Pa. St. 99.

purchase-money go to his personal representatives.[9] The holder of the contract can not impair the security. The legal title of the vendor in such case is not affected by any liens created by the person who holds the contract of purchase.[10] The vendee can not possibly do anything to impair the lien of the vendor, any more than a mortgagor can, after the execution of his mortgage, do anything with his title to impair that security. The right of dower of the widow of the vendee is subordinate to the vendor's lien.[11] No homestead right in the property can be acquired by the purchaser as against the lien.[12] If the vendee sells the property to another, his lien upon the land for the purchase-money is subordinate to the lien of the original vendor.[13]

§ 393. **Formal requisites.**—By the provisions of the English Statute of Frauds which has been re-enacted in practically all of the states of this country, no contract for the sale of land, or any interest in, out of, or concerning land, can be enforced, unless some note or memorandum thereof be made in writing, and signed by the party to be charged. The writing should contain within itself, without resort to parol testimony, the whole agreement, including the names of the vendor and vendee, the price to be paid, all stipulations intended to bind the parties, and such a description of the land as will enable any one acquainted with it to learn, upon reading the contract, what property was intended to be sold, the time when the purchase-money must be paid, and the date when the conveyance is to be made. The contract is sometimes made in the form of a sealed obligation under penalty on the part of the vendor to convey a good title, in which case the instrument is known as a title bond.[14] A valid and binding contract for the sale of real estate may be made through correspondence;[15] but in such case the name of the vendee or vendor can not be supplied by parol evidence.[16] The contract may be in several parts or papers; but if a formal contract be contemplated the agreement must be found therein.[17] A written instrument

[9] Lewis v. Hawkins 23 Wall, (U. S.) 119, 23 L. ed. 113.

[10] Williams v. Cunningham, 52 Ark. 439, 12 S. W. 1072; Thorpe v. Durbon, 45 Iowa 192; Tuck v. Calvert, 33 Md. 209.

[11] Zeischang v. Helmke (Tex. Civ. App.) 84 S. W. 436.

[12] Berry v. Boggers, 62 Tex. 239.

[13] Beattie v. Dickinson, 39 Ark. 205.

[14] Vardeman v. Lawson, 17 Tex. 10.

[15] Curtis Land & Loan Co. v. Interior Land Co., 137 Wis. 341, 118 N. W. 853, 129 Am. St. 1068.

[16] Stengel v. Sergeant, 74 N. J. Eq. 20, 68 Atl. 1106.

[17] Scott v. Fowler, 227 Ill. 104, 81 N. E. 34.

naming the grantor and grantee in which one agrees to sell real estate subject to the approval of the owner thereof, and which the vendee in signing refers to as a contract of sale will be treated as such, and not a contract of agency.[18]

The writing must be signed by the party to be charged, and is valid though not signed by the party insisting on its performance. The signature of the vendor alone is sufficient to satisfy the statute of frauds, and the bringing of an action for specific performance by the vendee in such a contract renders it mutual and enforcible between the parties.[19] But an instrument signed by the vendor only, agreeing to sell to certain named persons for a designated price, but which expresses no agreement on the part of the persons to buy nor any consideration for the agreement to sell is nudum pactum.[20]

Where an executory contract consists of mutual promises, both parties must be bound, or it will be void for want of mutuality. There can be no valid contract for the sale and conveyance of land unless the parties have mutually consented to the same conditions, until there is a clearly-defined offer on the one hand, and an acceptance on the other of the very terms offered.[21] The contract may be signed by an agent of the party to be bound, but the authority of the agent to sign need not be in writing.[22] A memorandum of sale if signed suffices,[23] but its acceptance may be oral[24] unless it is sought to enforce it against the vendee.[25]

Execution of the contract by part payment, or entry and possession, or both, will take the contract out of the statute of frauds.[26] The contract must be definite and certain as to the time of performance and the amount paid,[27] and must definitely bind some person to sell.[28] The contract must contain, either in terms or by reference, such a description of the property as to identify it.[29]

[18] Cartwright v. Ruffin, 43 Colo. 377, 96 Pac. 261.

[19] Perry v. Paschal, 103 Ga. 134, 29 S. E. 703.

[20] Smith v. Bateman, 25 Colo. 241, 53 Pac. 457.

[21] Heiland v. Ertel, 4 Kans. App. 516, 44 Pac. 1005.

[22] Whiteworth v. Pool, 29 Ky. L. 1104, 96 S. W. 880.

[23] Boehly v. Mansing, 52 Misc. 382, 102 N. Y. S. 171.

[24] Boehly v. Mansing, 52 Misc. 382, 102 N. Y. S. 171.

[25] Kingsbury v. Cornelison, 122 Ill., App. 495.

[26] City Loan & Banking Co. v. Poole, 149 Ala. 164, 43 So. 13.

[27] Watson v. Watson, 225 Ill. 412, 80 N. E. 332.

[28] Kingsbury v. Cornelison, 122 Ill. App. 495.

[29] Lange v. Waters, 156 Cal. 142, 103 Pac. 889, 19 Am. Cas. 1207; Ames

§ 394. **Record of contract of sale.**—The registration of a contract for the sale of land is notice, if the registry act authorizes it, but not otherwise.[30] Of course the law may authorize the recording of such a contract in general terms without specifically naming it.[31] Thus where the statute provided that "all the writings obligatory or contracts for conveyances of lands or of any interest or estate of, in or relating to lands" may be recorded if duly executed and acknowledged, it was held that a contract by which one of the parties agreed to sell and the other to buy real estate, may be recorded.[32] Also under a statute providing that an instrument in writing "affecting the title" to real property may be recorded it was held that a contract for the conveyance of real estate may be recorded and its record was notice to all persons.[33] When the vendor retains the legal title, the interest of the purchaser is insecure, unless the contract of purchase is recorded; for the land is subject to sale by the vendor, and subject to levy upon execution by his creditors.[34]

§ 395. **Construction of the contract.**—Time is not to be deemed of the essence of a contract to convey real estate unless made so by its terms, or by implication from the nature of the subject-matter, the object of the contract, or the situation of the parties.[35] In a contract to sell and buy land where the stipulations are that the vendee shall pay the money and the vendor shall execute a deed, and there is no provision that either is to be done first, the covenants are mutual and dependent. The vendee is not bound to pay without receiving his deed, nor the vendor to part with his land without receiving the purchase-money. The performance must be simultaneous.[36] The validity of a contract for the sale and purchase of real estate is to be determined by the law of the place where the property is situated, and not by the law of the place where the contract is made.[37] In every contract for

v. Ames, 46 Ind. App. 597, 91 N. E. 509.

[30] Mesick v. Sunderland, 6 Cal. 297.

[31] Memphis Land & Timber Co. v. Ford, 58 Fed. 452, 7 C. C. A. 304.

[32] South Baltimore Harbor & Imp. Co. v. Smith, 85 Md. 537, 37 Atl. 27.

[33] Kent v. Williams, 146 Cal. 3, 79 Pac. 527.

[34] Bell v. McDuffie, 71 Ga. 264; Evans v. Ashe, 50 Tex. Civ. App. 54, 108 S. W. 389, 1190.

[35] Martindale v. Waas, 8 Fed. 854, 3 McCrary (U. S.) 108; Cramer v. Mooney, 59 N. J. Eq. 164, 44 Atl. 625.

[36] Cole v. Killam, 187 Mass. 213, 72 N. E. 947.

[37] Morris v. Linton, 61 Nebr. 537, 85 N. W. 565; Baum v. Birchall, 150 Pa. St. 164, 24 Atl. 620, 30 Am. St. 797.

the sale of real estate there is an implied condition that the vendor will produce a fair marketable title to which no reasonable objection can be made.[38] Where the agreement contains no restrictive expressions it is an agreement to sell the whole of the vendor's estate or interest therein.[39] If the vendee contract for a title deducible of record, he can not be compelled to accept a title resting altogether upon matters in pais.[40]

§ 396. **Abstracting the contract.**—In making a synopsis of a contract for the sale of real estate such matters as the names of the parties, the description of the property, the quantity of the estate sold, the terms or conditions of the sale, and the time when the contract shall be executed should be clearly shown. The contract must be mutual; and the fact that it is signed by the vendor only does not affect its mutuality. Where there is a want of mutuality in the covenants or stipulations this fact should be noted. An example of a synopsis of a contract of the character under discussion is appended:

Charles Hewett to William Moore.	Contract for sale of real estate. Dated June 10, 1912. Recorded June 15, 1912. Book 145, page 280.

Said Charles Hewett on payment of $1,000.00 agrees to sell and convey to said William Moore, by good and sufficient warranty deed, the following described real estate to wit: [here describe property] free and clear of all incumbrances made, done or suffered by the said Charles Hewett.

Said William Moore in consideration of the above promise on the part of said Charles Hewett, agrees to buy said real estate and pay therefor to said Charles Hewett the sum of $1,000.00 in the manner as follows: [here state terms of payment]

Time is of the essence of the contract. Mutually agreed that said William Moore is to have possession of said premises until forfeiture for nonpayment of purchase-money in the manner above provided.

[38] Flinn v. Barber, 64 Ala. 193; Easton v. Montgomery, 90 Cal. 307, 27 Pac. 280, 25 Am. St. 123.

[39] Bower v. Cooper, 2 Hare (Eng.) 408.

[40] Page v. Greely, 75 Ill. 400; Noyes v. Johnson, 139 Mass. 436, 31 N. E. 767.

Said William Moore agrees to pay all taxes and assessments against the property. Failure to pay principal and interest when due as aforesaid, or failure to pay taxes operates as forfeiture of contract and all rights thereunder on the part of said William Moore, and amount paid by him forfeited as rental for the property. Signed and acknowledged by both parties June 10, 1912.

§ 397. **Assignment of contract.**—A condition in a contract for the sale of real estate to the effect that no assignment of the agreement will be valid without the consent and signature of the vendor has been upheld.[41] But under some statutes, a stipulation of nonassignability in a contract of this character will not prevent its transfer to an assignee subject, of course, to all defenses which would have been available in the hands of the assignor.[42] And an assignment may be valid as between the immediate parties thereto even though not binding upon the vendor.[43] The assignee of a contract for the sale of real estate in which there is neither fraud nor warranty, like the assignor under whom he claims, purchases at his peril.[44] In the absence of a stipulation to the contrary a vendee may assign his written contract of purchase, and his assignee succeeds to all his rights thereunder;[45] and such assignee may enforce specific performance of the contract, as against the vendor, upon complying with the terms of such contract.[46] But the mere assignment by the vendee, although followed by possession, does not by implication impose upon the assignee liability to pay the price agreed to in the contract, although by its terms its obligations are extended to the assignees of the parties.[47] An assignment of a contract of purchase as security is a mortgage, and when the assignee has completed the payments, and taken a conveyance to himself, the relation of the parties remains the same.[48]

§ 398. **Agreement as to title and its performance.**—In

[41] Lockerby v. Amon, 64 Wash. 24, 116 Pac. 463, 35 L. R. A. (N. S.) 1064n, Ann. Cas. 1913 A, 228n.

[42] Thomassen v. De Goey, 133 Iowa 278, 110 N. W. 581, 119 Am. St. 605.

[43] Sproull v. Miles, 82 Ark. 455, 102 S. W. 204.

[44] Carrier v. Eastis, 112 Ala. 474, 20 So. 595.

[45] Perry v. Paschal, 103 Ga. 134, 29 S. E. 703; Hooper v. Van Husen, 105 Mich. 592, 63 N. W. 522.

[46] Craver v. Spencer, 40 Fla. 135, 23 So. 880.

[47] Lisenby v. Newton, 120 Cal. 571, 52 Pac. 813, 65 Am. St. 203.

[48] Hays v. Hall, 4 Part. (Ala.) 374, 30 Am. Dec. 530; Smith v. Cremer, 71 Ill. 185; Gamble v. Ross, 88 Mich. 315, 50 N. W. 379.

every contract for the sale of real estate there is an agreement on the part of the vendor to convey to the vendee a good marketable title, free from all defects or incumbrances, and if such agreement is not expressed it will be implied.[49] But the implication that the vendee was to receive such title may be rebutted by showing that he had notice of the existence of incumbrances.[50] The contract may expressly state the title to be conveyed, and the rights of the vendee will be determined by such express terms.[51]

It often happens that an express provision regarding the title to be conveyed results disastrously to the vendee. Thus where the agreement is to make a "good and sufficient deed" it has been held a satisfaction of the agreement if the instrument is sufficient as a conveyance, though the vendor's title was bad.[52] But a contract by the vendor to convey by good and sufficient warranty deed requires the conveyance of a title free of incumbrances.[53] An agreement to make a "clear deed" has been held performd by a deed conveying only a life estate.[54] An agreement to convey by "quitclaim" is performed by the conveying all the interest the vendor has in the property.[55] Also an agreement to sell "all the right, title and interest" that the vendor has in the premises is performed by a conveyance of such interest without regard whether the title is good or sufficient.[56] An agreement to convey real estate, in the absence of any reservation or exception therein, requires the vendor to convey a marketable title.[57]

A marketable title is one free from reasonable doubt as to its validity.[58] There must be no doubt involved either as to matter of law or fact.[59] Thus, if the title depends upon the validity of a marriage—or upon a condition, and is liable to be forfeited by a breach of it—the vendor can not, in the absence of satisfactory evidence of the marriage, or of the performance of the condition,

[49] Flinn v. Barber, 64 Ala. 193; Easton v. Montgomery, 90 Cal. 307, 27 Pac. 280, 25 Am. St. 123; Donlon v. Evans, 40 Minn. 501, 42 N. W. 472.

[50] Newark Sav. Inst. v. Jones, 37 N. J. Eq. 449.

[51] Vardeman v. Lawson, 17 Tex. 10.

[52] Brown v. Covillaud, 6 Cal. 566.

[53] Powell v. Huey, 214 Ill. 132, 89 N. E. 299.

[54] Knapp v. Lee, 3 Pick. (Mass.) 452.

[55] Holland v. Rogers, 33 Ark. 251; Fitch v. Willard, 73 Ill. 92.

[56] Babcock v. Wilson, 17 Maine 372, 35 Am. Dec. 263; Johnston v. Mendenhall, 9 W. Va. 112.

[57] Curtis Land & Loan Co. v. Interior Land Co., 137 Wis. 341, 118 N. W. 853, 129 Am. St. 1068.

[58] Crouter v. Crouter, 133 N. Y. 55, 30 N. E. 726.

[59] Herman v. Somers, 158 Pa. St. 424, 27 Atl. 1050, 38 Am. St. 851.

insist on the vendee taking the title. A contract to convey a good and marketable title is complied with by conveying a title based on adverse possession for the prescriptive period.[60] But the vendee can not be compelled to accept such title where he has contracted for a title of record.[61] The record contemplated by a contract of sale giving the vendee a right to have a title "fairly deducible of record," is the entire record of the city and county setting forth the chain of title.[62]

A merchantable title which a vendee who has contracted for such title may be compelled to accept is a title deducible of record reasonably clear from defects which affect its salability, and such a title is not shown where parol evidence is necessary to show how a grantor in the chain of title acquired title.[63] The contract between vendor and vendee with reference to the title to be conveyed must be carefully examined by counsel to determine if the title proffered meets the requirements of such contract.

§ 399. **Forfeiture of contract of sale.**—Where, for any reason, agreements for conveyance do not contemplate an immediate consummation, forfeitures are of frequent occurrence. In all cases of unfulfilled contracts appearing in the chain of title counsel should spare no pains to determine if there has been a complete forfeiture thereof. Evidence of forfeiture is sometimes found in a foreclosure of the vendor's lien for purchase-money, but is more often discovered by express or implied declarations in the contract itself. Thus a forfeiture is implied from nonpayment of the purchase-money, where time is made the essence of the contract.[64] In such case the vendor will not be required to notify the vendee of his intention to declare a forfeiture,[65] but the vendor may treat the property as his own and convey it to another.[66]

A declaration of forfeiture must be clear and unambiguous.[67] But a vendee does not forfeit his contract by failure to make payments to his vendor after the latter has put it out of his power

[60] Tewksbury v. Howard ,138 Ind. 103, 37 N. E. 355; Freedman v. Oppenheim, 187 N. Y. 101, 79 N. E. 841, 116 Am. St. 595.

[61] Page v. Greely, 75 Ill. 400.

[62] Crim v. Umbsen, 155 Cal. 697, 103 Pac. 178, 132 Am. St. 127.

[63] Watson v. Boyle, 55 Wash. 141, 104 Pac. 147.

[64] Martin v. Thomas, 56 W. Va. 220, 49 S. E. 118.

[65] Prairie Development Co. v. Leiberg, 15 Idaho 379, 98 Pac. 616.

[66] Harmon v. Thompson, 119 Ky. 526, 84 S. W. 569.

[67] Maday v. Roth, 160 Mich. 289, 16 Det. Leg. N. 1099, 125 N. W. 13, 136 Am. St. 441.

to comply with his contract by conveying the property to another.[68] Where time is made the essence of the contract in respect to the making of the deferred payments, a forfeiture provided for nonpayment may be enforced in accordance with the express terms of the contract.[69] But where time is not made of the essence of the contract, an immaterial delay by a party will not work a forfeiture of his right.[70] An attempted forfeiture of a land contract will not be effective where both parties subsequently deal with the contract and land as though there had been no rescission.[71]

The vendor and vendee may, at any time before conveyance, rescind the contract by consent,[72] which consent may be express or implied from the acquiescence of the one party in the acts of the other. But in order to bind the one party by his presumed acquiescence in the acts of the other, it must clearly appear that he had notice of the intent of the other to rescind,[73] or knowledge of such acts on the part of the latter as constituted in themselves a rescission.[74]

The party having an option to declare a forfeiture must exercise it promptly upon discovering the ground therefor,[75] and, where the vendor has waived timely performance by extension of the time of performance or by leading the purchaser to believe that prompt payment will not be demanded, he can not declare a forfeiture until he has notified the vendee and given him a reasonable time to perform it.[76]

§ 400. **Title bond.**—Agreements for conveyance sometimes take the form of a sealed obligation under penalty on the part of the vendor to convey a good title, in which case the instrument is known as a "bond for a deed" or a "title bond."[77] Where the purchaser has knowledge of imperfections in the title, but takes a bond for a deed, he waives all right of rescission, and must sue on the bond in case of loss by reason of defective title.[78]

[68] Brodhead v. Reinbold, 200 Pa. 618, 50 Atl. 229, 86 Am. St. 735.

[69] Whitman v. Perkins, 56 Nebr. 181, 76 N. W. 547.

[70] Lese v. Lamprecht, 196 N. Y. 32, 89 N. E. 365.

[71] Clark v. Neumann, 56 Nebr. 374, 76 N. W. 892.

[72] Lauer v. Lee, 42 Pa. St. 165.

[73] Hussey v. Roquemore, 27 Ala. 281.

[74] 2 Warvelle Vend. 883.

[75] Ball v. Belden, 59 Tex. Civ. App. 29, 126 S. W. 20.

[76] Speer v. Phillips, 24 S. Dak. 257, 123 N. W. 722.

[77] Vardeman v. Lawson, 17 Tex. 10.

[78] Contra: Bellows v. Cheek, 20 Ark. 424; Horne v. Rogers, 110 Ga. 362, 35 S. E. 715, 49 L. R. A. 176; Baldridge v. Cook, 27 Tex. 565.

The assignee of a bond for title acquires all the rights and equities to which the assignor was entitled thereunder.[70] The vendor who has given a bond for title and taken purchase-money notes therefor, does not by their hypothecation pass the legal title to the land.[80] A vendee accepting a bond for title containing a power to sell in the vendor in case of nonpayment of the purchase-money notes, is bound by such power though he did not sign the bond.[81]

Where the bond has been fulfilled by a deed of conveyance only a brief reference to the bond need be made in the abstract, while if the bond remains executory a complete synopsis of it should be given. This should contain the usual formal requisites of such instruments. The following is deemed sufficient:

John Doe
v.
Richard Roe.

Title bond.
Dated ——.
Recorded ——.
Vol. —— of deeds, page ——.

In the penal sum of $1,000. Conditioned that if the above bonded obligor, John Doe, shall, on the —— day of ——, 19—, execute and deliver unto said Richard Roe, on payment of $500.00, a good and sufficient warranty deed to the following described real estate to wit: [here describe real estate.] Acknowledged ——.

§ 401. Agreement to devise real estate.—A contract by an owner of real estate to make a will disposing of it in a particular way, if based upon sufficient consideration and clearly established, may be enforced in equity against persons taking title to the property upon his decease.[82] The consideration for such contract must be valuable, as distinguished from a merely good or moral consideration.[83] A mere voluntary agreement or gratuitous promise to provide for the promisee by will is uninforcible;[84] nor will a court of equity decree specific performance of a unilateral contract so to provide, which by its terms remains ex-

[79] Walker v. Maddox, 105 Ga. 253, 31 S. E. 165.
[80] Morrison v. Chambers, 122 N. Car. 689, 30 S. E. 141.
[81] Battery Park Bank v. Loughran, 122 N. Car. 668, 30 S. E. 17.
[82] Klussman v. Wessling, 238 Ill. 568, 87 N. E. 544.
[83] Grant v. Grant, 63 Conn. 530, 29 Atl. 15, 38 Am. St. 379.
[84] Studer v. Seyer, 69 Ga. 125.

ecutory until the death of the person so contracting.[85] Such contracts are within the statute of frauds and must be in writing.[86] But a partial performance of a verbal contract of this character will take it out of the operation of the statute of frauds when a breach of the contract would work a fraud on the party so performing.[87] Where services have been performed under a verbal contract to devise real estate, and the contract being uninforcible by reason of the statute of frauds, an action will lie against the personal representative of the decedent on a quantum meruit to recover the value of the services.[88] Where a contract to devise real estate is found on the record and it affects the real estate in question, it should be set out in the abstract and carefully considered by counsel in passing upon the title.

[85] Colt v. O'Connor, 59 Misc. (N. Y.) 83, 109 N. Y. S. 689.

[86] Pond v. Sheean, 132 Ill. 312, 23 N. E. 1018, 8 L. R. A. 414; Austin v. Davis, 128 Ind. 472, 26 N. E. 890, 12 L. R. A. 120, 25 Am. St. 456.

[87] Carmichael v. Carmichael, 72 Mich. 76, 40 N. W. 173, 1 L. R. A. 596, 16 Am. St. 528; Duvale v. Duvale, 54 N. J. Eq. 581, 35 Atl. 750.

[88] Grant v. Grant, 63 Conn. 530, 29 Atl. 15, 38 Am. St. 379.

CHAPTER XVIII

LEASES

SEC.
405. Leases defined and distinguished.
406. Formal parts of leases.
407. Covenants in leases.
408. Assignment of leases.

§ 405. **Leases defined and distinguished.**—A lease is a species of contract for the possession and profits of lands and tenements either for life, or for a certain term of years, or during the pleasure of the parties.[1] The lease grants to and vests in the lessee a present interest and estate in the land for the term designated, and for the purposes specified.[2] By such contract, express or implied, a tenancy is created whereby one person permits another to occupy lands actually or constructively, and without such a contract there can be no relation of landlord and tenant.[3] On the other hand, contractual relations may exist between persons with regard to the occupation of land which imposes duties and restrictions similar to those of tenancy, and yet there will not be a tenancy. Thus an agent using and controlling the land of his principal would not ordinarily become a tenant.[4]

Contracts for the cultivation of land upon shares, contracts for lodgings, contracts for employment, and a license to do certain acts upon the land of another may all be made without establishing the technical relation of landlord and tenant. Some agreement between the parties for a tenancy, whether it be made expressly in words, or arises from their acts and conduct in relation to the land is essential to create the relation.[5] Whether an instrument is a contract of lease or merely an agreement to execute a contract of lease depends upon the intention of the parties to be gathered from the whole instrument considered in the light of surrounding circumstances.[6] Where a contract of sale is made

[1] Paul v. Cragnaz, 25 Nev. 293, 59 Pac. 857, 60 Pac. 983, 47 L. R. A. 540.
[2] Chandler v. Hart, 161 Cal. 405, 119 Pac. 516, Ann. Cas. 1913 B, 1094n.
[3] Rogers v. Coy, 164 Mass. 391, 41 N. E. 652.
[4] Hopkins v. Ratliff, 115 Ind. 213, 17 N. E. 288.
[5] Tucker v. Adams, 52 Ala. 254; Paige v. Akins, 112 Cal. 401, 44 Pac. 666.
[6] Schultz v. Hastings Lodge No. 50, I. O. O. F., 90 Nebr. 454, 133 N. W. 846.

between the vendor and purchaser of land, and the instrument provides that upon the nonperformance of conditions respecting payment of the purchase-price, it has been held that either party may treat the transaction either as a purchase and sale contract, or a lease, and if the election is made to treat it as a tenancy, the relation of landlord and tenant relates back to the inception of the contract.[7]

§ 406. Formal parts of leases.—No particular form of words is necessary to create a lease;[8] nor is it necessary that the word "lease" be used.[9] Any written instrument expressing the agreement of the parties, signed by one and accepted and acted on by the other, will be obligatory upon both.[10] Whatever words are sufficient to explain the intent of the parties that the one shall divest himself of the property and the other come into the possession of it for a definite time, whether they run in the form of a license, covenant, or agreement, will be construed as a lease as well as if the most pertinent words were used.[11] Thus an instrument in the form of a receipt acknowledging the payment of money as rent for a house has been held to be a lease.[12] Though no formal words are requisite to a lease at common law, the usual words of operation in it are "demise, grant and to farm let."[13]

Where the lease is for a longer period than that which the statute allows for verbal leases, it must, ordinarily, be by deed, and requires the same solemnities as to signing, sealing, attestation, release of dower, and acknowledgment as are required in other deeds of conveyance. The local statute should be consulted when in doubt about these matters.[14]

[7] Murphy v. Myar, 95 Ark. 32, 128 S. W. 359, Ann. Cas. 1912 A, 573.

[8] Alcorn v. Morgan, 77 Ind. 184; Upper Appomattox Co. v. Hamilton, 83 Va. 319, 2 S. E. 195.

[9] Bussman v. Ganster, 72 Pa. St. 285.

[10] Alcorn v. Morgan, 77 Ind. 184.

[11] Munson v. Wray, 7 Blackf. (Ind.) 403.

[12] Eastman v. Perkins, 111 Mass. 30.

[13] Folden v. State, 13 Nebr. 328, 14 N. W. 412.

[14] In most of the states leases for a term of more than one year must be in writing, otherwise they take effect only as tenancies at will, even as between the parties thereto. In Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Idaho, Iowa, Kansas, Kentucky, Mississippi, Missouri, Montana, Nebraska, Nevada, North Dakota, Oregon, Rhode Island, South Carolina, South Dakota, Texas and Wisconsin, leases for a term of more than one year must be executed, acknowledged, and recorded in the same manner as deeds, otherwise they are invalid as against third parties without notice. In Florida leases for more than two years must be recorded. In Indiana, Minnesota, New York and Tennessee, leases for more

A description of the premises, the amount of rent to be paid, and the duration of the term should be set out. Words of present demise must be used, or such words as will indicate that the parties intended the instrument to have that effect.

It is not necessary to the validity of a lease that it should be dated, as it does not take effect from its date, but from its delivery. But the date of a lease is important in determining the duration of the term.

Where a lease of the premises appears in the chain of title, but an examination of its contents shows that it has expired by its own limitation no further consideration should be given it, except perhaps it might be well to make an inquiry in pais to determine if there has been a surrender of possession on the part of the lessee. But when the term for which it was given has not expired a complete synopsis of the instrument should appear in the abstract. Its treatment should be as full and succinct as in cases of conveyances of the fee. Where the lease remains a charge upon the fee such matters as the date, the names of the parties, the description of the premises, the duration of the term, the rent reserved, the covenants, the conditions and restrictions, and any special agreements appearing, should all be made to appear.

Below is an example of such synopsis:

William Druley	Lease.
	Dated ——.
to	Recorded ——.
Harvey Cox.	Misc. Rec. ——, page ——.

First party leases, demises and lets to second party the following described real estate in Marion County, Indiana, to wit: [here describe property]. To hold for the term of five years from date hereof, at a rental of $200.00 per annum, payable semi-annually.

Second party covenants: To pay rent reserved; to pay taxes

than three years must be recorded. In Kentucky, Virginia, and West Virginia, leases for more than five years must be recorded. In Maine, Maryland, Massachusetts, and New Hampshire, leases for more than seven years must be recorded. In New Jersey, leases for more than three years must be in writing. In Pennsylvania, leases for more than three years must be in writing, and for more than twenty-one years must be recorded. In New Mexico, Utah, Vermont, Washington, and Wyoming, leases must be executed and recorded in the same manner as deeds. In North and South Dakota, leases of agriculture land are limited to ten years, those of city lots to twenty years.

levied and assessed against premises for the term; against waste, and against subletting:

Second party covenants: For quiet enjoyment, etc.

Provides for forfeiture in case of failure on part of second party to perform any one or more of covenants.

Signed by both parties.

Acknowledgment.

§ 407. **Covenants in leases.**—All covenants between lessor and lessee are either express or implied, the latter depending for their existence upon the intendment and construction of the law. A covenant for title[15] and for quiet enjoyment are usually implied from the relationship of landlord and tenant.[16] There is also an implied covenant that the tenant shall have the right of possession, occupancy, and the beneficial use of every portion of the leased premises.[17] The designation in a lease of the purpose for which the premises may be used amounts to a covenant not to use them for other purposes.[18] But where a lease contains an express covenant in regard to any subject, no covenants are to be implied in respect to the same subject.[19] If the estate out of which the lease was granted determines before the expiration of the lease, the implied covenant will be at an end.[20]

It is usual to provide in the lease for a short term for which the lessee is bound to return the premises and then give him a right to occupy them for a further period at his option. This option must be exercised by the tenant during the original term, and while the privilege is dependent on the will of only one of the parties it does not impair the mutuality of the contract.[21] A distinction is sometimes made between the effect of a mere holding over by a tenant in case of a covenant to extend a lease, and of a covenant to renew a lease, and it is held that, although a mere holding over is sufficient to extend a lease, it is not sufficient to renew a lease.[22] Besides the covenants already mentioned a

[15] Preswood v. Carlton, 162 Ala. 327; 50 So. 254.

[16] Milheim v. Baxter, 46 Colo. 155, 103 Pac. 376, 133 Am. St. 50; Ragland v. Conqueror Zinc Cas., 136 Mo. App. 631, 118 S. W. 1194.

[17] Talbott v. English, 156 Ind. 299, 59 N. E. 857.

[18] Kraft v. Welch, 112 Iowa 695, 84 N. W. 908.

[19] Crouch v. Fowle, 9 N. H. 219, 32 Am. Dec. 350; Burr v. Stenton, 43 N. Y. 462.

[20] Gessner v. Palmateer, 89 Cal. 89, 24 Pac. 608, 26 Pac. 789, 13 L. R. A. 187; Brookhaven v. Baggett, 61 Miss. 383.

[21] Spear v. Orendorf, 26 Md. 37.

[22] Shamp v. White, 106 Cal. 220, 39 Pac. 537; Callahan Co. v. Michael, 45

lease may contain a covenant restricting the use of the premises, a covenant as to the sale of the premises, a covenant for insurance, a covenant for repairs, and a covenant to pay taxes. Such covenants run with the land where they touch or concern it.[23]

Where the lease contains a provision for forfeiture in case of a breach of covenant, such provision should be set out at such length as its importance seem to demand. If the lease contains an option in favor of the lessee to purchase the premises, such option must be included in the synopsis.

§ 408. **Assignment of leases.**—The lessor has power to transfer either the entire reversion, or his interest under the lease, and such transfer is effective to vest in the transferee the right to all rent reserved in the lease, without any further action on the part of the tenant.[24] A warranty deed by the lessor of the demised premises operates as an assignment of the lease,[25] and entitles the grantee to all the rights of a lessor.[26] So a conveyance of a reversion in fee to a lessee or his assignee holding an outstanding lease causes the lease to merge in the freehold estate.[27]

The rule of the common law is that the owner of a leasehold estate has a right to alienate his interest, either by assigning the lease in toto or by subletting a part of the premises.[28] As a rule, a tenant under a lease which contains no provision against subletting has a perfect right to sublet, remaining himself bound for rent to his landlord. An exception to the general rule has been made in case where the amount of rent received must depend on the character and skill of the lessee.[29] Some states have enacted statutes against assignment and subletting, but in the absence of such statute or a restrictive covenant in the lease, the tenant may assign his lease.[30] Covenants against assignment or subletting

Ind. App. 215, 90 N. E. 642; Quinn v. Valiquette, 80 Vt. 434, 68 Atl. 515, 14 L. R. A. (N. S.) 962n.

[23] Gibson v. Holden, 115 Ill. 199, 3 N. E. 282, 56 Am. Rep. 146; Conover v. Smith, 17 N. J. Eq. 51, 86 Am. Dec. 247.

[24] American Freehold Land Mortgage Co. v. Turner, 95 Ala. 272, 11 So. 211.

[25] Starbuck v. Avery, 132 Mo. App. 542, 112 S. W. 33.

[26] Depere v. Reynen, 65 Wis. 271, 22 N. W. 761, 27 N. W. 155.

[27] McMahan v. Jacoway, 105 Ala. 585, 17 So. 39.

[28] Crommelin v. Thiess, 31 Ala. 412, 70 Am. Dec. 499; Robinson v. Perry, 21 Ga. 183, 68 Am. Dec. 455; Kew v. Trainor, 150 Ill. 150, 37 N. E. 223.

[29] Randell v. Chubb, 46 Mich. 311, 9 N. W. 429, 41 Am. Rep. 165.

[30] Gazlay v. Williams, 210 U. S. 41, 28 Sup. Ct. 687, 52 L. ed. 950.

are not looked upon with favor by the courts, and are liberally construed in favor of lessees so as to prevent the restriction from extending any further than necessary.[31] By the assignment the tenant is not thereby released from his covenants unless the landlord accepts the assignee as a substitute tenant.[32] An assignment of a lease carries with it a clause giving the tenant the right to renew at the end of the term as well as all other clauses.[33]

The assignment may be by indorsement on the back of the lease or by separate instrument,[34] and in the latter case such instrument, being a transfer of an interest in land, may properly be recorded; but it will not operate as constructive notice to a subsequent purchaser if it fail to describe the premises and define the terms or to contain language of description by which the original lease can be recognized as the thing transferred.[35] The express covenants in a lease continue to be binding upon the covenantor notwithstanding his assignment of the lease.[36] An assignee of a lease is bound by privity of estate to perform the express covenants which run with the land, but in the absence of express agreement on his part, he is liable only on such covenants as run with the land and only during such time as he holds the term.[37]

[31] Caley v. Portland, 12 Colo. App. 397, 56 Pac. 350; Presby v. Benjamin, 169 N. Y. 377, 62 N. E. 430, 57 L. R. A. 317.

[32] Page v. Ellsworth, 44 Barb. (N. Y.) 636.

[33] Sutherland v. Goodnow, 108 Ill. 528, 48 Am. Rep. 560; McClintock v. Joyner, 77 Miss. 678, 27 So. 837, 78 Am. St. 541.

[34] Cleveland C. C. & St. L. R. Co. v. Mitchell, 74 Ill. App. 602; Esty v. Baker, 48 Maine 495.

[35] Martindale v. Price, 14 Ind. 115.

[36] Brosman v. Kramer, 135 Cal. 36, 66 Pac. 979; Jones v. Parker, 163 Mass. 564, 40 N. E. 1044, 47 Am. St. 485.

[37] Bonetti v. Treat, 91 Cal. 223, 27 Pac. 612, 14 L. R. A. 151.

CHAPTER XIX

MORTGAGES

SEC.
415. Definition, origin, and nature of mortgages.
416. Legal and equitable theory of mortgages.
417. Equitable mortgages.
418. Mortgages distinguished from other transactions.
419. Absolute deed as mortgage.
420. Equity of redemption.
421. Form of mortgage in general.
422. Description of the parties.
423. Description of the premises.
424. Description of the debt secured or obligation to be performed.
425. Covenants of a mortgage generally.
426. Special covenants and conditions.
427. Estoppel of mortgagor subsequently acquiring title.
428. Merger as applied to mortgages.
429. Payment or discharge of mortgage.
430. Purchase-money mortgages.
431. Mortgages of the homestead.
SEC.
432. Mortgages of after-acquired property.
433. Record of mortgages.
434. Possession as notice.
435. Correction of errors in record and re-recording mortgage.
436. Assignment of mortgages and deeds of trust.
437. Form, requisites, and method of assignment.
438. Record of assignments of mortgages.
439. Equitable assignments of mortgages.
440. Abstracting mortgage and assignment of mortgage.
441. Trust deeds.
442. Power of sale in a mortgage or deed of trust.
443. Release or satisfaction of record.
444. Foreclosure by entry and possession.
445. Foreclosure by writ of entry.
446. Foreclosure by exercise of power of sale.
447. Foreclosure by equitable suit.

§ 415. **Definition, origin, and nature of mortgages.**—A mortgage, in its broadest sense, is a conveyance of land as security for the payment of a debt or the performance of an obligation.[1] This definition embraces two essential things necessary to constitute a mortgage, and if more be attempted it results in a description of one of the many forms which a mortgage may take. The origin of the law of mortgages of real property in English law dates back to the time of the Anglo-Saxon kings. The records of this early period are extremely meager and the extent of the custom to pledge real estate to secure the payment of debts is unknown, but enough evidence exists to conclusively

[1] Williams v. Davis, 154 Ala. 422, 45 So. 908; Priddy v. Smith, 106 Ark. 79, 152 S. W. 1028, 44 L. R. A. (N. S.) 285n; Gassert v. Bogk, 7 Mont. 585, 19 Pac. 281, 1 L. R. A. 240.

show that such pledges were sometimes made.[2] Upon the advent of the Norman kings and the inauguration of the feudal system the alienation of land was so restricted that the custom fell into disuse and was practically unknown for a period of two hundred years. After the statute of Quia Emptores, A. D. 1325,[3] removing the feudal restrictions and permitting the alienation of land, the records show that pledges of real property gradually came into use again as one of the means of securing the payment of debts. Little is known of the nature of the contract under the early English law and the rights of the parties thereunder. It seems, however, that, upon the execution of the mortgage, the mortgagee was entitled to take possession of the property as the legal owner thereof, and to hold the same so long as the debt remained unpaid. But upon the payment of the debt which the mortgage was given to secure, the mortgagor was entitled to have the property reconveyed to him, and upon failure of the mortgagee to do so he could resort to the courts for the enforcement of this right.

§ 416. Legal and equitable theory of mortgages.—A mortgage at law and in equity and the rights of the parties thereunder were very different. At law, a mortgage was a conveyance of an estate upon condition, and upon the failure of the mortgagor to perform the condition strictly according to its terms, his rights to the estate were forfeited and the title vested absolutely in the mortgagee. The mortgagor had no further right that a court of law could enforce, and, no matter how unjust the forfeiture, he was without remedy. But in equity the rule was different. While courts of equity could not alter the legal effect of the forfeiture which followed a breach of condition and did not attempt to do so, they regarded it as in the nature of a penalty which ought to be relieved against. They recognized the purpose as merely a pledge to secure a debt, and declared it as unreasonable that the mortgagee should by the failure of the debtor to meet his obligation at the day appointed, be entitled to keep as his own what was intended as a pledge. At law the legal right of the mortgagor to have his estate again was forfeited; but in equity he was still allowed to reclaim it upon pay-

[2] Essays in Anglo-Saxon Law, Appendix, Case No. 18, p. 342.

[3] 18 Edw. 2, Stat. 1.

ment of his debt with interest. In equity a mortgage was merely a security for the payment of a debt or the performance of an obligation and this is the view which prevails at the present time in courts of law as well as in courts of equity.[4]

While the common-law doctrine of mortgages prevails in some of the states, with more or less modification by equitable principles, a majority however, partly by force of statute, and partly by judicial decisions, the common-law doctrine has been abrogated, and has given place to the purely equitable theory. Thus, by statute in California, Colorado, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Montana, Nebraska, Nevada, New Mexico, New York, North Dakota, Oklahoma, Oregon, South Carolina, South Dakota, Texas, Utah, Washington, and Wisconsin, a mortgage is regarded as merely a lien upon the property both before and after breach of condition. It passes no title or estate in the property to the mortgagee, and gives him no right to possession before foreclosure. In Iowa, Kansas, and Nevada the statutes imply that the parties may, by express stipulation, give the right of possession to the mortgagee.[5] However, in Alabama, Arkansas, Connecticut, Illinois, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, North Carolina, Ohio, Pennsylvania, Rhode Island, Tennessee, Vermont, Virginia, and West Virginia, the courts have adhered to the doctrines of the common law as regards the nature of the mortgage interest and the respective rights of the parties. They regard the mortgage deed as passing at once the legal title to the mortgagee, subject to defeasance, as a condition subsequent which divests or defeats the estate on performance of it. The right of possession follows the title so that the mortgagee may enter into possession of the mortgaged property immediately unless restrained by express provisions, or necessary implication, of the mortgage; and in any case upon breach of the condition he becomes entitled to the possession and may recover it by action. The legal title is in the mortgagee only for the protection and enforcement of his interests. The mortgagee's title is in the nature of a base or determinable fee, which continues only so long as the debt continues.[6]

[4] Aetna Life Ins. Co. v. Broecker, 166 Ind. 576, 77 N. E. 1092.

[5] Whitley v. Barnett, 151 Iowa 487, 131 N. W. 704; Chick v. Willetts, 2 Kans. 384; Barber v. Crowell, 55 Nebr. 571, 75 N. W. 1109.

[6] Lightcap v. Bradley, 186 Ill. 510, 58 N. E. 221.

§ 417. **Equitable mortgages.**—The term "equitable mortgage" is properly applied to a transaction which would not in law be held to be a mortgage yet the effect of which is to convey real estate or some interest therein as security for a debt. The term is used more properly with reference solely to the kind of instrument or contract by which equity establishes a lien. It is the equitable form of the transaction and not the equitable nature of the property which is necessary to create an equitable mortgage. A deed or contract which does not contain a condition or defeasance but is used for the purpose of pledging real property or some interest in it as security for a debt or obligation and with the intention of creating a mortgage is an equitable mortgage.[7] Deeds and contracts which are wanting in the characteristics of a common-law mortgage are often used by parties for the purpose of pledging real property, or some interest in it, as security for a debt or obligation, and with the intention that they shall have effect as mortgages. Equity comes in to aid the parties in such cases, and gives effect to their intentions. Mortgages of this kind are, therefore, called equitable mortgages.[8] There are as many kinds of equitable mortgages as there are varieties of ways in which parties may contract for security by pledging some interest in land.[9] Whatever the form of contract may be, if it is intended thereby to create a security, it is an equitable mortgage.[10] The intent to create an equitable mortgage, or security for the payment of a debt must be manifest, as distinguished from an intent to apply to the payment of the debt the proceeds from the sale of the property.[11] It is not necessary that the contract should be in express terms a security, for equity will often imply this from the nature of the transaction between the parties.[12] As in the case of a legal mortgage there must be some debt, liability or obligation secured.[13] But the debt secured by an equitable mortgage need not be evidenced by notes, bonds, or

[7] Alexander v. Mortgage Co. of Scotland, 47 Fed. 131.

[8] Gessner v. Palmateer, 89 Cal. 89, 24 Pac. 608, 26 Pac. 789, 13 L. R. A. 187n; Brown v. Brown, 103 Ind. 23, 2 N. E. 233.

[9] Donald v. Hewitt, 33 Ala. 534, 73 Am. Dec. 431; Newlin v. McAfee, 64 Ala. 357; Payne v. Wilson, 74 N. Y. 348.

[10] Woodruff v. Adair, 131 Ala. 530, 32 So. 515; New Vienna Bank v. Johnson, 47 Ohio St. 306, 24 N. E. 503, 8 L. R. A. 614.

[11] Smith v. Rainey, 9 Ariz. 362, 83 Pac. 463.

[12] Bradley v. Merrill, 89 Maine 319, 34 Atl. 160.

[13] McLaren v. Clark, 80 Ga. 423, 7 S. E. 230.

other written obligation.[14] An agreement to give a mortgage or security on certain property, not objectionable for want of consideration, is treated in equity as a mortgage, and as such, will bind the maker of it and his heirs, and persons having notice.[15] Instruments which attempt to create a legal mortgage or trust deed, and fail through some defect in their execution or form, and written contracts intended to operate as mortgages or as charges upon property, which are too informal or defective to operate at law, are generally given effect and enforced as equitable mortgages.[16] A mortgage, or trust deed, which can not be enforced by a sale under the power by a judgment of foreclosure, on account of the omission of some formality requisite to a complete mortgage or deed of trust, will nevertheless be regarded as an equitable mortgage, and the lien will be enforced by special proceedings in equity.[17] Any agreement between the parties in interest that shows an intention to create a lien may be in equity a mortgage.[18] Although a mortgage signed in blank, and afterward filled in by an agent of the grantor, is not a legally executed deed, it may, however, create an equitable lien which the courts will enforce.[19]

An assignment by the vendee of a contract for the purchase of land made as security for a debt or loan, may be regarded as an equitable mortgage.[20] Also a bond for a conveyance may be assigned by way of mortgage; and if the assignee subsequently obtains the legal title to the land by virtue of the bond, and surrenders that, he will hold the land subject to the right of his assignor to redeem.[21] Likewise the assignment of a certificate of purchase of public lands issued by the state or federal government operates as an equitable mortgage, when intended to secure a debt due from the assignor to the assignee.[22]

[14] Bradley v. Merrill, 88 Maine 319, 34 Atl. 160.

[15] Baltimore & O. R. Co. v. Berkeley &c. R. Co., 168 Fed. 770; Richardson v. Wren, 11 Ariz. 395, 95 Pac. 124, 16 L. R. A. (N. S.) 190.

[16] Wood v. Holly Mfg. Co., 100 Ala. 326, 13 So. 948, 46 Am. St. 56; Bell v. Pelt, 51 Ark. 433, 11 S. W. 684, 4 L. R. A. 247, 14 Am. St. 57; Peers v. McLaughlin, 88 Cal. 294, 26 Pac. 199, 22 Am. St. 306; Howard v. Iron &c. Co., 62 Minn. 298, 64 N. W. 896; White v. University Land Co., 49 Mo. App. 450.

[17] Dyson v. Simmons, 48 Md. 207; Sprague v. Cochran, 144 N. Y. 104, 38 N. E. 1000; Atkinson v. Miller, 34 W. Va. 115, 11 S. E. 1007, 9 L. R. A. 544.

[18] Gest v. Packwood, 39 Fed. 525; Courtner v. Etheredge, 149 Ala. 78, 43 So. 368.

[19] Fox v. Palmer, 25 N. J. Eq. 416.

[20] Andrews v. Cone, 124 U. S. 720 8 Sup. Ct. 686, 31 L. ed. 564; Heard v. Heard, 181 Ala. 230, 61 So. 343.

[21] Fenno v. Sayre, 3 Ala. 458; Lewis v. Boskins, 27 Ark. 61.

[22] Hill v. Eldred, 49 Cal. 398; Stew-

An equitable mortgage may at common law be created by deposit of the title deeds of a legal or equitable estate as security for the payment of money.[23] But this method of creation of an equitable mortgage is sometimes repudiated on the ground that it is contrary to the policy of the registration laws and in violation of the statute of frauds.[24]

§ 418. Mortgages distinguished from other transactions. —A mortgage is distinguished from other conveyances of land in that there must be a debt or an obligation to perform, which the conveyance was given to secure, and that the grantor must have an absolute right to a reconveyance of the land upon the performance of the condition specified in the deed. The debt may be either a present subsisting obligation or it may be one that is to be incurred in the future, but there must be a debt to secure or an obligation to perform.

At law, an agreement for a reconveyance, to constitute a defeasance and make the transaction a mortgage, must be executed at the same time with the conveyance and as a part of the same transaction and must be under seal; while in equity any evidence, whether it be in writing or merely parol, which clearly shows that the conveyance was in fact intended only as a security, will make the transaction a mortgage; and if there be a written agreement for reconveyance, it matters not how informal it may be when it was executed.[25] It follows, therefore, that a court of equity will often pronounce that to be an equitable mortgage which at law would be considered a conditional sale. A court of equity is not concluded by the form of the transaction, whether this seems to indicate a mortgage or conditional sale, but will have regard to the actual facts.[26] Whether a conveyance be a mortgage or a conditional sale must be determined by a consideration of the peculiar circumstances of each case.[27] While a conditional sale

art v. McLaughlin, 11 Colo. 458, 18 Pac. 619.

[23] Higgins v. Manson, 126 Cal. 467, 58 Pac. 907, 77 Am. St. 192; Hamilton Trust Co. v. Clemes, 163 N. Y. 423, 57 N. E. 614.

[24] Lehman v. Collins, 69 Ala. 127; Pierce v. Parrish, 111 Ga. 725, 37 S. E. 79; Tuller v. Leaverton, 143 Iowa 162, 121 N. W. 515, 136 Am. St. 756.

[25] Pearson v. Seay, 38 Ala. 643; Beidleman v. Koch, 42 Ind. App. 423 85 N. E. 977; Harmon v. Grant's Pass &c. Trust Co., 60 Ore. 69, 118 Pac. 188.

[26] McNamara v. Culver, 22 Kans. 661.

[27] Horbach v. Hill, 112 U. S. 144, 5 Sup. Ct. 81, 28 L. ed. 670; Pendergrass v. Burris, 77 Cal. 19, 19 Pac. 187; Heath v. Williams, 30 Ind. 495.

and a mortgage are, in form and substance, very much alike, the rights of the parties under them are very different.[28] A mortgage may be redeemed at any time before the right is cut off by foreclosure, but there can be no redemption under a conditional sale after the day appointed. This is the contract of the parties and either one of them is entitled to have it enforced according to its terms.[29] The option to purchase under a conditional sale may be a personal privilege which can not be enforced in case of the death of the obligee during the continuance of the option.[30]

§ 419. **Absolute deed as mortgage.**—At law an absolute deed and separate, absolute defeasance or agreement to reconvey, executed at the same time as security for a debt amount to a mortgage.[31] Although there has been considerable objection by the courts to separate defeasances as tending to encourage fraud, yet a deed absolute in form, intended to operate as a security, if given in good faith to secure an actual indebtedness, is not constructively fraudulent as to the grantor's other creditors.[32] Such a deed and agreement to reconvey the estate upon payment of a certain sum of money, or upon the performance of some other condition, have always been held to constitute a legal mortgage if the instruments are of the same date, or were executed and delivered at the same time and as one transaction.[33]

As between the parties themselves, the relation is the same as if the mortgage had been in the ordinary form.[34] The fact that possession of the property is given to the grantee by the contract for conveyance does not affect the character of the transaction.[35] The instrument of defeasance must be of as high character as the deed itself; and consequently a written agreement to reconvey not

[28] Flagg v. Mann, 14 Pick. (Mass.) 467.

[29] People v. Irwin, 14 Cal. 428, 18 Cal. 117; Shays v. Norton, 48 Ill. 100; Trucks v. Lindsey, 18 Iowa 504; Cornell v. Hall, 22 Mich. 377; Merritt v. Brown, 19 N. J. Eq. 286.

[30] Newton v. Newton, 11 R. I. 390, 23 Am. Rep. 476.

[31] Teal v. Walker, 111 U. S. 242, 4 Sup. Ct. 420, 28 L. ed. 415; Cosby v. Buchanan, 81 Ala. 574, 1 So. 898; Sherrer v. Harris (Ark.) 13 S. W. 730; Booth v. Hoskins, 75 Cal. 271, 17 Pac. 225; McClure v. Smith, 14 Colo. 297, 23 Pac. 786; In re Gunn's Appeal, 55 Conn. 149, 10 Atl. 498; Wylly-Gabbett Co. v. Williams, 53 Fla. 872, 42 So. 910; Mutual L. Ins. Co. v. Nicholas, 144 App. Div. 95, 128 N. Y. S. 902; Adams v. McIntyre, 22 N. Dak. 337, 133 N. W. 915.

[32] McClure v. Smith, 14 Colo. 297, 23 Pac. 786.

[33] Nugent v. Riley, 1 Metc. (Mass.) 117, 35 Am. Dec. 355; Clark v. Landon, 90 Mich. 83, 51 N. W. 357.

[34] Short v. Caldwell, 155 Mass. 57, 28 N. E. 1124.

[35] Clark v. Landon, 90 Mich. 83, 51 N. W. 357.

under seal, though made at the same time with the deed, does not, at law, constitute a mortgage.[36] If not under seal, the agreement will constitute a mortgage only in equity.[37] If the deed and defeasance do not on their face show that the transaction is a security for a debt, the instruments do not, as a matter of law, constitute a mortgage, though they may be proved to be such by extrinsic evidence.[38]

The absolute deed may secure advances to be made, and in that case the mortgage becomes effectual when the advances are made.[39] It is not material that there should be any note or bond or other written evidence of debt, nor is it material that the indebtedness should have arisen in any particular manner. It is only material that there should be a bona fide debt.[40] Whenever a debt is recognized by the parties or established by the evidence, an agreement to reconvey serves to make a mortgage of the conveyance.[41] But a debt either pre-existing or created at the time, or contracted to be created, is essential.[42] And if an absolute deed was intended as security, it is a mortgage, though the bond for reconveyance makes time the essence of the contract.[43]

No agreement or intention of the parties, whether at the time of the transaction or subsequently, can change the redeemable character of a mortgage.[44] In some states, although the mortgage is a deed absolute in form, the grantee acquires no legal title to the land. The deed is a mere security, just as a formal mortgage is in the same states.[45] But in other states, in which a formal mortgage is held to pass the legal title, a deed absolute in form intended to operate as a mortgage does not pass such title.[46]

[36] Warren v. Lovis, 53 Maine 463; Flint v. Sheldon, 13 Mass. 443, 7 Am. Dec. 162; Runlet v. Otis, 2 N. H. 167.

[37] Kelleran v. Brown, 4 Mass. 443; Phelen v. Fitzpatrick, 84 Wis. 240, 54 N. W. 614.

[38] Teal v. Walker, 111 U. S. 242, 4 Sup. Ct. 420, 28 L. ed. 415; Carroll v. Tomlinson, 192 Ill. 398, 61 N. E. 484, 85 Am. St. 344.

[39] Bull v. Coe, 77 Cal. 54, 18 Pac. 808, 11 Am. St. 235.

[40] Overstreet v. Baxter, 30 Kans. 55, 1 Pac. 825.

[41] Thomas v. Livingston, 155 Ala. 546, 46 So. 851; Wilson v. Rehm, 117 Ill. App. 473; Voss v. Eller, 109 Ind. 260, 10 N. E. 74; Henninger v. McGuire, 146 Iowa 270, 125 N. W. 180; White v. Walsh, 62 Misc. 423, 114 N. Y. S. 1015.

[42] Bridges v. Linder, 60 Iowa 190, 14 N. W. 217.

[43] Jackson v. Lynch, 129 Ill. 72, 21 N. E. 580, 22 N. E. 246; Voss v. Eller, 109 Ind. 260, 10 N. E. 74.

[44] Woods v. Wallace, 22 Pa. St. 171; Hart v. Eppstein, 71 Tex. 752, 10 S. W. 85; Wing v. Cooper, 37 Vt. 169.

[45] Smith v. Smith, 80 Cal. 323, 21 Pac. 4, 22 Pac. 186, 549.

[46] Woodward v. Jewell, 140 U. S. 247, 11 Sup. Ct. 784, 35 L. ed. 478; Thaxton v. Roberts, 66 Ga. 704.

§ 420. **Equity of redemption.**—At common law a mortgage was an absolute conveyance with the condition that, on the payment of the debt which the mortgage was given to secure, the property would be reconveyed to the mortgagor. Upon the failure of the mortgagor to pay at the specified time or to otherwise comply with the strict terms of the condition, he lost his right to the property and the mortgagee became the absolute owner thereof. The injustice of this condition, especially in those cases where the value of the property was out of proportion to the amount of the debt secured, was so apparent that courts of equity assumed jurisdiction to grant relief to the debtor. This relief was known as the equity of redemption and under it a party was permitted to pay the debt after the day specified in the condition had passed, and, upon so doing, the court would compel the mortgagee to restore the property to him. "Once a mortgage always a mortgage,"[47] early became one of the important maxims in this branch of the law and has always been strictly adhered to. Accordingly the parties can not provide that upon the happening of a specified contingency, the transaction will cease to be a mortgage and become an absolute conveyance. An agreement made at the time of giving the mortgage, cutting off the right of redemption has always been held void,[48] and a subsequent release of the right will only be upheld when it clearly appears that it was made without oppression and upon sufficient consideration.[49]

If originally taken as a mortgage, nothing but a subsequent agreement of the parties can change its character and deprive the mortgagor of his right of redemption; and even such an agreement can not change its character as to intervening interests.[50] The right of redemption can not be waived or abandoned by any stipulation of the parties made at the time, even if embodied in the mortgage.[51] The mortgagor's equity of redemption may be seized upon execution by a third person, or even by the mortgagee, upon an execution obtained upon a debt not secured by

[47] Newcomb v. Bonham, 1 Vern. 7.

[48] Quartermous v. Kennedy, 29 Ark. 544; Lee v. Evans, 8 Cal. 424.

[49] Pritchard v. Elton, 38 Conn. 434; Wilson v. Fisher, 148 N. Car. 535, 62 S. E. 622.

[50] Peagler v. Stabler, 91 Ala. 308, 9 So. 157; Haggerty v. Brower, 105 Iowa 395, 75 N. W. 321; LeComte v. Pennock, 61 Kans. 330, 59 Pac. 641; McPherson v. Hayward, 81 Maine 329, 17 Atl. 164.

[51] Peugh v. Davis, 96 U. S. 322, 24 L. ed. 775, revg. 2 McArthur (D. C.) 114; Turpie v. Lowe, 114 Ind. 37, 15 N. E. 834.

mortgage either before or after default.[52] The levy of an execution by any other creditor, or by the mortgagee upon another debt, or the sale under it, does not affect the rights of the mortgagee.[53] A purchaser of the equity of redemption at execution sale succeeds to the equitable rights of the mortgagor, and may redeem the estate just as the mortgagor could.[54] The legal estate remaining in the mortgagor, he may execute a second or subsequent mortgage thereon; but a party taking a mortgage on land pending a bill to foreclose a prior mortgage or lien, will be bound by the decree and sale thereunder the same as if made a party to the foreclosure, and will be bound to redeem from such sale within the period allowed by law. If he fails to do so his equity of redemption will be barred.[55]

§ 421. **Form of mortgage in general.**—No particular form is necessary to constitute a mortgage.[56] It must be in writing,[57] and must clearly indicate the creation of a lien, specify the debt to secure which it is given, and the property upon which it is to take effect.[58] "An instrument must be deemed and held a mortgage, whatever may be its form, if, taken alone or in connection with the surrounding facts and attendant circumstances, it appears to have been given for the purpose or with the intention of securing the payment of money, and the mere absence of terms of defeasance can not determine whether it is a mortgage or not."[59] It is not necessary that the entire mortgage be embraced in one instrument. It may consist of an absolute deed with a separate defeasance executed by the grantee; and this defeasance may even rest in parol. It differs from a warranty deed in an added condition that, if the grantor pay a certain sum of money,

[52] Bernstein v. Humes, 71 Ala. 260; Seaman v. Hax, 14 Colo. 536, 24 Pac. 461, 9 L. R. A. 341; Walters v. Defenbaugh, 90 Ill. 241.

[53] Atcheson v. Broadhead, 56 Ala. 414.

[54] Shaw v. Lindsey, 60 Ala. 344; Turner v. Watkins, 31 Ark. 429.

[55] Parsons v. Noggle, 23 Minn. 328.

[56] De Leon v. Higuera, 15 Cal. 483; Connor v. Connor, 59 Fla. 467, 52 So. 727; Burnside v. Terry, 45 Ga. 621; Baldwin v. Jenkins, 23 Miss. 206; Cagliostro v. Galgano, 69 Misc. 321, 125 N. Y. S. 523; Harris v. Jones, 83 N. Car. 317.

[57] Williams v. Davis, 154 Ala. 422, 45 So. 908; Eikelman v. Perdew, 140 Cal. 687, 74 Pac. 291; Duke v. Culpepper, 72 Ga. 842; American Sav. Bank & Trust Co. v. Helgesen, 64 Wash. 54, 116 Pac. 837, Ann. Cas. 1913A, 390n.

[58] New Orleans Nat. Bank Assn. v. Adams, 109 U. S. 211, 3 Sup. Ct. 161, 27 L. ed. 910; National Bank v. Tenn. Coal &c. R. Co., 62 Ohio St. 564, 57 N. E. 450.

[59] Connor v. Connor, 59 Fla. 467, 52 So. 727.

or perform other obligations named, then it shall be void. There may be other conditions contained in the instrument, such as the payment of interest and of taxes upon the premises, or insurance upon the buildings; but these do not change the effect of the conveyance as a mortgage. In some states statutes have been enacted providing forms for the execution of mortgages. Under these statutes the granting part of the deed, as well as the condition, differs much in different parts of the country. Under them the legal tenor and effect of the different covenants may be, and in some states are, obtained simply by naming them, without repeating the covenants themselves. In like manner the full effect of a power of sale may be had by a simple reference in the mortgage to a statutory power, instead of incumbering the record with the elaborate powers now in use. The purpose of this legislation has been to simplify the mortgage conveyance and to get away from the cumbersome forms that grew up under the common law.[60]

A deed of trust to secure a debt is in legal effect a mortgage.[61] It is a conveyance made to a person other than the creditor, conditioned to be void if the debt be paid at a certain time, but if not paid that the grantee may sell the land and apply the proceeds to the extinguishment of the debt, paying over the surplus to the grantor.[62]

§ 422. **Description of the parties.**—While it is important that the names of the parties to the mortgage should be given, accurately and fully, in the granting part of the instrument, it is not absolutely necessary. Parol evidence is admissible to show who was really intended as the mortgagee, when the name is claimed to be erroneous and there is a person of the name used in the mortgage.[63] It is not absolutely essential that the mortgagee be described by name, if there be such other description as will distinguish the person intended from all others.[64] Even a mortgage made under an assumed name by the owner of the land is valid if the identity of the mortgagor as owner is proved.[65] While

[60] For further statutory forms see Jones on Mortgages (7th ed.), § 61.

[61] Union Nat. Bank v. Bank of Kansas City, 136 U. S. 223, 10 Sup. Ct. 1013, 34 L. ed. 341.

[62] Huene v. Cribb, 9 Cal. App. 141, 98 Pac. 78.

[63] Peabody v. Brown, 10 Gray (Mass.) 45.

[64] Frederick v. Wilcox, 119 Ala. 355, 24 So. 582, 72 Am. St. 925; Richey v. Sinclair, 167 Ill. 184, 47 N. E. 364.

[65] Scanlan v. Grimmer, 71 Minn. 351, 74 N. W. 146, 70 Am. St. 326.

the mortgagor's name and description should be stated at the beginning of the instrument, it will be valid if it occurrs later in the body of the same.[66] The omission of the mortgagee's name from the granting clause will not invalidate the mortgage, if the person intended to be secured is identified by other parts of the instrument.[67] The designation of "junior" or "second" is no part of a man's name; and, although convenient and desirable for the purpose of distinguishing one party from another of the same name, it is not essential, and the person intended may be shown in some other way.[68] The description of a person by his occupation is an addition of the same character, though of less importance because the terms used to describe the occupation are so general that they are of little aid in identifying the person.

§ 423. **Description of the premises.**—An accurate description of the premises is important as affecting the value of the security, and oftentimes affecting, as well, the interest of the mortgagor and of persons holding title under him. But a description, although general and indefinite in itself, if by extrinsic evidence it can be made practically certain what property it was intended to cover, will be sufficient to sustain the lien.[69] Thus a description by reference to other deeds is sufficient.[70] A description by boundaries prevails as against the description by reference to other deeds;[71] and a description by metes and bounds prevails over a general description of the land as being "all" of a certain tract of which a person died seised.[72] If the mortgage clearly and unequivocally describes more land than is embraced in the deeds referred to, although the premises are mentioned as "the same estate" mentioned in the deeds, the conveyance is not restricted by such reference to the premises described in the deeds referred to, but will also embrace the land described by metes and bounds.[73] The lines of ascertained boundaries generally control, rather than a description of the quantity of the land, unless it appears that the averment or covenant was intended to control.[74]

[66] Frederick v. Wilcox 119 Ala. 355, 24 So. 582, 72 Am. St. 925.

[67] Richey v. Sinclair, 167 Ill. 184, 47 N. E. 364; Bay v. Posner, 78 Md. 42, 26 Atl. 1084.

[68] Kincaid v. Howe, 10 Mass. 203.

[69] Johnson v. McKay, 119 Ga. 196, 45 S. E. 992, 100 Am. St. 166.

[70] Wallace v. Furber, 62 Ind. 103.

[71] Steele v. Williams, 12 Ky. L. 770, 15 S. W. 49.

[72] Cummings v. Black, 65 Vt. 76, 25 Atl. 906.

[73] Congregational Church v. Walker, 124 Mass. 69.

[74] Maguire v. Bissell, 119 Ind. 345, 21 N. E. 326; Doyle v. Mellen, 15 R. I. 523, 8 Atl. 709.

A reference to the "same premises" may enlarge the terms of a specific description.[75] If the description of the property in the granting clause of the mortgage be inconsistent with the provisions contained in the condition the former will prevail.[76] Although, in some cases, a mortgage describing land by township and range, without stating in what county and state the land was situated, has been held void,[77] the courts will take judicial notice of government surveys and legal subdivisions, and, when the county and state are not named, will generally presume that the land is situated in the state where the parties reside.[78] A mortgage describing land as parts of different sections, without stating the township or range, has been held void.[79] But an error in the number of the range or in the omission of it will not affect the validity of the mortgage, if the property be otherwise described with such certainty as to clearly identify it.[80] A mortgage which does not name the town, county or state in which the land is situated may nevertheless be rendered certain in the description of the premises by reference to another deed, which contains a full and accurate description,[81] or to the land of the adjacent owners,[82] or by extrinsic evidence.[83]

§ 424. **Description of the debt secured or obligation to be performed.**—To constitute a mortgage there must necessarily be a debt or obligation which is the subject of security. It is not necessary, however, that there be any personal liability to pay the debt, as in the case of a mortgage for future advances, where the mortgagee agrees to rely solely on the pledge of real estate for his security.[84] Literal exactness in describing the indebtedness is not required; it is sufficient if the description be correct as far as it goes, and full enough to direct attention to the sources of correct and full information in regard to it, and the language used is not liable to deceive or mislead as to the nature or amount of it.[85] It need not be so complete as to exclude ex-

[75] Patterson v. Harlan, 124 Pa. St. 67, 16 Atl. 496.
[76] Donnan v. Intelligence Printing &c. Co., 70 Mo. 168.
[77] Murphy v. Hendricks, 57 Ind. 593.
[78] Smith v. Green, 41 Fed. 455.
[79] Boyd v. Ellis, 11 Iowa 97.
[80] White v. Hermann, 51 Ill. 243, 99 Am. Dec. 543.
[81] Robinson v. Brennan, 115 Mass. 582.
[82] Johnson v. McKay, 119 Ga. 196, 45 S. E. 992, 100 Am. St. 166.
[83] Slater v. Breese, 36 Mich. 77.
[84] Hickox v. Lowe, 10 Cal. 197; Hodgdon v. Shannon, 44 N. H. 572.
[85] O'Connor v. Nadel, 117 Ala. 595, 23 So. 532; Schierl v. Newberg, 102 Wis. 552, 78 N. W. 761.

traneous inquiry concerning the liens on the property. But it must show with reasonable certainty what is the subject-matter of the mortgage, and must define the encumbrance so that a fraudulent mortgagor may not substitute other debts and shield himself from the demands of his creditors.[86]

It is not essential that there be a note or bond or other obligation separate from the mortgage.[87] It is only necessary that there be a debt or duty to be performed, either present or to arise in the future, and that this be recited in the mortgage.[88] This need not be evidenced by any writing. The nature and amount of the indebtedness secured may be expressed in terms so general that subsequent purchasers and attaching creditors must look beyond the deed to ascertain both the existence and the amount of the debt.[89] If the amount of the debt be left blank, this, it is held, may be supplied by parol evidence.[90] All the description required to be made of the debt is a general one, which will put those interested upon inquiry.[91] The mortgage usually describes the note, stating the date, amount, the makers of it and the time when it is payable. Such description serves to identify the note.[92]

§ 425. **Covenants of a mortgage generally.**—The covenants of a mortgage are usually those of a warranty deed, and have the same effect and construction. If, however, a mortgage with covenants be given for purchase-money of land conveyed to the mortgagor by a deed having like covenants, and the mortgagor is evicted, he may recover damages in an action for breach of the covenant, and the vendor who holds the mortgage is not allowed to set up the covenants in the mortgage deed as a defense by way of rebutter, especially when he holds the plaintiff's promissory notes secured by the mortgage.[93]

The covenants of warranty in a mortgage are often of im-

[86] Cazort & McGehee Co. v. Dunbar, 91 Ark, 400, 121 S. W. 270; Pettibone v. Griswold, 4 Conn. 158, 10 Am. Dec. 106.

[87] O'Connor v. Nadel, 117 Ala. 595, 23 So. 532; Schierl v. Newberg, 102 Wis. 552, 78 N. W. 761.

[88] Knight v. Coleman, 117 Ala. 266, 22 So. 974; Stuyvesant v. Western Mtg. &c. Co., 22 Colo. 28, 43 Pac. 144.

[89] Gardner v. Cohn, 191 Ill. 553, 61 N. E. 492; Burnett v. Wright, 135 N. Y. 543, 32 N. E. 253; Keagy v. Trout, 85 Va. 390, 7 S. E. 329, 27 Cent. L. J. 407.

[90] Burnett v. Wright, 135 N. Y. 543, 32 N. E. 253.

[91] Curtis v. Flinn, 46 Ark. 70; Bouton v. Doty, 69 Conn. 531, 37 Atl. 1064.

[92] Webb v. Stone, 24 N. H. 282.

[93] Hubbard v. Norton, 10 Conn. 422; Smith v. Cannell, 32 Maine 123.

portance where the mortgagor has no title, or an imperfect one at the time of making the mortgage, but afterward acquired one; they then operate by way of estoppel or rebutter, so that the after-acquired title inures to the benefit of the holder of the mortgage. Except in this way the ordinary covenants are of little use in a mortgage, because the damages for a breach of them would only entitle the holder of the mortgage to recover the amount due him on the mortgage, and this he can more readily recover by suit for the mortgage debt upon the note or bond, or upon the covenant for the payment of it sometimes contained in the mortgage.[94] A mortgage may, however, contain covenants which do not cease to exist upon its discharge. Thus, where a mortgage securing a debt payable in five years contained covenants by the mortgagor with the grantee and his heirs and assigns that no building nor part of a building should be erected upon the granted premises for five years from the date of the mortgage, and that no building nor part of a building erected thereafter upon the granted premises should be more than two stories in height, and that these covenants should be binding upon and available to heirs and assigns and run with the land for the benefit of the adjoining land of the grantee, and in the condition it is further provided that, upon payment and other performance by the grantor the deed, with the exception of the covenants above recited, should be void; an intention is clearly manifested that the operation of the covenants should not cease with the discharge of the mortgage, and the covenant that the land should not be used for buildings of over a certain height is in effect the grant of an easement in favor of the adjoining premises the violation of which may be restrained.[95]

§ 426. **Special covenants and conditions.**—It is not essential that the mortgage contain a covenant to pay the debt.[96] The debt is usually referred to in the condition and there merely by way of recital of the event upon which the deed is to be void. But unless expressly forbidden by statute, an express covenant in the mortgage to pay the debt enables the mortgagee to maintain an action upon the debt aside from his remedy by foreclosure

[94] Todd v. Johnson, 51 Iowa 192, 1 N. W. 498.

[95] Brown v. O'Brien, 168 Mass. 484, 47 N. E. 195.

[96] Evans v. Holman, 244 Ill. 596, 91 N. E. 723.

suit.[97] It is competent for the parties to so provide that the continuance of the loan shall depend upon the promptness of the borrower's paying the interest, or the instalments of principal.[98] The rate and time of payment of interest should be accurately stated in the mortgage; but where the rate is not definitely stated the debt will bear interest at the rate fixed by law at the place of performance.[99]

It is competent, also, for the parties to provide that upon a default of the mortgagor in the payment of the taxes assessed upon the premises the whole mortgage debt shall become due.[1] Sometimes the mortgage provides that such taxes, when paid by the mortgagee, shall became a part of the mortgage debt; but without such provision, the amount so paid in fact becomes a lien under the mortgage.[2] A stipulation in the mortgage that upon a failure to pay the taxes levied upon the premises, the principal debt shall become immediately due and payable, is valid.[3] The covenant to pay taxes, being part and parcel of the mortgage, expires with it.[4]

The mortgage usually contains a condition that the mortgagor shall keep the buildings upon the premises insured against loss for the benefit of the mortgagee, as the latter may direct, and a breach of this condition is as effectual in giving the mortgagee a right to enforce his mortgage as is a breach of the condition to pay an instalment of interest or principal or the whole principal debt.[5] In most jurisdictions a promise by a mortgagor to pay a stipulated attorney's fee in case of foreclosure is valid, when the sum stipulated for is reasonable and not unjust or oppressive.[6] Where the laws authorize an attorney's fee it becomes a part of the mortgage debt on default though stipulated for in the note alone and not in the mortgage.[7]

Provision is sometimes inserted that upon making certain pay-

[97] Newbury v. Rutter, 38 Iowa 179.

[98] Whitcher v. Webb, 44 Cal. 127; Cassidy v. Caton, 47 Iowa 22; National Ins. Co. v. Butler, 61 Nebr. 449, 85 N. W. 437, 87 Am. St. 462.

[99] Hayes v. Southern Home Bldg. &c. Assn., 124 Ala. 663, 26 So. 527, 82 Am. St. 216.

[1] Smalley v. Renken, 85 Iowa 612, 52 N. W. 507; Hockett v. Burns, 90 Nebr. 1, 132 N. W. 718.

[2] Sharp v. Barker, 11 Kans. 381; Green v. Grant, 134 Mich. 462, 96 N. W. 583.

[3] Stanclift v. Norton, 11 Kans. 218.

[4] Hitchcock v. Merrick, 18 Wis. 375.

[5] Mix v. Hotchkiss, 14 Conn. 32; Uedelhofen v. Mason, 201 Ill. 465, 66 N. E. 364; Barthell v. Syverson, 54 Iowa 160, 6 N. W. 178.

[6] Burns v. Scoggin, 16 Fed. 734, 9 Sawy. (U. S.) 73; Bailey v. Butler, 138 Ala. 153, 35 So. 111; Hovey v. Edmison, 3 Dak. 449, 22 N. W. 594.

[7] Bailey v. Butler, 138 Ala. 153, 35 So. 111.

ments the mortgagor shall be entitled to have certain portions of the mortgaged premises released from the operation of the mortgage;[8] or that the mortgagor may pay the whole or a part of the debt, at his option, before the time fixed for the payment of it.[9] But a provision for the release of a portion of the land on the payment of stated amounts must correctly describe the portions to be released.[10]

Modern mortgages almost universally contain the provision that, until default in the performance of the condition of the deed, the mortgagor may hold possession of the premises. The mortgage should be examined carefully by the abstracter and all conditions essentially a part of the contract, or which are apt to result in a foreclosure before the expressed maturity of the debt, should be set out in the abstract, and carefully noted by the attorney in his examination.

§ 427. Estoppel of mortgagor subsequently acquiring title.—If one having no title to land conveys it by a duly recorded mortgage with covenants of warranty, and afterward the mortgagor acquires title to the land, the estoppel by which he is bound under the covenants is turned into a good estate in the mortgagee, so that by operation of law the title is considered as vested in him in the same manner as if it had been conveyed to the mortgagor before he executed the mortgage. The mortgagor is estopped to say he was not then seised. Then if the mortgagor executes another mortgage, and this and the deed by which the mortgagor acquired his title are both recorded together, which mortgagee has the better title? The estoppel binds not only the mortgagor and his heirs, but his assigns as well. A second mortgagee is therefore estopped to aver that the grantor was not seised at the time of his making the first mortgage, and that mortgage being first recorded must have priority.[11] But if a mortgagor has title at the time of executing two mortgages, the fact that one contains covenants of warranty does not give it priority over the other which contains no such covenants, if the

[8] Ontario Land & Imp. Co. v. Bedford, 90 Cal. 181, 27 Pac. 39.

[9] Stalworth v. Blum, 41 Ala. 319.

[10] McCormick v. Parsons, 195 Mo. 91, 92 S. W. 1162.

[11] Christy v. Dana, 34 Cal. 548, 42 Cal. 174; Salisbury Sav. Soc. v. Cutting, 50 Conn. 113; Yerkes v. Hadley, 5 Dak. 324, 40 N. W. 340, 2 L. R. A. 363; Boone v. Armstrong, 87 Ind. 168; Newell v. Burnside Banking Co. (Ky. App.) 118 S. W. 267.

latter be first filed for record.[12] Where the mortgagor was part owner of the mortgaged premises at the time of giving the mortgage, it was held that the mortgage, though containing a general warranty, conveyed only the interest which the mortgagor had in the land at the time of the execution of the mortgage, and did not pass an interest subsequently acquired by will.[13] Where the mortgagor was in possession at the date of the mortgage, under a parol contract of sale, the record of the mortgage was held effective though the mortgagor had not yet acquired title, and the holder of a subsequent mortgage was bound thereby.[14] And, where a homestead entrywoman mortgaged her property before obtaining her patent, the recording of the mortgage prior to final proof was held constructive notice, the same as though the mortgage had been executed and recorded after patent.[15] A quitclaim deed or other deed without warranty does not have the effect of estopping the grantor from setting up a superior right and title subsequently acquired from another source.[16] A grantee under a quitclaim deed is not a bona fide purchaser under the recording acts, and his rights are subordinate to a prior unrecorded mortgage.[17]

§ 428. **Merger as applied to mortgages.**—It is a general rule that when the legal title to land becomes united with the equitable title, so that the owner has the whole title, the mortgage is merged by the unity of possession. But if the owner has an interest in keeping these titles distinct, or if there be an intervening right between the mortgage and the equity, there is no merger.[18] To effect a merger at law, the right previously held, and the right subsequently acquired, must coalesce in the same person and in the same right without any other right intervening.[19] An intervening encumbrance or equity of any kind is generally sufficient

[12] Vandercook v. Baker, 48 Iowa 199.

[13] Newell v. Burnside Banking Co. (Ky. App.) 118 S. W. 267.

[14] Crane v. Turner, 7 Hun (N. Y.) 357, aff'd, 67 N. Y. 437.

[15] Adam v. McClintock, 21 N. Dak. 483, 131 N. W. 394.

[16] Smith v. Pollard, 19 Vt. 272.

[17] Snow v. Lake, 20 Fla. 656, 51 Am. Rep. 625.

[18] Aetna Life Ins. Co. v. Corn, 89 Ill. 170; Bunch v. Grave, 111 Ind. 351, 12 N. E. 514; Truman v. Truman, 79 Iowa 506, 44 N. W. 721; Wilson v. Vanstone, 112 Mo. 315, 20 S. W. 612; Salvage v. Haydock, 68 N. H. 484, 44 Atl. 696; Lynch v. Pfeiffer, 110 N. Y. 33, 17 N. E. 402; Crane v. Aultman-Taylor Co., 61 Wis. 110, 20 N. W. 673.

[19] Hunt v. Hunt, 14 Pick. (Mass.) 374, 384, 25 Am. Dec. 400; Lime Rock Nat. Bank v. Mowry, 66 N. H. 598, 22 Atl. 555, 13 L. R. A. 294.

to prevent a merger of a mortgage with the equity of redemption, provided the encumbrance be not one which the owner has assumed to pay, or one against which he is estopped from defending whether such encumbrance be an attachment,[20] a levy of execution,[21] another mortgage,[22] a life interest reserved to the assignor,[23] or any other lien or equity.[24] No merger occurs when the mortgagee purchases the equity of redemption at an execution sale, so long as the debtor's right to redeem from such sale continues.[25] An assignment of a mortgage to one of two tenants in common of the equity of redemption does not discharge it.[26] Where one who has purchased part of the premises subject to a mortgage takes an assignment of the mortgage, although it may operate as a merger in respect to the part of the premises bought by him, it will not have this operation in respect to the part not bought.[27] Nor is there any merger when a mortgagee becomes a devisee of an undivided half of the premises.[28]

If the assignee of an undivided interest in a mortgage purchases the equity of redemption, assuming the mortgage, his interest under the mortgage is merged in the title acquired by purchase, and he becomes the debtor to the other part-owner of the mortgage for the amount due him, and the whole property may be sold on foreclosure for the payment of such other part of the debt.[29] The assignment of a mortgage to the wife of the mortgagor operated at common law as a discharge of it. But under the statutes now in force in all or nearly all our states, authorizing married women to buy and sell real estate, such an assignment would not operate as a discharge or merger. The marriage of a single woman, who holds a mortgage, with the mortgagor, does not extinguish the mortgage lien or debt, under the statutes in regard to the rights of married women in their separate property now generally in force.[30] Neither does the execution by the husband and wife, after marriage, of a mortgage upon the same

[20] Scrivner v. Dietz, 84 Cal. 295, 24 Pac. 171.
[21] Denzler v. O'Keefe, 34 N. J. Eq. 361.
[22] Dutton v. Ives, 5 Mich. 515; Hooper v. Henry, 31 Minn. 264, 17 N. W. 476.
[23] Cox v. Ledward, 124 Pa. St. 435, 16 Atl. 826.
[24] Bunch v. Grave, 111 Ind. 351.
[25] Southworth v. Scofield, 51 N. Y. 513.
[26] Barker v. Flood, 103 Mass. 474.
[27] Wilhelmi v. Leonard, 13 Iowa 330.
[28] Sahler v. Signer, 44 Barb. (N. Y.) 606.
[29] Ehrman v. Alabama Mineral Land Co., 109 Ala. 478, 20 So. 112.
[30] Power v. Lester, 23 N. Y. 527.

premises to a third person, discharge the lien of the wife's mortgage against her husband, if she uses no words of release to operate upon her mortgage, and it is apparent from the instrument that she joined merely to release her inchoate right of dower.[31] In case the equitable estate has been in any way extinguished, the doctrine of merger has no application.[32]

The question, whether there is a merger in a particular case, depends not so much upon the kind or form of instrument by which one estate is transferred to the holder of the other as upon the intention of the parties, and if the intention be declared in such instrument it may control the construction of its effect.[33] If at the time the mortgagee received a conveyance of the equity of redemption, the parties to such conveyance expressly stipulate that there shall be no merger, such stipulation will usually prevent a merger.[34]

In view of the fact that the record does not import notice of merger, or of any other fact depending alone on the intention of the parties, a thorough investigation should always be made by counsel whenever it is apparent that a merger has taken place. When there is no evidence of the intention of the owner in uniting the legal and equitable estates in himself, it is proper to presume that he intended that effect which is the most beneficial to himself.[35]

§ 429. **Payment or discharge of mortgage.**—At common law, payment or tender of payment at the time mentioned in the condition of the mortgage wholly discharges the encumbrance. Payment before the day named in the condition, equally with payment at the day, saves the breach of the condition and defeats the estate;[36] and the title to the mortgaged premises revests in the mortgagor without a reconveyance.[37] In such case no written release is needed except as evidence of the facts, and to remove the apparent encumbrance from the records.

[31] Gillig v. Maass, 28 N. Y. 191.

[32] Hill v. Pixley, 63 Barb. (N. Y.) 200.

[33] Weston v. Livezey, 45 Colo. 142, 100 Pac. 404; Oak Creek Valley Bank v. Helmer, 59 Nebr. 176, 80 N. W. 891.

[34] Cullum v. Emanuel, 1 Ala. 23, 34 Am. Dec. 757; Neff v. Elder, 84 Ark. 277, 105 S. W. 260, 120 Am. St. 67.

[35] Factors' & Traders' Ins. Co. v. Murphy, 111 U. S. 738, 4 Sup. Ct. 679, 28 L. ed. 582.

[36] Flye v. Berry, 181 Mass. 442, 63 N. E. 1071.

[37] Barrett v. Hinkley, 124 Ill. 32, 14 N. E. 863, 7 Am. St. 331; Stevenson v. Polk, 71 Iowa 278, 32 N. W. 340.

When the mortgage debt is due, if a tender of the sum secured be made and refused, the mortgagor may re-enter and the land is freed from the condition, though the tender be not kept good; the debt, however, is not discharged, but may be recovered by action.[38]

Neither party to the mortgage can enforce payment before the day on which the debt falls due;[39] but if the mortgagee accepts such payment, it will operate to extinguish the lien. At common law, payment after the breach of condition and forfeiture does not divest the title of the mortgagee,[40] and in case of the mortgagee's failure or refusal to reconvey, the mortgagor may compel reconveyance by a suit in equity.[41] Under our modern lien theory, however, payment at any time before foreclosure will discharge the mortgage, and the title revests in the mortgagor without a reconveyance.[42]

The possession of the mortgage note or bond by the mortgagor or those claiming under him raises a presumption, in the absence of all other proof, that it has been paid. This presumption is one of fact and not of law, and may be rebutted by evidence accounting for the mortgagor's possession of the note without having paid it,[43] or in any way rebutting the inference of payment.[44] The purchase of a mortgage and note secured thereby by one who has bought the land and assumed the payment of the mortgage operates as payment.[45] Payment is also presumed from lapse of time; as where the mortgagor has remained in possession without making any payment of either principal or interest, or doing any other act in recognition of the mortgage debt for a period of twenty years or more, or whatever may be the statutory period of limitation.[46] Such presumption is not conclusive, and

[38] Security State Bank v. Waterloo Lodge, 85 Nebr. 255, 122 N. W. 992.

[39] Bowen v. Julius, 141 Ind. 310, 40 N. E. 700; Gordon v. Ware Savings Bank, 115 Mass. 588; Armstrong v. Wilson (Tex. Civ. App.) 109 S. W. 955.

[40] Perre v. Castro, 14 Cal. 519, 76 Am. Dec. 444; Munson v. Munson, 30 Conn. 425.

[41] Doton v. Russell, 17 Conn. 146; Currier v. Gale, 9 Allen (Mass.) 522.

[42] Willemin v. Dunn, 93 Ill. 511; Kortright v. Cady, 21 N. Y. 343, 78 Am. Dec. 145.

[43] Martin v. Walker, 102 Ga. 72, 29 S. E. 132; Flower v. Elwood, 66 Ill. 438; Shipley v. Fox, 69 Md. 572, 16 Atl. 275.

[44] Anderson v. Culver, 63 Hun 633, 6 N. Y. S. 181, 25 N. Y. St. 314, 2 Silvernail 1; Mynes v. Mynes, 47 W. Va. 681, 35 S. E. 935.

[45] Northwestern Nat. Bank v. Stone, 97 Iowa 183, 66 N. W. 91.

[46] Chick v. Rollins, 44 Maine 104; Anthony v. Anthony, 161 Mass. 343, 37 N. E. 386.

circumstances may be shown sufficiently strong to repel the presumption.[47] No presumption of payment, however, can arise from lapse of time when the mortgagee or his assignee is in possession.[48] As a general rule, when the mortgage or the accompanying security does not appoint any place at which the principal or interest is to be paid, the debtor is bound to seek the creditor to make his payments.[49] The indorsement on a mortgage and its surrender to the mortgagor is held to be nothing more than a receipt in full of the mortgage debt, which, as between the original parties, is not conclusive evidence of payment.[50]

The rule is well settled, that when the mortgagor becomes executor or administrator of the mortgagee's estate, the debt itself is not extinguished or released without actual payment, but the right of action is discharged or suspended because the executor or administrator can not maintain an action against himself, and because of this impossibility of action such indebtedness should be regarded as prima facie assets in the hands of such executor or administrator.[51]

No change in the form of indebtedness or in the mode or time of payment will discharge the mortgage. Nothing short of actual payment of the debt, or an express release, will operate to discharge the mortgage.[52] A new note is not a discharge as against a subsequent purchaser, unless it is so as to the mortgagor.[53]

§ 430. **Purchase-money mortgages.**—A mortgage given at the time of the purchase of real estate, to secure the payment of purchase-money, or the balance thereof, has preference over all judgments, mortgages, liens and other debts of the mortgagor, to the extent of the land purchased, and it is for this reason that they should be so designated in the abstract. It has been said that the lien of a purchase-money mortgage is entitled to the highest consideration in a court of equity.[54] If a mortgage is in

[47] Hughes v. Edwards, 9 Wheat. (U. S.) 489, 6 L. ed. 142.

[48] Brobst v. Brock, 10 Wall. (U. S.) 519, 19 L. ed. 1002.

[49] Smith v. Smith, 25 Wend. (N. Y.) 405.

[50] Montague v. Priester, 82 S. Car. 492, 64 S. E. 393.

[51] Stewart v. Hurd, 107 Maine 457, 78 Atl. 838, 32 L. R. A. (N. S.) 671, Ann. Cas. 1912D, 662n.

[52] Kieser v. Baldwin, 62 Ala. 526; Greist v. Gowdy, 81 Conn. 351, 71 Atl. 555; Brockway v. McClun, 243 Ill. 196, 90 N. E. 374; Gribben v. Clement, 141 Iowa 144, 119 N. W. 596, 133 Am. St. 164.

[53] Reid v. Abernethy, 77 Iowa 438, 42 N. W. 364.

[54] Brace v. Superior Land Co., 65 Wash. 681, 118 Pac. 910.

fact given for purchase-money, the fact need not be recited or appear on its face, to give it priority,[55] and in such case the fact that the mortgage is for purchase-money need not be stated in the abstract unless it be known to the abstracter.

The purchase-money mortgage executed and recorded contemporaneously with a title deed has preference over a prior mortgage given by the purchaser to a creditor and recorded before the title deed, since the purchaser had no title when he executed the first mortgage.[56] A purchase-money mortgage is good and effectual against the wife of the mortgagor, without her joining in the execution of it. The seisin of the husband is instantaneous only; and it is a well settled rule that in such case no estate or interest can intervene.[57] The rules giving preference to a purchase-money mortgage and holding it effectual against the wife of the mortgagor, apply even where the mortgage is made to a third person,[58] who as part of the same transaction advances the purchase-money; but one advancing money is not entitled to be subrogated to the rights of the vendor, where this would result in defeating the vendor's lien or mortgage for the unpaid purchase-money.[59]

§ 431. **Mortgages of the homestead.**—While a mortgage of the homestead is valid if duly executed the law regards such transactions with jealous care. In some states, however, a mortgage of a homestead is prohibited altogether.[60] In some states homesteads may be mortgaged for specific purposes only, such as, for instance, to secure payment of money loaned for improvements on the land.[61] In a majority of the states permitting mortgages of homesteads such mortgages are effectual only when there has been a special release and waiver of the homestead right;[62] while in all the states, the free and voluntary assent of

[55] Commonwealth Title Ins. & Trust Co. v. Ellis, 192 Pa. St. 321, 43 Atl. 1034, 73 Am. St. 816.

[56] Hinton v. Hicks, 156 N. Car. 24, 71 S. E. 1086.

[57] Jones v. Davis, 121 Ala. 348, 25 So. 789; Birnie v. Main, 29 Ark. 591; Frederick v. Emig, 186 Ill. 319, 57 N. E. 883, 78 Am. St. 283; Walters v. Walters, 73 Ind. 425.

[58] Protestant Episcopal Church v. E. E. Lowe Co., 131 Ga. 666, 63 S. E. 136, 127 Am. St. 243.

[59] Brower v. Witmeyer, 121 Ind. 83, 22 N. E. 975.

[60] Planters' Loan & Sav. Bank v. Dickinson, 83 Ga. 711, 10 S. E. 446; Van Wickle v. Landry, 29 La. Ann. 330; Texas Land & Loan Co. v. Blalock, 76 Tex. 85, 13 S. W. 12.

[61] Hicks v. Texas Loan & Investment Co., 51 Tex. Civ. App. 298, 111 S. W. 784.

[62] Balkum v. Wood, 58 Ala. 642; Browning v. Harriss, 99 Ill. 456.

the mortgagor's wife, if he be a married man, is a condition precedent to the vesting of the lien.[63] But a husband may execute a valid mortgage upon a community homestead in his own name and as his wife's attorney in fact, she giving him a general power of attorney to convey or otherwise dispose of their community property.[64] If the statute provides that the homestead release shall be made by the joint deed of the husband and wife, a deed or mortgage made by the husband alone is void, and it does not become valid by reason that the homestead is afterward abandoned.[65] Also if the statute provides that the wife shall acknowledge her deed releasing her homestead rights, a mortgage without her acknowledgment creates no lien upon the homestead.[66] The mere signature of a married woman to a mortgage by her husband is no evidence of a release or waiver by either him or her of the homestead exemption unless it is affirmatively and substantially stated in the body of the instrument that she is a party to and unites in the conveyance.[67] A mortgage given to secure the purchase-price of a homestead need be signed only by the person taking title to the homestead.[68] In all cases where an express waiver of the homestead is required, the mortgage should recite the fact of waiver, and in the absence of such recital the abstract should contain a statement that no such waiver appears in the mortgage. This the abstractor need not do, however, when the mortgage is for unpaid purchase-money. All mortgages executed by the husband only, as well as those executed jointly by husband and wife, but unaccompanied by a release or waiver of the homestead, is sufficient to give rise to an inquiry in pais, unless the mortgage is for purchase-money.

§ 432. Mortgages of after-acquired property.—At common law, nothing can be mortgaged that does not belong to the mortgagor at the time the mortgage is made.[69] Therefore at law, although a mortgage in terms is made to cover after-acquired property, yet, after such property is acquired, an execution levied

[63] Long v. Mostyn, 65 Ala. 543; Anderson v. Culbert, 55 Iowa 233, 7 N. W. 508; Justice v. Souder, 19 N. Dak. 613, 125 N. W. 1029.

[64] Oregon Mtg. Co. v. Hersner, 14 Wash. 515, 45 Pac. 40.

[65] Gleason v. Spray, 81 Cal. 217, 22 Pac. 551, 15 Am. St. 47.

[66] Park v. Park, 71 Ark. 283, 73 S. W. 993; Montana Nat. Bank v. Schmidt, 6 Mont. 609, 13 Pac. 382.

[67] Hawkins v. Pugh, 91 Ky. 522, 13 Ky. L. 104, 16 S. W. 277.

[68] Jarvis v. Armstrong, 94 Miss. 145, 48 So. 1; Prout v. Burke, 51 Nebr. 24, 70 N. W. 512.

[69] Moody v. Wright, 13 Metc. (Mass.) 17, 46 Am. Dec. 706.

upon it as the property of the mortgagor or a sale by him will prevail over the mortgage.[70] Equity, however, will give effect to a mortgage embracing future acquired realty,[71] and will enforce it against the mortgagor and all other persons except purchasers for value and without notice.[72] A conveyance of what does not exist does not operate as a present transfer in equity any more than it does in law. The difference is merely that at law the conveyance, having nothing to operate upon, is void; while in equity, what is in form a conveyance operates, by way of present contract, to take effect and attach to the subject of it as soon as it comes into being; the agreement to convey then ripens into an actual transfer.[73] Courts of equity hold such conveyances operative as executory agreements binding on the property when acquired; the mortgagor holding the property and equity enforcing the trust, and in some of the decisions the adjudications rest upon the ground of equitable lien.[74]

Equity considers as done that which the mortgagor distinctly agreed to do, and is in consequence bound to do. Upon every acquisition of property within the description contained in the mortgage, a decree might be obtained that the mortgagor should execute a mortgage of such property; but instead of actually following out this process, equity treats the mortgage as already attaching to the newly acquired property as it comes into the mortgagor's possession, or, in other words, considers that, of every particle of property as acquired, there was an actual mortgage then executed in fulfillment of the mortgagor's contract.[75]

The mortgage lien upon after-acquired property only attaches from the time of the acquisition thereof by the mortgagor, and is subject to all pre-existing liens.[76] After-acquired land not within the terms of the mortgage is not covered by it.[77] The mortgage is subject to any liens there may be upon the property when ac-

[70] Looker v. Peckwell, 38 N. J. L. 253.

[71] Hickson Lumber Co. v. Gay Lumber Co., 150 N. Car. 281, 63 S. E. 1048.

[72] Toledo D. & B. R. Co. v. Hamilton, 134 U. S. 296, 10 Sup. Ct. 546, 33 L. ed. 905.

[73] Mitchell v. Winslow, 2 Story (U. S.) 630, Fed. Cas. No. 9673; Rust v. Electric Lighting Co., 124 Ala. 202, 27 So. 263.

[74] National Shoe & Leather Bank v. Small, 7 Fed. 837.

[75] Semple v. Scarborough, 44 La. Ann. 257, 10 So. 860.

[76] Brady v. Johnson, 75 Md. 445, 26 Atl. 49, 20 L. R. A. 737; Monmouth County Electric Co. v. McKenna, 68 N. J. Eq. 160, 60 Atl. 32.

[77] Wheeler v. Aycock, 109 Ala. 146, 19 So. 497.

quired by the mortgagor. The mortgage attaches to the property in the condition in which it comes into the mortgagor's hands. If it be at that time subject to mortgages or other liens, the general mortgage does not displace them, though they may be junior to it in point of time.[78]

§ 433. Record of mortgages.—The record of a deed or mortgage is constructive notice to all purchasers and mortgagees in the line of title.[79] As to them the instrument takes effect, not because of its prior execution, but by reason of its prior record. Subsequent purchasers are bound conclusively by the record of the deed, or other conveyance in the line of their title, as much as the purchaser himself.[80] It is notice only to subsequent purchasers and incumbrancers under the same grantor, or through one who is the common source of title in the line of title to which the recorded deed belongs.[81] Of course the record of the mortgage operates as notice to persons subsequently acquiring title to the mortgaged premises from the mortgagor,[82] and, so long as the mortgage remains unsatisfied, the record protects not only the rights of the mortgagee, but those of the assignee of the mortgage as well.[83] A mortgage by a stranger to the record title is not constructive notice to an intending purchaser of a prior unrecorded deed to the purchaser, nor is the fact that the property is assigned to another than the record owner such notice.[84] When a mortgage is recorded prior to another conveyance from the mortgagor, it does not matter that this conveyance was made in pursuance of contract entered into without the execution of the mortgage, and before the record of it, if nothing had been done toward carrying the contract into execution at the time of filing the mortgage for record.[85] A mortgage duly recorded is notice

[78] Bear Lake & River Waterworks & Irr. Co. v. Garland, 164 U. S. 1, 17 Sup. Ct. 7, 41 L. ed. 327.

[79] In re Vigilancia, 68 Fed. 781; Kent v. Williams, 146 Cal. 3, 98 Pac. 527; Smith v. Russell, 20 Colo. 554, 80 Pac. 474; Beach v. Osborne, 74 Conn. 405, 50 Atl. 1019, 1118; Havighorst v. Bowen, 214 Ill. 90, 73 N. E. 402; Schmidt v. Zahrndt, 148 Ind. 447, 47 N. E. 335; Wilson v. Godfrey, 145 Iowa 696, 124 N. W. 875; Banton v. Shorey, 77 Maine 48; Campbell v. Keys, 130 Mich. 127, 89 N. W. 720; Robley v. Withers, 95 Miss. 318, 51 So. 719.

[80] North v. Knowlton, 23 Fed. 163.

[81] Hager v. Spect, 52 Cal. 579; Kerfoot v. Cronin, 105 Ill. 609; Baker v. Griffin, 50 Miss. 158.

[82] Commercial Bank v. Prichard, 126 Cal. 600, 59 Pac. 130.

[83] Curtis v. Moore, 152 N. Y. 159, 46 N. E. 168, 57 Am. St. 506.

[84] Advance Thresher Co. v. Esteb, 41 Ore. 469, 69 Pac. 447.

[85] Kyle v. Thompson, 11 Ohio St. 616.

not only of the existence of the mortgage but of all its contents so far as these fall within the line of the chain of title.[86] It is notice, too, of the covenants contained in it,[87] of the debt which it secures,[88] and all easements and privileges created thereby, or referred to in the mortgage.[89] Although the debt or the property be not fully described, the record is notice of all that is said about it, and a purchaser is bound by the statement made, and by the information he has or may upon inquiry find out.[90] It is notice of the statements in it regarding the deed, whether the description be fully carried out or consists of references to other instruments.[91] It is notice of a prior unrecorded mortgage referred to in the covenant against incumbrances.[92] The record imparts notice of all the facts which could have been ascertained from a casual examination thereof, including not only those recited in the record,[93] but also material matters suggested thereby which might be disclosed by reasonable inquiry.[94] But constructive notice from the record of the mortgage can not be more extensive than the facts stated therein, and only embraces information which could have been obtained from an actual inspection of the record.[95] The record of the mortgage containing a power of sale puts subsequent purchasers upon inquiry whether any proceedings had been had thereunder; so that if there has been a sale under the power, although the deed has not been recorded, a subsequent purchaser from the mortgagor, instead of acquiring an equity of redemption may find that this has been cut off by sale under the power.[96]

§ 434. **Possession as notice.**—Possession by one who is not the owner of record is a fact which should induce one in proposing to purchase or take a mortgage to inquire whether the possession is founded on any right or title. It is notice of the rights of the occupant, whatever they may be; and if he claim by deed

[86] Beach v. Osborne, 74 Conn. 405, 50 Atl. 1019, 1118; Matt v. Matt, 156 Iowa 503, 137 N. W. 489.

[87] Morris v. Wadsworth, 17 Wend. (N. Y.) 103.

[88] Whitney v. Lowe, 59 Nebr. 87, 80 N. W. 266.

[89] Bellas v. Lloyds, 2 Watts (Pa.) 401.

[90] Bright v. Buckman, 39 Fed. 243.

[91] Dimon v. Dunn, 15 N. Y. 498.

[92] Taylor v. Mitchell, 58 Kans. 94, 48 Pac. 859.

[93] Weldon v. Tollman, 67 Fed. 986.

[94] Mattlage v. Mulherin, 106 Ga. 834, 32 N. E. 940; Loser v. Plainfield Sav. Bank, 149 Iowa 672, 128 N. W. 1101, 31 L. R. A. (N. S.) 1112.

[95] Smith v. Lowry, 113 Ind. 37, 15 N. E. 17.

[96] Dixie Grain Co. v. Quinn, 181 Ala. 208, 61 So. 886.

his possession is regarded by most authorities as equivalent to the recording of such deed.[97] Thus, possession by a person other than the mortgagor, at the time of the execution of a mortgage, is sufficient to put the mortgagee upon inquiry as to the rights of the person in possession, and he takes the mortgage subject to such rights.[98] Possession by a vendee under a contract of purchase, whether it be personal or by a tenant, is constructive notice of his equitable rights as purchaser, and any one taking a mortgage under such circumstances from his vendor takes subject to his rights.[99] The mortgage lien in such case covers the property only to the extent of the unpaid purchase-money.[1] Possession does not amount to constructive notice of the nature and extent of the rights of the person in possession; but puts the purchaser or mortgagee upon inquiry as to such rights. He is bound to pursue the inquiry with diligence, and to ascertain what those rights are.[2]

Inquiries should be made, in the first instance, of the person in actual possession; and the mortgagee is chargeable with notice of

[97] Kirby v. Tallmadge, 160 U. S. 379, 16 Sup. Ct. 349, 40 L. ed. 463; Gamble v. Black Warrior Coal Co., 172 Ala. 669, 55 So. 190; Campbell v. Southwestern Tel. &c. Co., 108 Ark. 569, 158 S. W. 1085; Beattie v. Crewdson, 124 Cal. 577, 57 Pac. 463; Davis v. Pursel, 55 Colo. 287, 134 Pac. 107; Harral v. Leverty, 50 Conn. 46, 47 Am. Rep. 608; Tate v. Pensacola &c. Land &c. Co., 37 Fla. 439, 20 So. 542, 53 Am. St. 251; Garbutt v. Mayo, 128 Ga. 269, 57 S. E. 495, 13 L. R. A. (N. S.) 58n; Merchants' & Farmers' State Bank of Sullivan v. Dawdy, 230 Ill. 199, 82 N. E. 606; Adams v. Betz, 167 Ind. 161, 78 N. E. 649; Sanders v. Sutlive, 163 Iowa 172, 143 N. W. 492; Penrose v. Cooper, 86 Kans. 597, 121 Pac. 1103; Bryant v. Main, 25 Ky. L. 1242, 77 S. W. 680; Duval v. Wilmer, 88 Md. 66, 41 Atl. 122; Torpin v. Peabody, 162 Mass. 473, 39 N. E. 280; Holden v. Butler, 173 Mich. 116, 38 N. W. 1071; Niles v. Cooper, 98 Minn. 39, 107 N. W. 744, 13 L. R. A. (N. S.) 49n; Bolton v. Roebuck, 77 Miss. 710, 27 So. 630; Squires v. Kimball, 208 Mo. 110, 106 S. W. 502; McParland v. Peters, 87 Nebr. 829, 128 N. W. 523; Stillings v. Stillings, 67 N. H. 584, 42 Atl. 271; Wood v. Price, 79 N. J. Eq. 620, 81 Atl. 983, 38 L. R. A. (N. S.) 772, Ann. Cas. 1913A, 1210n; Carthage Tissue Paper Mills v. Carthage, 200 N. Y. 1, 93 N. E. 60; Lee v. Giles, 161 N. Car. 541, 77 S. E. 852; O'Toole v. Omlie, 8 N. Dak. 444, 79 N. W. 849; Brown v. Trent, 36 Okla. 239, 128 Pac. 895; Randall v. Lingwall, 43 Ore. 383, 73 Pac. 1; Wertheimer v. Thomas, 168 Pa. St. 168, 31 Atl. 1096, 47 Am. St. 882; Harris v. Arnold, 1 R. I. 125; Folk v. Brooks, 91 S. Car. 7, 74 S. E. 46; Phillis v. Gross, 32 S. Dak. 438, 143 N. W. 373; Kuteman v. Carroll (Tex.) 80 S. W. 842; Sowles v. Butler, 71 Vt. 271, 44 Atl. 355; Effinger v. Hall, 81 Vt. 94.

[98] Dennis v. Atlanta Nat. Bldg. & Loan Assn., 136 Fed. 539, 69 C. C. A. 315.

[99] Reynolds v. Kirk, 105 Ala. 446, 17 So. 95; McIntosh v. Bowers, 143 Wis. 74, 126 N. W. 548.

[1] Houzik v. Delglise, 65 Wis. 494, 27 N. W. 171, 56 Am. Rep. 634.

[2] International Harvester Co. v. Myers, 86 Kans. 497, 121 Pac. 500, 39 L. R. A. (N. S.) 528.

all the facts affecting the validity of the mortgage, which he could have ascertained by proper inquiry of such person.[3] Possession under an apparent claim of ownership has been held to constitute notice to purchasers of whatever interest the person actually in possession has in the fee, whether the interest be either legal or equitable.[4] A mortgagee who, in reliance upon the record title, takes a mortgage upon property from one to whom it has been transferred by a fraudulent grantee, is not chargeable with constructive notice of the fraud, although the person defrauded occupies the property, where at the time such person was ignorant of the fraud perpetrated and could not have disclosed the fact to the mortgagee had he made inquiry.[5]

A mortgagee is chargeable with constructive notice of the legal and equitable rights of a tenant in possession under a lease;[6] as well as the claims of a third person through such tenant.[7]

Possession is notice only during its continuance. In order to operate as notice, or to suggest inquiry to a purchaser or mortgagee, the possession must have existed at the time of the purchase or the taking of the mortgage.[8] Possession, to operate as implied notice, must be visible and open, notorious and exclusive, and not merely a constructive possession.[9] An equivocal, occasional, or temporary possession, will not take the case out of the operation of the registration laws.[10] Generally, a mortgagee is not chargeable with notice arising from a mixed possession or joint occupancy shared by the mortgagor and relatives; although the person sharing such tenancy with the mortgagor may have actual claims upon the estate originating prior to the mortgage.[11] Possession of a part of the premises described in a deed or mortgage may be notice to a purchaser or mortgagee of the condition of the title of the entire tract, if the purchaser or mortgagee has actual notice of the possession.[12]

[3] Collins v. Moore, 115 Ga. 327, 41 S. E. 609.

[4] Kirby v. Tallmadge, 160 U. S. 379, 16 Sup. Ct. 349, 40 L. ed. 463.

[5] Cornell v. Maltby, 165 N. Y. 557, 59 N. E. 291.

[6] Kerr v. Kingsbury, 39 Mich. 150, 33 Am. Rep. 362; Allen v. Gates, 73 Vt. 222, 50 Atl. 1092.

[7] Collins v. Moore, 115 Ga. 327, 41 S. E. 609.

[8] Christopher v. Curtis-Attalla Lumber Co., 175 Ala. 484, 57 So. 837.

[9] Kirby v. Tallmadge, 160 U. S. 379, 16 Sup. Ct. 349, 40 L. ed. 463.

[10] Boynton v. Rees, 8 Pick. (Mass.) 329, 19 Am. Dec. 326.

[11] Atlanta Nat. Bldg. & Loan Assn. v. Gilmer, 128 Fed. 293.

[12] Staples v. Fenton, 5 Hun (N. Y.) 172.

§ 435. **Correction of errors in record and re-recording mortgage.**—The record of the mortgage, duly transcribed, can not be altered by the recorder, even with the consent of the parties. The proper method to correct a material mistake in a recorded mortgage is to execute and record a new mortgage, reciting that it is given to correct the former mortgage.[13] A second mortgage covering the same realty and securing the same debt, between the same parties, reciting that it is given to correct a former mortgage, supersedes the first, and the two constitute one mortgage, nothing having intervened to affect the mortgages secured.[14] When there are two records, which differ only in one or two material points in the description of the property, and the debt, grantor, grantee, consideration, acknowledgment, and the signature of the entry are the same in each, the presumption is not that the first record is the correct record and the other the record of some other deed, or of the original debt after a change in the description has been made, but that they are records of the same debt, with mistakes in one of them; and, in seeking to determine in which of the two the mistakes are, the original deed being lost, the court will consider the evidence afforded by the records themselves as to which has been more carefully registered, the situation of the property as described in each, and the conduct of the parties in reference to the property in dispute.[15] Where the re-records of mortgages have been made to correct errors of a former record, such re-record and former record should be carefully compared, and if they disclose that the former is a record of the latter it should be placed in the abstract immediately following the entry of the first record.

§ 436. **Assignment of mortgages and deeds of trust.**—A mortgagee may transfer his rights either by a legal or equitable assignment.[16] In general, if an assignment of a mortgage be made without any transfer of the note, bond or debt secured by the mortgage, the assignee takes only a naked legal estate, which he will hold in trust for the owner of the note or other mortgage debt. The transfer of the debt is essential to an effective assign-

[13] Youtz v. Julliard, 10 Ohio Dec. 298, 20 Wkly. L. Bul. 26.

[14] Rossbach v. Micks, 89 Nebr. 821, 132 N. W. 526, 42 L. R. A. (N. S.) 444.

[15] Stinson v. Doolittle, 50 Fed. 12.

[16] Densmore v. Savage, 110 Mich. 27, 67 N. W. 1103.

ment of the mortgage.[17] A purchaser of the mortgage title, not finding the note in the possession of the mortgagee, is held to take it subject to the rights of any persons to whom the mortgage debt has been previously assigned.[18] Yet it is held that an assignment of the mortgage generally carries the debt. The assignment of it conveys the right to receive payment of the notes, if these be actually sold and delivered to the assignee of the mortgage, or if they be in terms included in the assignment, though they be not actually delivered to the assignee.[19] On the other hand, the mortgage being merely an incident of the debt it can not be assigned separately from it so as to give any beneficial interest. The incident must pass by a grant of the principal, but not the principal by the grant of the incident.[20] And it is held that the mere delivery of the mortgage deed without the bond or note does not constitute a transfer of it either by way of sale or pledge, though the full consideration was paid or money was advanced upon it.[21]

When a mortgage has been formally assigned and the mortgage note delivered to the assignee without any indorsement of it, the mortgagor is not justified in refusing payment to the assignee on the ground that the note has not been indorsed by the payee.[22] The formal assignment, duly acknowledged and recorded, and the possession of the note, are the best possible evidence of ownership, and the assignee is entitled to demand and enforce payment whether the note is endorsed or not, or whether it be negotiable or not.[23] Such an assignment is a good equitable transfer of the mortgage and note. It is sufficient evidence of an intention to pass the beneficial interest in them.[24] Whether the assignee of a mortgage has paid value for it does not concern the mortgagor, except in his interposing an equitable defense in the way of payment or set-off.[25] The assignee of a mortgage should also as a practical matter give notice of the assignment to the mortgagor so

[17] Farrell v. Lewis, 56 Conn. 280, 14 Atl. 931; Hamilton v. Browning, 94 Ind. 242; Lunt v. Lunt, 71 Maine 377.

[18] Fletcher v. Carpenter, 37 Mich. 412.

[19] Hilton v. Woodman's Estate, 124 Mich. 326, 82 N. W. 1056; Williams v. Teachey, 85 N. Car. 402.

[20] Morrison v. Roehl, 215 Mo. 545, 114 S. W. 981; Luetchford v. Lord, 132 N. Y. 465, 30 N. E. 859; Roach v. Sanborn Land Co., 135 Wis. 354, 115 N. W. 1102.

[21] Warden v. Adams, 15 Mass. 233; Bowers v. Johnson, 49 N. Y. 432.

[22] Moreland v. Houghton, 94 Mich. 548, 54 N. W. 285; Thorndike v. Norris, 24 N. H. 454.

[23] Morris v. Peck, 73 Wis. 482, 41 N. W. 623.

[24] Pratt v. Skolfield, 45 Maine 386.

[25] Johnson v. Beard, 93 Ala. 96, 9 So. 535.

as to protect himself against payment which may be made in good faith to the assignor. A mortgage securing a promissory note passes as an incident upon transfer of a note, but an assignment of the mortgage alone and separate from the note will not transfer the note unless it is in fact delivered.[26]

§ 437. Form, requisites, and method of assignment.—An assignment of a mortgage is usually effected by a brief form in which the mortgage is identified by a recital of the names of the parties to it, of its date, and of the book and page, in the registry where it was recorded, without any other description of the property. It is usual to deliver with the assignment the original mortgage; but this is not essential.[27] It is, however, essential to a formal and complete assignment that the note or bond secured by the mortgage should be indorsed or otherwise assigned, and delivered with the assignment;[28] or, at any rate, that an intention should be manifest to assign the mortgage debt, to which the mortgage is only an incident; otherwise the assignment will only pass a naked legal title to the land.[29] The legal title to a mortgage can only be transferred by deed, executed with due formality with words of conveyance, except in those states where the common-law character of the mortgage as an estate in land has given place to the doctrine that the mortgage is a mere chattel interest.[30] An assignment, though indorsed upon the mortgage, and delivered with it, if not under seal, has been held to convey only an equitable interest.[31] It does not pass the legal estate, though it will authorize the assignee to enforce the mortgage in equity.[32] It must, also, contain the words necessary in an ordinary deed of

[26] In re Tobin's Estate, 139 Wis. 494, 121 N. W. 144.

[27] Warden v. Adams, 15 Mass. 233. See also, Goettlicher v. Wille, 76 Misc. 361, 134 N. Y. S. 977.

[28] Bailey v. Gilliland, 2 Kans. App. 558, 44 Pac. 747.

[29] Hill v. Alexander, 2 Kans. App. 251, 41 Pac. 1066.

[30] Sanders v. Cassady, 86 Ala. 246, 5 So. 503; New England Mtg. Sec. Co. v. Clayton, 119 Ala. 361, 24 So. 362; Barron v. Barron, 122 Ala. 194, 25 So. 55; Givan v. Doe, 7 Blackf. (Ind.) 210; Burton v. Baxter, 7 Blackf. (Ind.) 297; Vose v. Handy, 2 Greenl. (Maine) 322, 11 Am. Dec. 101; Dorkray v. Noble, 8 Greenl. (Maine) 278; Smith v. Kelley, 27 Maine 237, 46 Am. Dec. 595; Dwinel v. Perley, 32 Maine 197; Lyford v. Ross, 33 Maine 197; Warren v. Homestead, 33 Maine 256; Douglass v. Durin, 51 Maine 121; Phelps v. Townsley, 10 Allen (Mass.) 554; Adams v. Parker, 12 Gray (Mass.) 53; Warden v. Adams, 15 Mass. 233; Williams v. Teachey, 85 N. Car. 402; Henderson v. Pilgrim, 22 Tex. 464; Torrey v. Deavitt, 53 Vt. 331.

[31] Adams v. Parker, 12 Gray (Mass.) 53.

[32] Kinna v. Smith, 3 N. J. Eq. 14.

land to pass the legal estate, as, for instance, words of grant,[33] but an assignment which purports to pass all the mortgagee's interest in the mortgaged premises and the debt vests in the assignee all the mortgagee's rights, and not merely a life estate, though no words of inheritance are used in the assignment.[34]

§ 438. **Record of assignments of mortgages.**—The registration laws and the doctrines of priority by record generally extend to assignments of mortgages, either by express provision of statute or by judicial construction. Where the statutes themselves do not in terms directly apply to assignments of mortgages, the courts have generally drawn an inference of intended application.[35] But this liberal construction to include assignments of mortgages has not been invariably adopted by the courts; and many decisions hold that assignments are not within the application of the recording acts unless they are expressly made so, or the language of the statute is sufficiently comprehensive to fairly include them.[36] An assignment of a recorded mortgage need not be recorded to protect the assignee against a subsequent purchaser of the mortgaged premises, but the assignment must be recorded to protect him against a subsequent assignment from the same assignor, for value and without notice.[37] The mere assignment of a note, which as an incident carries with it the mortgage securing it, is not an assignment of the mortgage, such as is required to be recorded or noted in the margin of the original record of the mortgage.[38] But a mortgage passing as collateral to a negotiable note before maturity must be assigned of record, where required by the registration laws to give it priority over subsequent mortgages.[39]

An acknowledgment is, of course, essential to a valid record of an assignment.[40] And likewise proper attestation is essential, and

[33] Cottrell v. Adams, 2 Biss. (U. S.) 351, Fed. Cas. No. 3272, 2 Leg. Gaz. 275; Lanigan v. Sweany, 53 Ark. 185, 13 S. W. 740; Williams v. Teachey, 85 N. Car. 402.

[34] Barnes v. Boardman, 149 Mass. 106, 21 N. E. 308, 3 L. R. A. 785.

[35] Reeves v. Hayes, 95 Ind. 521.

[36] Oregon & W. Trust Inv. Co. v. Shaw, 5 Sawy. (U. S.) 336, Fed. Cas. No. 10556; Garrett v. Fernauld, 63 Fla. 434, 57 So. 671; Hull v. Diehl, 21 Mont. 71, 52 Pac. 782; Leonard v. Leonia Hights Land Co., 81 N. J. Eq. 489, 87 Atl. 645, Ann. Cas. 1914C, 749n.

[37] People's Trust Co. v. Tonkonogy, 144 App. Div. 333, 128 N. Y. S. 1055.

[38] Perry v. Fisher, 30 Ind. App. 261, 65 N. E. 935.

[39] Newman v. Fidelity Savings &c. Assn., 14 Ariz. 354, 128 Pac. 53.

[40] Wright v. Shimek, 8 Kans. App. 353, 55 Pac. 464.

the record of an assignment of a mortgage executed by a corporation without the attestation of its secretary as required by statute, is not constructive notice.[41]

The assignment is invalid against subsequent purchasers without notice unless it is recorded. Consequently, if a mortgagee transfers the note secured by the mortgage, or makes a formal assignment of a mortgage which is not recorded, and afterwards enters a satisfaction of the mortgage upon the record, or if the mortgagee takes a conveyance of the equity of redemption, and then with an apparent ample title conveys the property to another, the mortgage ceases to be a lien as against one who purchases the property in good faith and without notice.[42] In like manner an assignee of the mortgage is not bound by an unrecorded agreement executed between the parties to the mortgage, whereby the mortgagee was bound to release a portion of the premises upon receiving a certain sum in payment.[43] An assignee of the mortgage whose assignment is not recorded is barred by a decree foreclosing a prior lien in a suit against his assignor, who appeared of record as owner of the incumbrance, unless his assignment is recorded prior to the deed of sale under such decree.[44] The doctrine, that the assignee of a mortgage takes it subject to all equities existing between the mortgagor or his grantees and the mortgagee, can not be applied to those instruments which are properly designated in the recording acts as conveyances, which both a release of the mortgage and an agreement for such release would be, without nullifying the acts to that extent, and withholding the protection they were designed to confer on the purchasers. But the record of an assignment of a mortgage is not constructive notice of it to the mortgagor so as to make invalid a payment made by him to the mortgagee.[45] It is desirable, for this reason, that personal notice should be given him of the assignment, though the assignee's title is complete without notice to the owner of the equity of redemption.[46] A purchaser of the

[41] Randall Co. v. Glendenning, 19 Okla. 475, 92 Pac. 158.

[42] Commercial Bank v. King, 107 Ala. 484, 18 So. 243; Buehler v. McCormick, 169 Ill. 269, 48 N. E. 287; Connecticut Mut. Life Ins. Co. v. Talbot, 113 Ind. 373, 14 N. E. 586, 3 Am. St. 655.

[43] Warner v. Winslow, 1 Sandf. Ch. (N. Y.) 430.

[44] Jones v. Fisher, 88 Nebr. 627, 130 N. W. 269.

[45] Williams v. Keyes, 90 Mich. 290, 51 N. W. 520, 30 Am. St. 438.

[46] Barnes v. Long Island Real Estate &c. Co., 88 App. Div. 83, 84 N. Y. S. 951.

equity of redemption is charged with notice of the assignment of the mortgage which has been recorded prior to the purchase.[47] The record of the assignment is a part of the record title of which he must take notice at the time of his purchase. Although the assignment of a debt is not recorded, it carries with it the mortgage securing the same,[48] leaving the original mortgagee without any interest.[49] The effect of recording an assignment is not only to protect the assignee against a subsequent sale of the mortgage by the apparent holder of it, but also to prevent a wrongful discharge of it by the mortgagee.[50] A separate assignment of a mortgage is generally recorded in the same manner as the mortgage itself or any other instrument affecting lands.[51] When an assignment of a mortgage is indorsed upon the mortgage deed, which is referred to as "the within described mortgage," it is sufficient to record the assignment without recording the mortgage with it anew, and identification by cross-references to the respective pages on which the instruments are recorded is sufficient.[52] Such reference is usually made by the register from the record of one instrument to the other; but unless required by law this is not essential. A recital of the names of the parties to the mortgage, and its date is a sufficient identification of it; although it is usual in addition to this description, when the assignment is not indorsed upon the mortgage to refer, in the description of it, to the book and page of the record. But neither a reference to the record of the mortgage nor a description of the mortgaged lands is necessary. An assignment is sufficient which so identifies the mortgage that by examining the records the one referred to can be ascertained.[53] It is usual for the register to note an assignment upon the margin of the record of a mortgage; and in many states it is made by statute his duty to do so.

§ 439. **Equitable assignments of mortgages.**—An equitable assignment of a mortgage may be made by a sale of it, without either a formal transfer of the mortgagee's interest in the property, or an indorsement of the note. In those states where a

[47] Brewster v. Carnes, 103 N. Y. 556, 9 N. E. 323.

[48] Fish v. First Nat. Bank, 150 Fed, 524, 80 C. C. A. 266.

[49] Turpin v. Derickson, 105 Md. 620, 66 Atl. 276.

[50] Parmenter v. Oakley, 69 Iowa 388, 28 N. W. 653.

[51] Merrill v. Luce, 6 S. Dak. 354, 61 N. W. 43, 55 Am. St. 844.

[52] Soule v. Corbley, 65 Mich. 109, 31 N. W. 785.

[53] Viele v. Judson, 82 N. Y. 32.

mortgage is considered a mere chattel interest and not a conveyance, and the doctrines of the courts of equity in regard to mortgages obtain, a parol assignment is sufficient if accompanied by a transfer of the note, bond or other evidence of the mortgage debt, by delivery without indorsement or other formal assignment, and the assignee may maintain an action in his own name.[54] The equitable interest of the purchaser enables him to deal with the mortgage for all beneficial purposes. He may enforce it against the property and the person liable upon it.[55] But it has been held that the mere possession by a third person of a mortgage not assigned and a note not indorsed by the mortgagee is not sufficient evidence of his ownership of them to enable him to sustain an action upon them. He must allege and prove his ownership by other evidence.[56] He must show that there was an intention to transfer the beneficial interest in the securities by the mere manuel delivery of them.[57] After an assignment of the mortgage note the mortgagee can not discharge the mortgage if the note be negotiable and it be assigned to an innocent party, before due and for a good consideration, although the note be without any consideration; and satisfaction so entered will be vacated by a court of equity.[58]

Where there is no statute requiring assignments of mortgages to be recorded, the mortgagor or other person paying the mortgage debt and taking the discharge is bound to know that, if the mortgagee has indorsed the notes before maturity to a bona fide holder, the mortgagee has no longer authority to satisfy the mortgage; and therefore the person taking the discharge is bound to ascertain whether the mortgagee still held the note at the time he discharged the mortgage.[59] The notes in such case become the evidence of the mortgagee's authority to enter satisfaction of the

[54] Younker v. Martin, 18 Iowa 143; Haescig v. Brown, 34 Mich. 503; Greeley State Bank v. Line, 50 Nebr. 434, 69 N. W. 966; Strause v. Josephthal, 77 N. Y. 622; Sprague v. Lovett, 20 S. Dak. 328, 106 N. W. 134; Andrews v. Powers, 35 Wis. 644.

[55] Barron v. Barron, 122 Ala. 194, 211, 25 So. 55.

[56] Haescig v. Brown, 34 Mich. 503.

[57] Strause v. Josephthal, 77 N. Y. 622.

[58] Brewer v. Atkeison, 121 Ala. 410, 25 So. 992, 77 Am. St. 64; Reeves v. Hayes, 95 Ind. 521; Vandercook v. Baker, 48 Iowa 199; Mutual Benefit Life Ins. Co. v. Huntington, 57 Kans. 744, 48 Pac. 19; Dunham v. W. Steele Packing &c. Co., 100 Mich. 75, 58 N. W. 627; State Bank v. Frame, 112 Mo. 502, 20 S. W. 620.

[59] Reeves v. Hayes, 95 Ind. 521; Perry v. Baker, 61 Nebr. 841, 86 N. W. 692.

lien.[60] After discharge by a mortgagee who has transferred the mortgage notes before maturity, a subsequent mortgagee or purchaser in good faith and without notice of the unauthorized discharge of the mortgage is entitled to rely on the record.[61] The assignee may take free from existing equities between the mortgagor and mortgagee.[62] If the note or other debt secured by a mortgage be transferred without any formal assignment of the mortgage, or even of a delivery of it, the mortgage in equity goes with the debt unless there be an agreement to the contrary.[63]

§ 440. Abstracting mortgage and assignment of mortgage.—The abstract should contain a synopsis of every unsatisfied and unenforced mortgage appearing of record affecting the particular land in question, and of every such mortgage followed by foreclosure in equity. An unsatisfied and unenforced mortgage may be shown as follows:

William J. Kennedy and Maria Kennedy, his wife, to The Milwaukee Land Company.	Mortgage. Dated Jan. 1, 1887. Recorded Feb. 17, 1887. Book 98, page 75.

To secure the payment of $200 in three years from date thereof with interest at the rate of 6 per cent. per annum, evidenced by note signed by said William J. Kennedy, of even date with mortgage. Conveys the southwest quarter of section No. 31, township No. 110, range No. 55, containing 160 acres. Acknowledged January 1, 1887, by William J. Kennedy and Maria Kennedy, before A. F. Bothwell, notary public, Walworth County, Wisconsin. Notary seal annexed. Where the mortgage was given to secure the payment of the purchase-price of the land this fact may be noted in connection with the above synopsis in the manner following: It is stated in the mortgage that it is given to secure the payment of the unpaid purchase-money for the land described therein. In case there has been an assignment of the mortgage, a synopsis of

[60] Swift v. Smith, 102 U. S. 442, 26 L. ed. 193, 2 Ky. L. 127; Ayres v. Hays, 60 Ind. 452; Livermore v. Maxwell, 87 Iowa 705, 55 N. W. 37.

[61] Porter v. Ourada, 51 Nebr. 510, 71 N. W. 52.

[62] Crosby v. Roub, 16 Wis. 616, 84 Am. Dec. 720.

[63] New England Mtg. Security Co. v. Clayton, 119 Ala. 361, 24 So. 362; Farrell v. Lewis, 56 Conn. 280, 14 Atl. 931.

such assignment should follow immediately after that of the mortgage, thus:

Milwaukee Land Company, by William Jenkins, president. Attest: J. C. Wilkes, secretary, to The Wilkins Investment Company.	Assignment of mortgage. Dated July 9, 1888. Recorded July 17, 1888. Recorded book 96, page 344. Consideration $200. Acknowledged July 15, 1888. by said William Jenkins. Corporate seal affixed. Assigns mortgage described in mortgage record 98, page 75.

§ 441. **Trust deeds.**—The delay and expense incident to a foreclosure and sale in equity have brought power of sale mortgages and trust deeds into general favor both in England and America; and although their general use is now confined only to a part of our states, the same influences which have already led to their partial adoption and use are likely to lead to their general use everywhere at an early day.[64] A trust deed is, in legal effect, a mortgage with a power of sale.[65] It differs only from a mortgage by providing for sale without foreclosure.[66]

There is a manifest and well settled distinction between an unconditional deed of trust and a mortgage or deed of trust in the nature of a mortgage. The former is an absolute and indefeasible conveyance of land for the purpose expressed, whereas the latter is conditional and defeasible. By an absolute deed of trust the grantor parts absolutely with the title which rests in the grantee unconditionally for the purpose of the trust, while a deed of trust in the nature of a mortgage is a conveyance in trust for the purpose of securing a debt, subject to a condition of defeasance.[67] In a deed of trust to secure a debt the conveyance is made to a person other than the creditor conditioned to be void if the debt be paid at a subsequent time, but if not paid the grantee

[64] First Nat. Bank v. Bell &c. Mining Co., 8 Mont. 32, 19 Pac. 403, affd. 156 U. S. 470, 15 Sup. Ct. 440, 39 L. ed. 497.

[65] Connecticut Mut. Life Ins. Co. v. Jones, 8 Fed. 303, 1 McCrary (U. S.) 388.

[66] Axman v. Smith, 156 Mo. 286, 57 S. W. 105.

[67] Hoffman Burneston & Co. v. Mackall, 5 Ohio St. 124, 64 Am. Dec. 637.

may sell the land to the extinguishment of the debt, paying over the surplus to the grantor.[68] Such a deed has all the essential elements of a mortgage; it is a conveyance of land as security for a debt and the addition of a power of sale does not change the character of the instrument.[69] Both instruments convey a defeasible title only; and the right to redeem is the same in one case as it is said to be in the other. The only important difference between them is that in the one case the conveyance is directly to the creditor, while in the other it is to a third person for his benefit and the trustee's title is in the nature of a base or determinable fee.[70] An absolute deed of trust and a deed of trust in the nature of a mortgage should not be confused. The former is for trust purposes and is unconditional and indefeasible; while the latter is conditioned and defeasible, in the same way that a mortgage is.[71] In abstracting a deed of trust unexecuted and still a lien, it should be treated in the same manner as a mortgage. The abstract should disclose the name of the trustee, and his successor, if named in the deed; the cestui que trust if named; and should describe the indebtedness as in case of an original mortgage. The synopsis of a trust deed may be in the following form:

Perry Martin	Trust deed.
	Dated May 1, 1896.
to	Recorded May 5, 1896.
Frank Lobdell, trustee.	Book 178, page 83.

To secure the payment of $500.00 due in three years with interest at the rate of 6 per cent. per annum evidenced by one promissory note of even date herewith signed by said Perry Martin and made payable to said Frank Lobdell. Conveys the northeast quarter of the northwest quarter of section 25, north of range 8 east, in Grant County, State of Indiana, in trust and upon the conditions therein specified. Power of sale given after default for sixty days. Acknowledged May 1, 1896.

§ 442. Power of sale in a mortgage or deed of trust.— Powers of sale in a mortgage or deed of trust are contractual, and

[68] DeWolf v. A. & W. Sprague Mfg. Co., 49 Conn. 282; State Bank v. Chapelle, 40 Mich. 447.

[69] Newman v. Samuels, 17 Iowa 528; Eaton v. Whiting, 3 Pick. (Mass.) 484.

[70] Ware v. Schintz, 190 Ill. 189, 60 N. E. 67.

[71] Weber v. McCleverty, 149 Cal. 316, 86 Pac. 706; Fox v. Frazer, 92 Ind. 265; Union Co. v. Sprague, 14 R. I. 452.

as there are many opportunities for oppression in their enforcement courts of equity are disposed to criticise them, and to hold the mortgagee to the letter of the contract. If a different view should prevail, and we should dispense with some stipulation in the power because we could not see that injury had ensued from failure to observe it we could practically destroy the contract of the parties.[72] It is probably safe to say that in its practical operation the power of sale is not used to oppress or injure the debtor more frequently than is the process of foreclosure by suit. At the present time every mortgage has a power of sale; for when not inserted in the deed, as is usually the case, a power of sale is supplied by statute. A power of sale in a mortgage or deed of trust authorizing foreclosure by advertisement or sale without resort to the courts, is considered perfectly valid,[73] except in a few states, where the exercise of the power is expressly forbidden by statute.[74] Such powers have been recognized as valid even in the absence of any statute authorizing them.[75]

The validity of these powers of sale is everywhere recognized, and the use of them, either in mortgages or trust deeds, is becoming general.[76] The use of power of sale mortgages, however, has not yet become so universal here as to lead to their being regarded as a necessary incident of the mortgage. The terms of a mortgage or trust deed have sometimes been held to imply a power of sale, although generally such power should be expressly conferred. Generally a power of sale does not affect the right to foreclose in equity, either by a strict foreclosure,[77] or by judicial sale,[78] or to foreclose in any way provided by statute for the ordinary foreclosure of mortgages, as by entry and possession, or by suit at law. The power is merely a cumulative remedy. It is one species of foreclosure, but it does not exclude jurisdiction in equity.[79] The option, however, to proceed in equity lies wholly

[72] Eubanks v. Becton, 158 N. Car. 230, 73 S. E. 1009.

[73] Fogarty v. Sawyer, 17 Cal. 589; Moseley v. Rambo, 106 Ga. 597, 32 S. E. 638; Lariverre v. Rains, 112 Mich. 276, 70 N. W. 583; Pearson v. Gooch, 69 N. H. 208, 40 Atl. 390; Elliott v. Wood, 45 N. Y. 71.

[74] See Jones on Mortgages, Nos. 1723-1763.

[75] Walthall v. Rives, 34 Ala. 91; Bloom v. Van Rensselaer, 15 Ill. 503; Clark v. Condit, 18 N. J. Eq. 358.

[76] Very v. Russell, 65 N. H. 646, 23 Atl. 522.

[77] Cormerais v. Genella, 22 Cal. 116.

[78] Vaughan v. Marable, 64 Ala. 60; Martin v. Ward, 60 Ark. 510, 30 S. W. 1041; Green v. Gaston, 56 Miss. 748.

[79] Dupee v. Rose, 10 Utah 305, 37 Pac. 567.

with the mortgagee.[80] A resort to a court of equity is not necessary, except where made so by statute; it can be effectually exercised without the aid of the courts.[81] If the power proves to be defective, a resort to a suit in equity is rendered necessary.[82] A power of sale in a mortgage or deed of trust may be enforced by the court, but the sale is by virtue of the power and not of the degree when the court enforced the power. It has been held that a power of sale given to a mortgagee includes the power to make a conveyance in pursuance of a sale by him; and where the mortgagee has the power to purchase at a sale and becomes the purchaser he has the power to execute a deed to himself which will convey the title.[83]

Where a link in the chain of title is based upon a conveyance made in pursuance of a power of sale in a mortgage or deed of trust, inquiry must be made to ascertain if the stipulations of the expressed power or the provisions of the statute regulating such sales have been complied with. It is important that there was a default in the payment of the debt secured which authorized the execution of the power. Such matters as notice, advertisement, and the manner of sale should not be overlooked in the inquiry. Where the title is based on a trustee's deed executed under a power of sale in a mortgage or deed of trust, the abstract should contain such power of sale in full.

§ 443. Release or satisfaction of record.—Upon payment of the mortgage debt, or the performance of the conditions rendering it void, it becomes the duty of the mortgagee or his representative to cancel the mortgage of record in the manner and form recognized by the law of the place where the mortgage is recorded. Statutes generally provide that satisfaction may be by a brief entry upon the margin of the record of the mortgage, signed by the holder of it, or by his executing a certificate of satisfaction which is recorded at length with a proper reference to and from the record of the mortgage. The record then becomes a conveyance within the meaning of the recording acts.[84] In general, it may be said that the entry or certificate provided for may be made by the person who appears of record to be entitled

[80] Lang v. Stansel, 106 Ala. 389, 17 So. 519.
[81] Hyde v. Warren, 46 Miss. 13.
[82] Webb v. Haeffer, 53 Md. 187.
[83] Jackson v. Tribble, 156 Ala. 480, 47 So. 310.
[84] Bacon v. Van Schoonhoven, 19 Hun 158, affd. 87 N. Y. 446.

to receive payment of the mortgage, or who could properly execute a deed of release of the premises.[85]

The person making the entry should have authority to make same, and such authority should appear in the entry.[86] The entry of satisfaction may be made by the mortgagor's attorney acting under a formal power,[87] or by his duly appointed agent.[88] Where the security is in the form of a trust deed satisfaction should be entered by the trustee, but only upon payment or actual satisfaction of the debt.[89] Where there are several trustees, all must join in the certificate of satisfaction.[90] Where, by statute or otherwise, it is customary to enter satisfaction upon the margin of the record, the mortgagor has an absolute right to have such entry made when he has paid the full amount due under the mortgagor.[91]

The statutes generally provide for the recovery of a penalty from the person who has refused or neglected to discharge a mortgage after having received payment of it. This is a means of compelling a discharge, in addition to the relief that may be had under the general jurisdiction of courts of equity.[92] An assignee of a mortgage, who has received payment of the debt, is liable for failure or neglect to execute a release or enter satisfaction,[93] at least where the assignment is duly recorded, in accordance with the statute.[94] One to whom the note or debt is transferred becomes the owner of the security, and, on being paid the note or debt, he may be required to acknowledge satisfaction of the mortgage, and it is his duty, if need be, to provide himself with authority to satisfy the mortgage of record.[95]

A mortgage to several persons who are partners may be dis-

[85] Jefferson v. Burhans, 85 Fed. 924, 29 C. C. A. 487; Summers v. Kilgus, 14 Bush (Ky.) 449; Seymour v. Laycock, 47 Wis. 272, 2 N. W. 297.

[86] Cerney v. Pawlot, 66 Wis. 262, 28 N. W. 183.

[87] Hutchings v. Clark, 64 Cal. 228, 30 Pac. 805.

[88] Storch v. McCain, 85 Cal. 304, 24 Pac. 639; Douglass v. Douglass Bagging Co., 94 Mo. 226, 7 S. W. 280.

[89] Murto v. Lemon, 19 Colo. App. 314, 75 Pac. 160; Feld v. Roanoke Inv. Co., 123 Mo. 603, 27 S. W. 635; Browne v. Davis, 109 N. Car. 23, 13 S. E. 703.

[90] People v. O'Loughlin, 79 Misc. 650, 140 N. Y. S. 488.

[91] Murray v. Brokaw, 67 Ill. App. 402; Baker v. Central Nat. Bank, 86 Kans. 293, 120 Pac. 549; Verges v. Giboney, 47 Mo. 171.

[92] Beach v. Cooke, 28 N. Y. 508, 86 Am. Dec. 260.

[93] Southwestern Bldg. & Loan Assn. v. Acker, 138 Ala. 523, 35 So. 468.

[94] Low v. Fox, 56 Iowa 221, 9 N. W. 131.

[95] Daniels v. Densmore, 32 Nebr. 40, 48 N. W. 906.

charged by any one of them, but all are jointly liable to the penalty for failure of one to enter satisfaction.[96] An entry of satisfaction by a stranger, without authority, is void and ineffectual.[97] Under statutes which require the holder of a mortgage upon receiving payment to enter satisfaction upon the record, such entry is the act of the holder of the mortgage, not of the recorder. The latter is merely the custodian of the records. Though he attests the entry, this does not constitute a judicial determination of the fact that the mortgage has been satisfied. If by mistake the entry is made upon the margin of the record of a mortgage between the same parties, but not held by the person who makes the entry, the real owner of the mortgage may show that such entry was made by mistake by an unauthorized person, even as against a bona fide purchaser for value without notice of the mortgage.[98] Since it is not generally necessary to describe the land released, an erroneous description thereof is immaterial where the mortgage is otherwise identified.[99] A release obtained from the mortgagee by fraud, concealment, or misrepresentations, or by means of promises which have not been fulfilled, is inoperative and may be canceled in equity.[1] Although payment of the debt is in effect a discharge of the mortgage, a release of the security does not of itself discharge the debt.[2] A deed of release in the ordinary form, as well as an entry of satisfaction upon the margin as usually made, contains an express acknowledgment of the payment of the debt; and in such case this would be prima facie evidence of the discharge of the debt,[3] and perhaps conclusive evidence of it, unless fraud or mistake be shown in making such entry or release.[4] But this is otherwise if the release contains no such recital; although, if the purpose be to release the security without releasing the debt, this should be distinctly stated. If the mortgage note be left outstanding, and there was no evidence that the release was intended to operate as payment of the note, the mortgagee may still collect

[96] Renfro v. Adams, 62 Ala. 302.
[97] Mallett v. Page, 8 Ind. 364; In re Brownell, 60 Hun 586, 15 N. Y. S. 475, 39 N. Y. St. 918.
[98] Brown v. Henry, 106 Pa. St. 262.
[99] Bryant v. Richardson, 126 Ind. 145, 25 N. E. 807.

[1] San Francisco Mut. Loan Assn. v. Bowden, 137 Cal. 236, 69 Pac. 1059.
[2] Sherwood v. Dunbar, 6 Cal. 53.
[3] Burke v. Snell, 42 Ark. 57; Van Slooten v. Wheeler, 140 N. Y. 624, 35 N. E. 583.
[4] Ellis v. Bashor, 17 Idaho 259, 105 Pac. 214.

or negotiate the note.[5] A satisfaction of mortgage may be shown as follows:

The Wilkins Investment Company, by George D. West, president, to William J. Kennedy and Maria Kennedy, his wife.	Release. Dated Sept. 7, 1891. Recorded Dec. 8, 1891. Recorded in book 78, page 456.

Shows satisfaction and release of mortgage recorded in book 78, page 75. Corporate seal affixed. Acknowledged by said president September 7, 1891.

§ 444. Foreclosure by entry and possession.—Various modes of foreclosure are in use in the several states, and in a number of jurisdictions the subject is fully covered by statutory provisions. Generally, there is no difference in the manner of foreclosure between equitable mortgages and those in the usual form.[6] In Maine, Massachusetts, New Hampshire, and Rhode Island, foreclosure may be effected by an entry by the mortgagee on the mortgaged premises and the retention of the possession for a limited time, after which all rights of redemption become barred. The entry serves to give notice to the mortgagor that his right of redemption will be lost unless he discharges the obligations of his deed. Being a statutory procedure, the provisions of the statute must be strictly observed.[7] After the expiration of the time limited for possession on the part of the mortgagee he takes an absolute estate,[8] and when several parcels are covered by the same mortgage, an entry on one is sufficient.[9] There must be an actual entry by the mortgagee, but the possession may be passed to an assignee or tenant.[10] Upon the death of the mortgagee the entry should be made by his executor or administrator.[11]

After the foreclosure is complete, the legal estate vests in the heirs, subject, like other real estate of the deceased, to be used for

[5] Van Deusen v. Frink, 15 Pick. (Mass.) 449.
[6] Sprague v. Cochran, 144 N. Y. 104, 38 N. E. 1000.
[7] Freeman v. Atwood, 50 Maine 473.
[8] Randall v. Bradley, 65 Maine 43.
[9] Green v. Cross, 45 N. H. 574.
[10] Lucier v. Marsales, 133 Mass. 454; Green v. Pettingill, 47 N. H. 375, 93 Am. Dec. 444.
[11] Fifield v. Sperry, 20 N. H. 338.

the purposes of administration; but until the title is thus made complete in the heirs, they can do nothing with the mortgage or with the premises covered by it. The entry is made by the person entitled to make same in the presence of witnesses who, upon being satisfied that the entry is made under the particular mortgage, sign and make oath to a certificate of the fact of entry. This certificate is duly recorded within thirty days in the registry of deeds for the county where the land lies.[12] The purpose of the certificate being to give notice to all persons concerned that the mortgagee has entered for foreclosure, its allegations must be definite, and must cover all matters necessary to effect this change of title. The mortgage to be foreclosed must be identified. The fact of entry and the date of it are the most essential features. The purpose of it should be declared; but the manner in which the entry is made is not material so far as the certificate goes. The certificate should state that the entry was open and peaceful, and was made in the presence of the witnesses. The form of certificate in general use is as follows: "We hereby certify that we were this day present and saw ——, the mortgagee named in a certain mortgage deed given by ——, dated ——, and recorded ——, make an open, peaceable and unopposed entry on the premises described in the said mortgage, for the purpose by him declared of foreclosing said mortgage for breach of the condition thereof. In witness whereof we hereto set our hands this —— day of ——, ——.

"A. B.

(Jurat) C. D."

The statutes generally require that the mortgagor shall also sign the certificate of entry by the mortgagee; the form of the mortgagor's certificate usually being: "I, the within named mortgagor, hereby acknowledge and certify that ——, the within named mortgagee, has this day made an open, peaceable, and unopposed entry upon the premises described in the within mortgage, for breach of condition therein contained. Witness my hand this —— day of ——, ——. "A. B."

The record of the certificate being all the notice of the entry required to be given, it is essential that the record be made as re-

[12] Thompson v. Kenyon, 100 Mass. 108.

quired, or the certificate is wholly inoperative.[13] A sufficient entry properly recorded is constructive notice to all persons who claim by any title acquired subsequently to the mortgage. The statutes sometimes require that notice shall be given to all parties whose interests may be affected by the foreclosure, and that actual notice must be given to the mortgagor or owner of the equity of redemption. Where these requirements obtain care should be taken to see that the statute has been complied with in respect to the form of such notice and the manner of giving same. Where the mortgagee has complied with all the requirements respecting entry and notice, his continued possession for the statutory period effects a complete foreclosure,[14] cuts off all right of redemption, and invests him with a complete and indefeasible title to the land.[15]

In compiling an abstract to land, the title to which is based upon a foreclosure by entry and possession, the material parts of the record pertaining to such forclosure should be set out, together with an affidavit showing that the mortgagee's possession was for the period prescribed by the statute.

§ 445. **Foreclosure by writ of entry.**—The process of foreclosure by a writ of entry as used in Massachusetts and Maine, although in form a suit at law, is in effect a bill in equity. Instead of possession obtained by entry, the mortgagee may obtain possession by writ of entry, declaring on his own seisin, stating that it is in the mortgagee, and if it appears that he is entitled to possession for breach of the condition, the court on motion of either party awards a conditional judgment, if the defendant be the mortgagor or any one claiming under him, that if he within two months after the judgment pays to the plaintiff the sum found due on the mortgage with interest and costs the mortgage shall be void; otherwise that the plaintiff shall have his execution for possession. Action may be brought by an assignee of the mortgage, and after his death by his executor or administrator. It may be brought against whoever is tenant of the freehold. Possession obtained in this way must be continued for three years to foreclose the right of redemption. In Rhode Island, instead of

[13] Potter v. Small, 47 Maine 293.

[14] Tompson v. Tappan, 139 Mass. 506, 1 N. E. 924.

[15] Randall v. Bradley, 65 Maine 43.

a writ of entry for obtaining possession, an action of ejectment, or of trespass and ejectment, is used for the purpose.

The declaration in an action to foreclose by writ of entry should allege the seisin to be in the mortgagee. It should show that a foreclosure is desired, rather than possession for taking the profits. It should describe the demanded premises with sufficient certainty and particularity. Possession obtained in this way has the same effect as an entry in pais as described in the preceding section, and if continued for three years the right of redemption at the end of that period is forever foreclosed. The conditional judgment usually requires that redemption may be accomplished by payment of the mortgagee's claim and costs by a day named therein, and on failure to make said payment in the time designated the mortgage will be deemed to be perpetually foreclosed.[16] In Massachusetts the execution and the officer's return thereon must be recorded in the registry of deeds, in order that the three years necessary for foreclosure shall run from the time of the delivery of seisin, as against any person other than the parties to the action and their heirs and devisees, and those having actual notice.[17]

Where the chain of title shows a foreclosure by writ of entry, the abstract should show the essential features of each step in the proceedings. It should show the mortgage, the court in which the action was brought, the number and title of the case, and a statement of the fact of the judgment. This should be followed by an affidavit showing that the mortgagor held possession of the property for the period fixed by the statute for redemption, and that the right to redeem was not exercised by the party entitled to redeem.

§ 446. Foreclosure by exercise of power of sale.—A sale of property pursuant to a power given in the mortgage, in the absence of fraud, is effectual to foreclose the equity of redemption of the mortgagor.[18] A foreclosure sale under a power contained in a mortgage, which conveys the title of the mortgagor, is in a legal sense the complete foreclosure proceedings, beginning with the act of sale and terminating with the execution of the

[16] Pitman v. Thornton, 66 Maine 469; Gage v. Porter, 64 N. H. 619, 15 Atl. 147.

[17] Walsh v. Anderson, 135 Mass. 65.

[18] Dunn v. Oettinger, 148 N. Car. 276, 61 S. E. 679.

deed after the expiration of the period allowed for redemption. It includes all the proceedings for the foreclosure of the right of redemption by sale and deed. The title conveyed by such completed foreclosure sale is all the right, title, and interest in and to the mortgaged premises which the mortgagor possessed at the time the mortgage was executed or which was subsequently acquired by him.[19] This method of foreclosure is not in any sense an action at law or a suit in equity, but when the sale is made in conformity to statute, it is held to be a judicial sale, or at least a quasi-judicial sale.[20] A foreclosure under a power of sale, when made in conformity with the statute and the provisions of the mortgage, has the effect to extinguish the debt and to bar the mortgagor's equity of redemption.[21] The effect, in fact, is the same as that of a strict foreclosure by a suit in equity.[22] Where the proceedings are regular and in compliance with law, the purchaser at the sale obtains the same title the mortgagor had when he executed the mortgage.[23] The mortgage usually specifies the manner of conducting the sale, although statutes generally regulate such matters. Where the statute requires notice to be given, the requirement must be strictly observed.[24] The mortgage may, however, expressly waive notice,[25] and a private sale may be expressly authorized. Strict compliance with the provisions of the mortgage and statute must be had in reference to such matters as the time of sale, the place of sale, and the conditions of the sale, as by public auction, if so required. The proceeds of the sale must be first applied to the payment of the mortgage debt, and any residue remaining should be paid to the mortgagor.

The abstract, in such case, should, of course, show the deed made in execution of the power, and this deed should show a compliance with the necessary conditions precedent to the sale.

§ 447. Foreclosure by equitable suit.—The most usual mode of foreclosure is by suit in equity. In many states, juris-

[19] North Dakota Horse & Cattle Co. v. Serumgard, 17 N. Dak, 466, 117 N. W. 453, 29 L. R. A. (N. S.) 508n, 138 Am. St. 717.

[20] Vizard v. Moody, 119 Ga. 918, 47 S. E. 348.

[21] Meier v. Meier, 105 Mo. 411, 16 S. W. 223.

[22] Aiken v. Bridgeford, 84 Ala. 295, 4 So. 266.

[23] Beach v. Shaw, 57 Ill. 17; Martin v. Castle, 193 Mo. 183, 91 S. W. 930.

[24] Chace v. Morse, 189 Mass. 559, 76 N. E. 142; Reading v. Waterman, 46 Mich. 107, 8 N. W. 691.

[25] Princeton Loan & Trust Co. v. Munson, 60 Ill. 371.

diction in equity of the foreclosure of mortgages is expressly conferred by statute. When provisions in detail are made on this subject, they are generally founded upon principles and rules of practice already established by courts of equity under the general jurisdiction they have always exercised of the subject; and the powers of these courts are only enlarged and defined by the statutes. Although the mortgage contains a power of sale, courts of chancery are not generally deprived of their jurisdiction to foreclose it;[26] neither does the fact that there is a statutory remedy oust the jurisdiction of a court of equity.[27] The suit is generally required to be brought in the county where the mortgaged premises or some part thereof are situated, but where separate mortgages are given upon land in different counties and each secures a part of the debt, there must be separate foreclosures in the separate counties.[28]

The general requisites of a bill to foreclose a mortgage are, that it shall allege the execution and delivery of the mortgage and of the note or bond secured by it; the names of the parties to it; the date and amount of it; the title of the mortgagor in the mortgaged premises; when and where recorded; a description of the premises; the amount claimed to be due; and the default upon which the right of action has accrued. It must show also that the complainant is entitled to maintain the action, and that the defendants have, or claim to have, certain interests in the premises, or liens upon them.[29] The bill should close with a prayer for the foreclosure of the equity of redemption and a decree for the sale of the property.

The decree may be either for strict foreclosure, or merely for the sale of the property. A decree of strict foreclosure cuts off the equity of redemption immediately, or within a limited time after the decree is granted, whereupon the estate becomes absolute in the mortgagee.[30] Such decree is given in some states where the mortgagor is shown to be insolvent, or where the property is worth less than the mortgage debt.[31] But in most states, the

[28] Martin v. Ward, 60 Ark. 510, 30 S. W. 1041; Green v. Gaston, 56 Miss. 748.

[27] Benjamin v. Cavaroc, 2 Woods (U. S.) 168, Fed. Cas. No. 1300.

[28] Citizens' Nat. Bank v. Abbott, 72 Wash. 73, 129 Pac. 1085.

[29] Jones On Mortgages, § 1452.

[30] Gates v. Boston &c. R. Co., 53 Conn. 333, 5 Atl. 695; Ellis v. Leek, 127 Ill. 60, 20 N. E. 218, 3 L. R. A. 259; Higgins v. West, 5 Ohio 554.

[31] Carpenter v. Plagge, 192 Ill. 82, 61 N. E. 530; Miles v. Stehle, 22 Nebr. 740, 36 N. W. 142.

court simply decrees a sale of the mortgaged land, or so much thereof as is necessary to pay the debt.[32] The sale under the decree must be conducted in the manner prescribed by statute, and before the sale can become effective it must be confirmed by the court.[33]

Certain persons must be made parties to the suit or the decree will not be valid. These are termed "necessary parties," and include the mortgagee, or whoever may be the real beneficial owner of the debt secured; the mortgagor, unless he has parted with all his interest in the property; and all other persons who have any interest in the mortgaged premises, since such persons, if not made parties, may redeem from the mortgage.[34] A trustee in a deed of trust is a necessary party, since he holds the legal title.[35] One who has purchased the mortgaged property since the execution of the mortgage should be made a party if it is desired to cut off his right and equity of redemption.[36] The holders of equitable estates or liens are necessary parties,[37] as also are persons having vested estates in remainder in the mortgaged premises.[38]

Where there has been a foreclosure by suit in equity, every step necessary to sustain the title under the foreclosure must be shown in the abstract. The essential features of the mortgage should be set out, but it need not be described in detail. As much of the judgment roll must be given as will disclose the regularity of the proceedings and the jurisdiction of the court both as to the subject-matter and the parties. So much of the final and interlocutory decrees must be given as will show every material point decided. The officer's certificate of sale, his report, and the court's confirmation thereof should be set out. Finally, the officer's deed should be included.

[32] Moore v. Crandall, 146 Iowa 25, 124 N. W. 812, 140 Am. St. 276.

[33] Zinkeisen v. Lewis, 71 Kans. 837, 80 Pac. 44, 83 Pac. 28; Gerhardt v. Ellis, 134 Wis. 191, 114 N. W. 495.

[34] Moulton v. Cornish, 138 N. Y. 133, 33 N. E. 842, 20 L. R. A. 370.

[35] Gardner v. Brown, 21 Wall. (U. S.) 36, 22 L. ed. 527.

[36] Anderson v. Thompson, 3 Ariz. 62, 20 Pac. 803; Watson v. Grand Rapids &c. R. Co., 91 Mich. 198, 51 N. W. 990.

[37] Noyes v. Hall, 97 U. S. 34, 24 L. ed. 909.

[38] Hope v. Shevill, 137 App. Div. 86, 122 N. Y. S. 127.

CHAPTER XX

WILLS

SEC.
450. Introductory remarks.
451. Nature of title acquired by will.
452. Wills and related words defined.
453. Distinguishing characteristics of a will.
454. Kinds of wills.
455. Codicils.
456. What laws govern devises.
457. Capacity to make a will.
458. Capacity to take under a will.
459. Construction of wills.
460. False, erroneous, conflicting, and repugnant descriptions.
461. Repugnant provisions and conditions.
462. Void conditions and provisions.
463. Operative words of a will.
464. Words of purchase and limitation.
465. Rule in Shelley's Case.
466. How particular words and phrases are interpreted.
467. Words passing real estate.
468. Estates in remainder.
469. Executory devises.
470. Gifts of the use, possession, rents, profits, and income of real property.
471. Devise to a class.
472. Devise of life estate with power of disposition.
473. Devise charged with payment of debts, legacies, and support.
474. Devise on condition precedent or subsequent.
475. Conditional limitations.
476. Gifts over on death of beneficiary or death without issue or heirs.
477. Conditions restraining marriage.
478. Conditions against alienation.
479. Devise to separate use of married woman.
480. Devises in trust.
481. Designation of the devisee.
482. Perpetuities.
483. Lapsed devises.
484. Equitable conversion.
485. Residuary devises.
486. Revocation of wills.
487. Form and language of wills.
488. Abstracting the will.
489. Method of abstracting will and proof of probate.
490. Example of an abstract of a will.
491. Probate of wills.
492. Effect of probate.
493. Probate of foreign wills.
494. Abstracting probate proceedings.

§ 450. **Introductory remarks.**—In most titles of long duration will be found one or more testamentary instruments standing as a muniment of title to the premises. If such instrument has been properly probated and administration thereunder completed, its dignity is equal to that of a deed. Technically, however, a will is not a conveyance. A conveyance operates in the lifetime of the grantor, while a will does not operate until after the death of the maker. Of course, death transfers all property, and a will says where it shall go; but this does not render a will a conveyance.[1] While a will is a muniment of title, to be effectual to

[1] Comstock v. Adams, 23 Kans. 513, 33 Am. Rep. 191.

pass the title to real estate, it must be duly probated as required by law.[2] Testamentary instruments purporting to transfer landed interests present a greater variety of phases and give rise to more questions of construction than any other form of transfer. They have been the subject of a great deal of litigation, and there is a lack of harmony among the court decisions respecting their construction and interpretation. An abstracter is not liable if he mistakes the law in a matter of difficulty where the law is not well settled, but if he undertakes to note in the abstract those provisions only of a will upon which the passing of the title depends, he should be familiar with the general nature and operation of devises, the different varieties of devises, their manner of execution, and the rules and principles of construction applicable to them. The attorney who is called upon to examine the title is supposed to have a thorough knowledge of the law of wills, and especially with the provisions which operate to transfer the title to real property. It is apparent that only a brief outline of this important branch of the law can be included in a work of this character, but it is deemed appropriate to discuss the leading and more important characteristics of this form of transferring title, and to call attention to some of the questions that arise in the examination of titles acquired by will.

§ 451. Nature of title acquired by will.—Title to land is said to be either by descent or by purchase. The former is that title by which one person upon the death of another acquires the real estate of the latter as his heir at law. The latter includes all methods of acquiring real estate other than by descent. It follows, therefore, that title by purchase includes title by devise, or will, and the devisee is a purchaser in the same sense that the grantee in a deed is a purchaser, although the title acquired by devise does not always possess that indefeasible character which attaches to a title acquired by deed. Thus, an innocent purchaser for value by deed takes the title free from any and all outstanding trusts or equities in favor of third parties, while a devisee takes only such title as the testator had at the time of his death. In most jurisdictions, if the personal estate left by the testator is insufficient to pay his debts and the costs and expenses of administration, the land may be sold to make assets for their payment

[2] Hanley v. Kraftczyk, 119 Wis. 352, 96 N. W. 820.

against not only the devisees, but against persons claiming under them. This liability of the land to sale constitutes, in effect, a lien on the land.[3] If the will expressly directs that specific legacies shall be paid out of the land, or if the intention thus to charge it may be implied from the whole will, an equitable lien is thereby created for their payment.[4] If, after giving certain legacies and making disposition of specific articles, the testator, by a residuary clause, gives the remainder of his property to a residuary legatee, he will be held to have intended in case of a deficiency in personalty to charge the unpaid legacies upon the realty devised by such residuary clause.[5] The title to land devised, as a rule, takes effect immediately upon the death of the testator,[6] although the will may provide that title shall not vest until some time after the testator's death,[7] and, in some states, it is provided by statute that title to realty shall, for the purposes of administration, vest temporarily in the executor of the will.[8]

§ 452. **Wills and related words defined.**—Will.—A will is a legal declaration of a person's intention or wish respecting what shall be done after his death touching the disposition of his property, the guardianship of his children, or the administration of his estate.[9] Testament.—Originally the term "will" was used to denote an instrument disposing of real estate, while an instrument disposing of personal property was termed a "testament." An instrument disposing of both real and personal property was called a "last will and testament." This distinction, however, is no longer observed, the term "will" being used to designate an instrument disposing of both real and personal property, while the term "testament" is practically obsolete.[10] Codicil.—A codicil is a supplement or addition to a will made after the execution

[3] Davis v. Van Sands, 45 Conn. 600, Fed. Cas. No. 3655; Myers v. Pierce, 86 Ga. 786, 12 S. E. 978.

[4] Hibler v. Hibler, 104 Mich. 274, 62 N. W. 361; Johnson v. Poulson, 32 N. J. Eq. 390.

[5] Walker v. Atmore, 50 Fed. 644; Reid v. Corrigan, 143 Ill. 402, 32 N. E. 387; American Cannel Coal Co. v. Clemens, 132 Ind. 163, 31 N. E. 786.

[6] Simmons v. Spratt, 26 Fla. 449, 8 So. 123, 9 L. R. A. 343; Flemister v. Flemister, 83 Ga. 79, 9 S. E. 724; Satcher v. Grice, 53 S. Car. 126, 31 S. E. 3; Hall v. Hall, 98 Wis. 193, 73 N. W. 1000.

[7] Henry v. Henderson, 81 Miss. 743, 33 So. 960, 63 L. R. A. 616.

[8] Banks v. Speers, 97 Ala. 560, 11 So. 841; Dexter v. Hayes, 88 Iowa 493, 55 N. W. 491; Grady v. Warrell, 105 Mich. 310, 63 N. W. 204.

[9] Colton v. Colton, 127 U. S. 300, 8 Sup. Ct. 1164, 32 L. ed. 138; Rice v. Rice, 68 Ala. 216; In re Wood's Estate, 36 Cal. 75.

[10] Compton v. McMahan, 19 Mo. App. 494.

of the will and annexed to or to be taken as a part thereof, by which the disposition made in the original will is explained, added to or altered.[11] Testator.—The word "testator" has reference to the person who makes a will, and a woman who has made a will is sometimes called a "testatrix." Devisor.—A person disposing of real property by will is termed a "devisor." Devisee.—A person taking real property under a will is termed a "devisee." Bequeath.—As a verb the word "bequeath" denotes the making of a bequest or will of personalty. Bequest.—A bequest is a gift of personal property in general by will. Legacy.—A legacy denotes a gift of money, also of personalty generally by will. Legatee.—A person taking personal property under a will is termed a "legatee." Devise.—When used as a verb the word "devise" denotes the act of disposing of real property by will, and when used as a noun it denotes a gift of real property by will. The terms used to designate gifts of realty and personalty, respectively, have no fixed legal meaning, and when used interchangeably in a will do not affect the validity of the gift.

§ 453. **Distinguishing characteristics of a will.**—From the definition given of a will, it will be observed that the instrument does not pass a present interest or right in the property, and that such right or interest does not take effect until the death of the testator. During his lifetime it is entirely inoperative;[12] in other words, the will is ambulatory during the life of its maker. It is in effect reiterated as his will at each moment during his life.[13] The true test of the character of the instrument is not the testator's realization that it is a will, but his intention to create a revocable disposition of his property to accrue and take effect only upon his death, and passing no present interest.[14] To be a will the instrument must have been intended as such. Mere memoranda or direction for drawing a will, or a paper reciting the terms of a proposed or partly executed will do not constitute a will, though sufficiently executed as such.[15]

A will is distinguished from a deed of conveyance in that the

[11] Home for Incurables v. Noble, 172 U. S. 383, 19 Sup. Ct. 226, 43 L. ed. 486; Watson v. Turner, 89 Ala. 220. 8 So. 20; In re Zeile, 74 Cal. 125, 15 Pac. 445.

[12] Dunn v. Houghton (N. J. Eq.), 51 Atl. 71.

[13] In re Kopmier's Will, 113 Wis. 233, 89 N. W. 134.

[14] Kenney v. Parks, 125 Cal. 146, 57 Pac. 772, rev'g 54 Pac. 251.

[15] Peake v. Jenkins, 80 Va. 293.

latter instrument must pass a present interest in the property. Whether, therefore, an instrument be a deed or a will depends upon whether the maker intended the estate to vest before his death and upon execution of the paper, or whether he intended that all the interest and estate should take effect only after his death. If the former, it is a deed; if the latter, a will; and it is immaterial whether he calls it a will or a deed, the instrument will operate according to its legal effect.[16] Generally, without regard to its form, any instrument which does not pass a present interest in property, and is to take effect on the death of the maker, and is testamentary in character, may operate as a will.[17]

§ 454. **Kinds of wills.**—Wills are sometimes divided into two general classes (1) Written wills; and (2) oral or nuncupative wills.[18] To the former class belong practically all wills, as the statutes generally provide that wills must be in writing. This class of wills is divided, with respect to their manner of execution, into (1) Ordinary written wills signed by the testator and attested as required by law; (2) holographic wills, or wills written entirely by the hand of the testator; (3) mystic wills, or those required to be enclosed in an envelope and sealed in the presence of witnesses; and (4) nuncupative wills required under the civil law to be either dictated to a notary by the testator, or written by himself or another at his request in the presence of witnesses. A nuncupative will at common law is an oral declaration made by the testator in extremis, and in the presence of witnesses. Neither form of nuncupative will can be used to transfer title to real property, except under certain circumstances lands may be devised by this form of will in the states of North Carolina, Tennessee, Georgia, and Mississippi.

With respect to their contents and effect written wills may be divided into: (1) Contingent or conditional wills, or such as are to take effect upon the happening or not of some event; (2) alternative wills, as where a testator, after having executed one or more wills, executes another in which he expresses a contingency upon which that will or one of the former wills is to become operative; (3) joint and mutual wills, or one where the same in-

[16] Adair v. Craig, 135 Ala. 332, 33 So. 902.

[17] Corwine v. Corwine, 24 N. J. Eq. 579.

[18] Leathers v. Greenacre, 53 Maine 561; Hubbard v. Hubbard, 12 Barb. (N. Y.) 148.

strument is made the will of two or more persons and is jointly signed by them; (4) separate wills in relation to property in different jurisdictions; (5) wills appointing an executor only; and (6) wills operative at the direction of another.

§ 455. **Codicils.**—We have said that a codicil is an addition to, qualification or alteration of, a will. It is practically a supplemental will, incomplete in itself, but merely an appendage to an existing will, of which it is a part. It must be executed with all the formalities required in executing wills.[19] But an instrument testamentary in character and executed with the formalities of a will may operate as a codicil, although it be in the form of a deed,[20] power of attorney,[21] or a letter.[22]

A codicil is often made for the sole purpose of naming an executor. In case of the death of the beneficiary during the lifetime of the testator, a codicil is sometimes made to prevent a lapse. Its use is generally to modify or vary the terms of the will, and does not revoke it unless it is expressly stated that it is made for that purpose.[23] Nothing short of an absolute inconsistency will work a revocation by implication.[24]

Codicils are included in the term "will" and all legal provisions pertaining to wills must be understood as embracing codicils.[25] The will and codicil are to be taken and construed as part of one and the same instrument, and the dispositions of the will are not to be disturbed further than are necessary to give effect to the codicil.[26] For certain purposes the codicil brings the will to its own date. It is to be regarded as a part thereof; both are to be construed as one instrument, and they are alike subject to the rules of law governing the admission of parol evidence for the purpose of adding to, varying, or explaining their respective conditions. The authority of both rests upon the execution of the

[19] Home for Incurables v. Noble, 172 U. S. 383, 19 Sup. Ct. 226, 43 L. ed. 486; Green v. Lane, 45 N. Car. 102.

[20] Kelly v. Richardson, 100 Ala. 584, 13 So. 785.

[21] Stewart v. Stewart, 177 Mass. 493, 59 N. E. 116.

[22] Barney v. Hays, 11 Mont. 571, 29 Pac. 282, 28 Am. St. 495.

[23] Colt v. Colt, 32 Conn. 422; Bringhurst v. Orth, 7 Del. Ch. 178, 44 Atl. 783; Herzog v. Title Guarantee & Trust Co., 177 N. Y. 86, 97, 69 N. E. 283, 67 L. R. A. 146; Thompson v. Churchill, 60 Vt. 371, 14 Atl. 699.

[24] Bosley v. Wyatt, 14 How. (U. S.) 390, 14 L. ed. 468.

[25] Fry v. Morrison, 159 Ill. 244, 42 N. E. 774.

[26] Herzog v. Title Guarantee & Trust Co., 177 N. Y. 86, 69 N. E. 283, 67 L. R. A. 146.

writing in accordance with the statutory requirements.[27] The distinction between a will and a codicil exists only in their relation to each other. Thus a will has the effect of revoking all wills previously made; whereas a codicil recognizes the existence of a previous will, to which it is supplementary, but leaves it in full force except so far as it undertakes to alter its terms.[28] If the codicil is not attached to the original will, it must expressly identify the will to which it relates.[29] If a codicil is executed with all due formalities, and expressly confirms the will so far as it is consistent with such will, it serves to republish the will, supplies all omissions, and remedies all defects, if any, in the execution of the will.[30] It is provided by statute in many states that the word "will" shall include or mean a codicil, but in the absence of such statute such word does not cover or embrace the codicil where anything appears to show that it was not intended to do so.[31]

§ 456. What laws govern devises.—It is a well-settled policy of the law in this country, except where not modified by statute, that wills of real estate or affecting real estate must be executed in accordance with the law of the state where the real estate is situated, and that the provisions disposing of such real estate must be valid under the laws of such state. It is not enough that such will and the provisions thereof are valid in the state of the testator's domicil.[32] This rule includes not only the form and mode of execution of a will, but also the lawful power and authority of the testator to make such disposition.[33] It also includes the capacity of the testator to make such disposition.[34] The rule also includes the power to devise after-acquired property,[35] the

[27] Dunham v. Averill, 45 Conn. 61, 29 Am. Rep. 642.

[28] Kelly v. Richardson, 100 Ala. 584, 13 So. 785; In re Plumel's Estate, 151 Cal. 77, 90 Pac. 192, 121 Am. St. 100.

[29] Ferrell v. Gill, 130 Ga. 534, 61 S. E. 131, 14 Ann. Cas. 471.

[30] Camp v. Shaw, 52 Ill. App. 241; McCurdy v. Neall, 42 N. J. Eq. 333, 7 Atl. 566. But see Phelps v. Robbins, 40 Conn. 250, 271, 272.

[31] Sloane v. Stevens, 107 N. Y. 122, 13 N. E. 618.

[32] Clarke v Clarke, 178 U. S. 186, 20 Sup. Ct. 873, 44 L. ed. 1028; Higgins v. Eaton, 188 Fed. 938; Blacksher Co. v. Northrup, 176 Ala. 190, 57 So. 743, 42 L. R. A. (N. S.) 454n; Crossett Lumber Co. v. Files, 104 Ark. 600, 149 S. W. 908; Lucas v. Tucker, 17 Ind. 41; Succession of Herber, 128 La. 111, 54 So. 579; Rackemann v. Taylor, 204 Mass. 394, 90 N. E. 552; In re Turner, 82 Misc. 25, 143 N. Y. S. 692; Ford v. Ford, 70 Wis. 19, 33 N. W. 188, 5 Am. St. 117.

[33] Ford v. Ford, 70 Wis. 19, 33 N. W. 188, 5 Am. St. 117.

[34] Evansville Ice & Cold Storage Co. v. Winsor, 148 Ind. 682, 48 N. E. 592.

[35] Frazier v. Boggs, 37 Fla. 307, 20 So. 245; Wynne v. Wynne, 23 Miss. 251, 27 Am. Dec. 139.

power to devise property held in common,[36] the power to disinherit by devise,[37] the application of the rule in Shelley's Case,[38] the application of the rule against perpetuities,[39] and the application of the doctrine of equitable conversion.[40]

There are cases holding that a will disposing of real estate is governed by the law of the testator's domicil, unless it appears from the will that he drew it with reference to the law of the place where the land was situated.[41] The rule that the lex rei sitæ governs a will devising real property has been modified in some states by the adoption of the rule that a will is valid to pass land anywhere if it is valid by the law of the jurisdiction where the testator was domiciled at the time of his death.[42] The rule that a will devising real estate is governed by the law of the place where the real estate is situated includes the capacity of the devisee to take under the will.[43] Where a will creates a trust in relation to lands devised, its validity is governed by the law of the place where the land is situated.[44] In the absence of a statute to the contrary, the law of the domicil of a donor of a power created by will controls in determining the validity of the execution of the power.[45]

The revocation of a will devising real property is governed by the law of the place where the land is situated, whatever be the mode of revocation.[46]

Questions of election with regard to real property are governed by the lex rei sitæ.[47]

The lex rei sitæ governs in interpreting the interest created by a devise of real estate.[48]

[36] Pratt v. Douglas, 38 N. J. Eq. 516.

[37] In re Lewis' Estate, 32 La. Ann. 385.

[38] DeVaughn v. Hutchinson, 165 U. S. 566, 17 Sup. Ct. 461, 41 L. ed. 827.

[39] Ford v. Ford, 80 Mich. 42, 44 N. W. 1057; Hobson v. Hale, 95 N. Y. 588.

[40] In re Clark's Appeal, 70 Conn. 195, 39 Atl. 155.

[41] Higgins v. Eaton, 188 Fed. 938; Keith v. Eaton, 58 Kans. 732, 51 Pac. 271; Lincoln v. Perry, 149 Mass. 368, 21 N. E. 671, 4 L. R. A. 215; Washburn v. Van Steenwyk, 32 Minn. 336, 20 N. W. 324.

[42] Green v. Alden, 92 Maine 177, 42 Atl. 358.

[43] Jones v. Habersham, 107 U. S. 174, 2 Sup. Ct. 336, 27 L. ed. 401; White v. Howard, 46 N. Y. 144.

[44] Ford v. Ford, 80 Mich. 42, 44 N. W. 1057.

[45] Sewall v. Wilmer, 132 Mass. 131; In re Bingham's Appeal, 64 Pa. St. 345; Cotting v. DeSartiges, 17 R. I. 668, 24 Atl. 530, 16 L. R. A. 367.

[46] DeVaughn v. Hutchinson, 165 U. S. 566, 17 Sup. Ct. 461, 41 L. ed. 827; Ware v. Wisner, 50 Fed. 310; In re Clark's Appeal, 70 Conn. 195, 39 Atl. 155.

[47] Apperson v. Bolton, 29 Ark. 418; Jennings v. Jennings, 21 Ohio St. 56.

[48] Handley v. Palmer, 103 Fed. 39, 43 C. C. A. 100; McCartney v. Osburn, 118 Ill. 403, 9 N. E. 210;

As a general rule the validity of the execution of a will is controlled by the statute in force at the time of its execution. And a statute enacted subsequent to the execution and prior to the death of the testator, changing the rule with respect to the form of the instrument, the capacity of the testator and the like, has no retrospective effect.[49] But if the legislative intent is manifest that the act shall govern wills already executed, it will have a retrospective effect.[50] However, if this intention is not manifest the act will apply only to wills executed after its passage, and the statute in force at the time of the death of the testator controls their validity.[51] Until the death of the testator, therefore, the power of the legislature over wills, the manner of their execution, and the mode of carrying out their provisions is absolute and supreme, but upon the death of the testator the interest passing under the will becomes vested if the will is valid, and the legislature may not interfere with or divest the estate.[52]

§ 457. **Capacity to make a will.**—The capacity of a person to make testamentary disposition of his property is generally expressed or implied in the different statutes of wills, and the other statutes relating thereto of the different states.[53] In some jurisdictions, however, it is held that every one of mature age and sound mind has an inherent right to make a will and have it carried out according to his intent.[54] The very purpose of the statute of wills was to recognize and create a right in the owner, having testamentary capacity, to make disposition of his property according to his own choice and pleasure, and in variance, if need be, to the usual rules of inheritance as fixed by the statute of descent and distribution.[55] The legislative body of each state has plenary

Thompson v. Penn, 149 Ky. 158, 148 S. W. 33.

[49] In re Lane's Appeal, 57 Conn. 182, 17 Atl. 926, 14 Am. St. 94, 4 L. R. A. 45; Coleman v. O'Leary, 114 Ky. 388, 24 Ky. L. 1248, 70 S. W. 1068.

[50] Hoffman v. Hoffman, 26 Ala. 535; In re Learned's Estate, 70 Cal. 140, 11 Pac. 587; Hargroves v. Redd, 43 Ga. 142; Crawford v. Thomas, 114 Ky. 197, 21 Ky. L. 1100, 54 S. W. 197; Perkins v. George, 45 N. H. 453.

[51] Powell v. Powell, 30 Ala. 697; Gregory v. Oates, 92 Ky. 532, 18 S. W. 231, 13 Ky. L. 761.

[52] White v. Keller, 68 Fed. 796; In re Deake's Appeal, 80 Maine 50, 12 Atl. 790; Remington v. Metropolitan Sav. Bank, 76 Md. 546, 25 Atl. 666.

[53] United States v. Perkins, 163 U. S. 625, 16 Sup. Ct. 1073, 41 L. ed. 287; Wolfe v. Mueller, 46 Colo. 335, 104 Pac. 487; In re Graves, 242 Ill. 212, 89 N. E. 978; In re Noyes' Estate, 40 Mont. 178, 105 Pac. 1013; Strand v. Stewart, 51 Wash. 685, 99 Pac. 1027. See also digest of statute of wills in appendix to this work.

[54] In re Ball, 153 Wis. 27, 141 N. W. 8.

[55] Purdy v. Evans, 156 Ky. 342, 160 S. W. 1071.

power to withhold or grant the right to make a will, and where a legislative body does grant this right, it may make its exercise subject to such regulations, restrictions and requirements as it may see fit to impose upon the testator.[56] In all cases where the capacity to make wills is regulated by statute, the provisions thereof must be strictly followed. The point of time at which the competency of the testator to execute a will is to be tested is that of the execution of the will, and where a codicil is subsequently made he must have capacity at both the date of the will and the date of the codicil, as a codicil draws the will down to its own date, and makes the will speak as of the date of the codicil.[57] If there be a want of testamentary capacity at the time of the execution of the will, such will never takes effect, or, rather, is not so made and executed as to take effect, without republication, although a statute giving testamentary capacity should be subsequently passed, but that a will which was legally executed by a person having testamentary capacity, which attempted to pass property not then effectually devised, and hence invalid as to such devise, will be validated and pass such property included by force of a subsequent statute operating to authorize it.[58] Generally speaking, a testator may dispose of his property as he chooses, but in doing so he must not contravene any settled principle of public policy, or any clear right of another growing out of the statutory provisions or court decisions.[59]

At common law aliens had no right to transmit real property by devise, but this rule has been greatly modified by statute, so that in some states resident aliens are placed upon the same footing as citizens in this respect. In other states the statutes apply only to aliens who have resided for a certain length of time in the state or who have declared their intention to become citizens.

As a general rule, at common law, infants can not make a valid devise of real property, but at present the age of testamentary capacity is regulated by statute everywhere, the age ranging from fourteen to twenty-one years, and is not in all cases uniform between the sexes.

At common law a married woman could not make a valid de-

[56] In re Walker's Estate, 110 Cal. 387, 42 Pac. 815, 30 L. R. A. 460, 52 Am. St. 104.

[57] Smith v. Day, 2 Pennew. (Del.) 245, 45 Atl. 396.

[58] Mitchell v. Kimbrough, 98 Tenn. 535, 41 S. W. 993.

[59] Rhoads v. Rhoads, 43 Ill. 239.

vise of her real estate, but modern statutes generally empower her to make a devise as if sole.

In this country, where forfeiture for crime is not generally recognized, the conviction of a crime does not affect the capacity of a person to transfer real property by will.

The mental capacity of a person to make a valid will is a matter of primary investigation and proof upon probate, and is seldom if ever encountered in the examination of a title.

§ 458. Capacity to take under a will.—As a general rule any person may take real property by devise. But for reasons of public policy and good morals the law has seen fit to designate who may and who may not be the objects of the testator's bounty. The capacity of a person to take a present vested interest in the land under a will is judged as of the date of the testator's death,[60] and if the capacity existed at that date, a prior or subsequent incapacity does not render the devise invalid. But where a devise is intended to be vested in the beneficiary, not at the death of the testator, but at some later time, it is immaterial whether the beneficiary is capable of taking at the time of the death, provided he is capable at the time when the gift is intended to become vested.[61] A beneficiary under a will must be in existence either at the death of the testator or at the time the gift vests.[62] A devise to a corporation not in existence at the death of the testator is void.[63] Also a will devising property to the estate of a person is void; it not being a person or entity which can take under a will.[64] In most states aliens are permitted to take real property by devise as fully as citizens can.[65] In some states, however, nonresident aliens are forbidden by statute to acquire any interest in real estate by devise.[66] By the common law a private corporation may acquire title to real estate by devise,[67] and unless prohibited by statute the

[60] Hargroves v. Redd, 43 Ga. 142.

[61] Lougheed v. Dykeman's Baptist Church, 129 N. Y. 211, 29 N. E. 249, 14 L. R. A. 410.

[62] Milne v. Milne, 17 La. 46.

[63] Zeisweiss v. James, 63 Pa. St. 465, 3 Am. Rep. 558

[64] In re Glass' Estate, 164 Cal. 765, 130 Pac. 868.

[65] DeGeoffroy v. Riggs, 7 Mackey (18 D. C.) 33 rev'd, 133 U. S. 258, 10 Sup. Ct. 295, 33 L. ed. 642; Nicrosi v. Phillippi, 91 Ala. 299, 8 So. 561; Utassy v. Geidinghagen, 132 Mo. 53, 33 S. W. 444; Stamm v. Bostwick, 122 N. Y. 48, 25 N. E. 233, 9 L. R. A. 597.

[66] Ryan v. Egan, 156 Ill. 224, 40 N. E. 827; Meier v. Lee, 106 Iowa 303, 76 N. W. 712.

[67] Hubbard v. Worcester Art Museum, 179 Fed. 406; In re McGraw's Estate, 111 N. Y. 66, 19 N. E. 233, 2 L. R. A. 387.

devise may be made to a foreign corporation.[68] In some states statutes have been enacted which provide that no devise to a corporation shall be valid unless it is expressly authorized to take by devise. Other statutes provide that certain corporations shall not take by gift, grant, or devise more than a certain stated amount in value of property. So a devise to a corporation not authorized to take real estate, or to one which has acquired all the property it is entitled by its charter to take, is void.[69] As a general rule a municipal corporation, unless specially restricted, is capable of taking property by devise, and acting as trustee for the purpose of a public nature germane to the objects of the corporation.[70] Unincorporated societies are generally held incapable of taking property by devise, for the reason that the beneficiary is uncertain;[71] although a devise may be made to the trustees of such society for its benefit.[72] Charitable, religious, and educational institutions can generally take real property under a will, but the statutes of many states regulate the amount and value thereof.[73] Under modern statutes a husband or wife may devise real estate to each other; and married women are now generally empowered to make wills disposing of both real and personal property as if sole. Unless there is a statute prohibiting or restricting it, a testator may devise his property to his illegitimate children, and even to the exclusion of his legitimate children.[74] In many jurisdictions it is held that a devise to an attesting witness is void.[75] But where such attesting witness would be entitled to a share of the testator's estate in case of intestacy, it is held that so much of such share shall be preserved to him as does not exceed his gift under the will.[76] It has also been held that if there are sufficient other competent witnesses besides the beneficiary to prove the will the gift may be valid, and it matters not whether the beneficiary

[68] West Virginia Pulp & Paper Co. v. Miller, 176 Fed. 284.

[69] Barton v. King, 41 Miss. 288; DeCamp v. Dobbins, 31 N. J. Eq. 671; Wood v. Hammond, 16 R. I. 98, 17 Atl. 324, 18 Atl. 198.

[70] Handley v. Palmer, 91 Fed. 948; Quincy v. Attorney-General, 160 Mass. 431, 35 N. E. 1066.

[71] Kennett v. Kidd, 87 Kans. 652, 125 Pac. 36, 44 L..R. A. (N. S.) 544n, Ann. Cas. 1914A, 592.

[72] Stone v. Griffin, 3 Vt. 400.

[73] Jones v. Habersham, 107 U. S. 174, 2 Sup. Ct. 336, 27 L. ed. 401.

[74] Dunlap v. Robinson, 28 Ala. 100; Smith v. Du Bose, 78 Ga. 413, 3 S. E. 309, 6 Am. St. 260; Elliott v. Elliott, 117 Ind. 380, 20 N. E. 264, 10 Am. St. 54.

[75] Hodgman v. Kittredge, 67 N. H. 254, 32 Atl. 158, 68 Am. St. 661.

[76] Clark v. Miller, 65 Kans. 726, 68 Pac. 1071, aff'd, 65 Kans. 726, 70 Pac. 586; Grimm v. Tittman, 113 Mo. 56, 20 S. W. 664.

testified as a witness or not.[77] Under the general principle of law that no man is permitted to acquire property as the result of his own crime, the murderer of a testator is not allowed to take as beneficiary under the will of his victim.[78]

§ 459. **Construction of wills.**—Perhaps the most difficult questions on which title to real estate depends are those which involve the true construction of wills which form a part of the muniments of title. The true intent of the testator, whose will has been inartificially and unskilfully drawn, is often a question difficult of determination. In the law of contingent remainders, executory devises, restraints upon alienation, the creation of perpetuities, and the like, many niceties and subtleties arise, concerning which, as related to the peculiar circumstances of each case, the most learned in the law are sometimes in doubt.

The rule for the construction of wills followed by courts in recent times is to ascertain the intent of the testator from the whole instrument, attributing due weight to all its language, and then give effect to that intent unless prevented by some positive rule of law, rather than to try to make the interpretation of particular words or phrases in one instrument square with that before given to somewhat similar words used by some one else under other surroundings to accomplish a more or less different end. A few combinations of words have become so fixed in their meaning by long and unvarying use as to be rules of property. But ordinary canons for the interpretation of wills, having been established as aids for determining testamentary intent, are to be followed only so far as they accomplish that purpose, and not when the result would be to defeat it.[79] The intention of the testator is to be gathered from the whole will rather than from the phraseology of any particular clause.[80]

In determining the nature of an estate created by will, the will itself is to be first consulted to ascertain the intention of the testator, and after this has been determined the statute is to be con-

[77] Caw v. Robertson, 5 N. Y. 125; Davis v. Davis, 43 W. Va. 300, 27 S. E. 323.

[78] Riggs v. Palmer, 115 N. Y. 506, 22 N. E. 188, 5 L. R. A. 340, 12 Am. St. 819.

[79] Ware v. Minot, 202 Mass. 512, 88 N. E. 1091.

[80] Cook v. Hart, 135 Ky. 650, 117 S. W. 357; Ball v. Phelan, 94 Miss. 293, 49 So. 956, 23 L. R. A. (N. S.) 895; In re Title Guarantee & Trust Co., 195 N. Y. 339, 88 N. E. 375; In re Prasser's Will, 140 Wis. 92, 121 N. W. 643.

sulted in order to ascertain how far the estate intended to be created by the testator is affected, limited or inhibited by law.[81] While the terms of a will are not, of necessity, to be construed technically and with strict reference to grammatical accuracy, yet the importance of a correct use of language should not be overlooked. "Words and expressions used are to be taken in their ordinary, proper and grammatical sense; unless, upon so reading them in connection with the entire will, or upon applying them to the facts of the case, an ambiguity or difficulty of construction arises; in which case the primary meaning of the words may be modified, extended, or abridged, and the words and expressions supplied or rejected, in accordance with the presumed intention, so far as to remove or avoid the difficulty or ambiguity in question, but no further."[82]

The law favors that construction by which gifts will be vested at the earliest moment consistent with a fair interpretation of the whole will,[83] which is usually at the death of the testator.[84] Contradictory clauses will be construed so as to avoid intestacy where possible; and where a whole subject is covered by clear and careful provisions such will be modified by subsidiary contradictory provisions in as restricted a way as consistent with the language used.[85]

An endless variety of expressions have been employed to charge real estate with the payment of debts and legacies, and whether there is such a charge in any particular case depends upon the intention of the testator, to be determined by a consideration of the whole will. But legacies may be charged upon real estate without the use of express words where an intention on the part of the testator to so charge his real estate is clearly manifested by the whole will.[86] In order to charge real estate specifically devised with the payment of debts and legacies the will must contain an express provision to that effect, or the charge must be clearly and unmistakably implied from the whole will, read in the light of all the surrounding circumstances.[87] It is a familiar

[81] In re Prasser's Will, 140 Wis. 92, 121 N. W. 643.

[82] Hawkins Wills (2d ed.) 2.

[83] Johnson v. Washington Loan &c. Co., 224 U. S. 224, 32 Sup. Ct. 421, 56 L. ed. 741.

[84] Sumpter v. Carter, 115 Ga. 893, 42 S. E. 324, 60 L. R. A. 274; Patton v. Ludington, 103 Wis. 629, 79 N. W. 1073, 74 Am. St. 910.

[85] In re Phillips' Estate, 205 Pa. 504, 55 Atl. 210, 97 Am. St. 743.

[86] Davidson v. Coon, 125 Ind. 497, 25 N. E. 601, 9 L. R. A. 584.

[87] Hibler v. Hibler, 104 Mich. 274, 62 N. W. 361.

rule of construction that when an estate is devised to be divided equally between certain persons, whether specifically named, or designated by more general terms, as the children or heirs of certain persons, the language imports the taking of an equal share by each devisee, in the absence of other provisions showing a contrary intention.[88] The general rule of construction, both as to deeds and wills, is that if there be an interest and a power existing together in the same person over the same subject, and an act be done without particular reference to the power, it will be applied to the interest and not to the power.[89]

§ 460. **False, erroneous, conflicting, and repugnant descriptions.**—As a general rule technical accuracy in the use of language to describe the real estate which the testator intended to devise is not required, if from the whole will it appears that it was his intention to pass his interest in the property.[90] Gifts by words of general description will not be limited by subsequent attempts at particular description, unless such appears to be the intention of the testator.[91] Where the property intended to be given is described in different ways which do not agree, and some of the property answers all the descriptions and some answers a part only, the expressions will be understood as restrictive, and only that property will pass which answers all the descriptions.[92] If the description is wholly false, or so defective that the property can not be identified with the aid of such light as the testator's situation throws on the will, the gift must fail for uncertainty.[93] In arriving at the intention of the testator, so much as is false in the description of the premises devised may be stricken out, and if enough remains to identify the premises intended, the will will be sustained with the false words eliminated therefrom.[94] While no particular form of expression is required to pass the whole estate, the intention to do so must be expressed in some form, and wherever the words used are such as will carry

[88] Kling v. Schnellbecker, 107 Iowa 636, 78 N. W. 673; Smith v. Curtis, 29 N. J. L. 345.

[89] Phillips v. Brown, 16 R. I. 279, 15 Atl. 90.

[90] Lindsay v. Wilson, 103 Md. 252, 63 Atl. 566, 2 L. R. A. (N. S.) 408.

[91] Chace v. Lamphere, 148 N. Y. 206, 42 N. E. 580.

[92] Bourke v. Boone, 94 Md. 472, 51 Atl. 396.

[93] Williams v. Williams, 189 Ill. 500, 59 N. E. 966; Sturgis v. Work, 122 Ind. 134, 22 N. E. 996, 17 Am. St. 394.

[94] Whitcomb v. Rodman, 156 Ill. 116, 40 N. E. 553, 28 L. R. A. 149, 47 Am. St. 181.

the whole estate, it will be presumed that the testator intended to dispose of all his property.[95]

As a rule, general words are sufficient to pass after-acquired real estate, and a simple devise of all the testator's real property will pass land acquired by him after the making of his will, unless a different intention appears by the will.[96] Where a testator devised the "west one-half" of a certain quarter section "containing about 76 acres," when the only land owned by him in that county was 76 acres in the north one-half of that quarter section, it was held that the word "west" should be stricken out and the will be given effect as a gift of the 76 acres in the north one-half of the section, though there was a residuary clause.[97] On the contrary, it has been held that where a will purported to devise the northeast quarter of a certain section which the deceased did not own, but he owned the southeast quarter of the section, and owned no other land, a rejection of the false description in the will as surplusage, left no description whatever by which the land intended to be devised could be identified, and the will did not devise the land owned by the testator.[98]

§ 461. Repugnant provisions and conditions.—Where two clauses in a will are irreconcilably inconsistent and repugnant the earlier clause in point of local position must be rejected and the later clause allowed to prevail as expressing a later testamentary intention.[99] But if a subsequent clause is vague and unintelligible, and the prior clause is clear, the prior clause will not be destroyed, cut down or limited by the subsequent clause.[1] It is a familiar rule of construction that no portion of a will is to be rejected for repugnancy except from necessity; but that every portion will be upheld, if possible, and to effect this the order of the devises will be reversed.[2] Conditions which are repugnant to the estate limited are void. Thus a testator can not create a fee with absolute power of disposal, and at the same time clog that

[95] Given v. Hilton, 95 U. S. 591, 21 L. ed. 458.

[96] Graham v. DeYampert, 106 Ala. 279, 17 So. 355; Johnson v. White, 76 Kans. 159, 90 Pac. 810.

[97] Collins v. Capps, 235 Ill. 560, 85 N. E. 934, 126 Am. St. 232.

[98] McGovern v. McGovern, 75 Minn. 314, 77 N. W. 970, 74 Am. St. 489.

[99] Mansfield v. Shelton, 67 Conn. 390, 35 Atl. 271, 52 Am. St. 285; Heidlebaugh v. Wagner, 72 Iowa 601, 34 N. W. 439; Hiestand v. Meyer, 150 Pa. St. 501, 24 Atl. 749.

[1] Hovey v. Walbank, 100 Cal. 192, 34 Pac. 650; Howe v. Howe, 152 Ill. 252, 38 N. E. 1083.

[2] Bailey v. Sanger, 108 Ind. 264, 9 N. E. 159.

power of alienation by limitations over to another; in other words he can not include provisions which are absolutely inconsistent in terms and meaning, and have all given force and effect.[3]

§ 462. **Void conditions and provisions.**—A testator may subject his gifts to such lawful conditions and limitations as he chooses to impose; but conditions in conflict with public policy, or inhibiting the performance of acts which the public has an interest in having performed, are void, and can not be imposed on his beneficiaries.[4] If a condition precedent be void, or if it be or become impossible of performance, even though there be no fault on the part of the devisee, the devise can not take effect.[5] If, on the other hand, the condition be subsequent, the estate becomes absolute in the devisee.[6] Conditions which are impossible of performance are void; and when a condition precedent becomes impossible to be performed, even though there be no default or laches on the part of the devisee himself, the devise fails. "Where the performance of the condition is the sole motive of the bequest, or its impossibility was unknown to the testator, or the condition which was possible in its creation has since become impossible by the act of God, or where it is illegal as involving malum in se, in these cases the civil agrees with the common law in holding the gift and conditions void."[7]

At common law if a testator devised his estate to his heir-at-law, so that the heir took neither a greater nor a less estate by the devise than he would have taken without it, the heir was adjudged to take by descent and not by purchase, and the devise was held to be void. This rule still obtains in some jurisdictions,[8] although the prevailing rule in this country is that such devise is valid, and that the devisee takes by purchase and not by descent.[9]

§ 463. **Operative words of a will.**—The operative words of a will are the words by which the estate passes from the testa-

[3] Law v. Douglass, 107 Iowa 606, 78 N. W. 212.

[4] New Orleans v. Baltimore, 13 La. Ann. 162.

[5] Halsey v. Goddard, 86 Fed. 25; Robbins v. Boulder County Com'rs, 50 Colo. 610, 115 Pac. 526.

[6] New Haven County v. New Haven Trinity Church, 82 Conn. 378, 73 Atl. 789, 17 Ann. Cas. 432.

[7] 2 Jarman Wills, § 853. See also Stark v. Conde, 100 Wis. 633, 76 N. W. 600.

[8] Akers v. Clark, 184 Ill. 136, 56 N. E. 296, 75 Am. St. 152; Biedler v. Biedler, 87 Va. 300, 12 S. E. 753.

[9] Robinson v. Le Grand, 65 Ala. 111; Gilpin v. Hollingsworth, 3 Md. 190, 56 Am. Dec. 737; Campbell v. Wiggins, 1 Rice's Eq. (S. Car.) 10.

tor to the beneficiary. The words generally used for this purpose are "give," "devise," or "bequeath." Either of these words are sufficient to pass title to real estate, although the technical word for this purpose is "devise." The word "give" may be used with reference to either real or personal property. The word "bequeath" is used with reference to personal property, but it may be used in the popular sense to include "devise."[10] But whether the word "bequeath" means the same thing as "devise," when used in a will, is to be determined by the connection in which it is found.[11] When the context shows that the word is used by the testator to denote a gift of real estate it will be construed to be synonymous with the term "devise."[12] Even where the will contains no formal words of gift, a gift will be implied where the intention of the testator to dispose of his property by will is clearly shown.[13]

Gifts may also be made indirectly by direction to executors or trustees to pay or divide, but in such case the direction to pay or divide constitutes the devise, and therefore the vesting in interest is postponed, as well as the vesting in possession or enjoyment.[14]

Where a testator desires his devisee to benefit some third person out of the estate given, he frequently expresses his desire by words of entreaty, expectation, request, recommendation, hope, wish, desire, and the like, rather than by words of command. Such expressions in wills are termed "precatory words," and they have often been held sufficient to create a trust in favor of the person or object sought to be benefited. But in order that a trust may be created by the use of such words it must appear: (1) That the testator intended his words to be imperative upon the legatee, so that the latter will have no option to comply or refuse to comply with them; (2) that the subject-matter of the wish or recommendation is certain; and (3) that the beneficiaries are clearly designated.[15]

§ 464. **Words of purchase and limitation.**—Words of purchase in a will are such as designate the person or persons who are to take the estate or estates limited; while words of limitation are those which fix the time for the commencement of the

[10] Ogle v. Tayloe, 49 Md. 158.
[11] Dow v. Dow, 36 Maine 211.
[12] Borgner v. Brown, 133 Ind. 391, 33 N. E. 92.
[13] Masterson v. Townshend, 123 N. Y. 458, 25 N. E. 928, 10 L. R. A. 816.
[14] In re Reiff's Appeal, 124 Pa. St. 145, 16 Atl. 636.
[15] Colton v. Colton, 127 U. S. 300, 8 Sup. Ct. 1164, 32 L. ed. 138; Burnes v. Burnes, 137 Fed. 781, 70 C. C. A. 357.

estate or estates, and their quantum or duration. A number of words, such as "heirs," "issue," "children," etc., are capable of use either as words of limitation or as words of purchase, and the determination of the purpose of their use in a particular instrument is often a matter of difficulty. When used to designate beneficiaries such words are said to be used as words of purchase, that is, they designate the purchasers or persons who are to take the estate. When used to describe the estate or interest given, they are said to be used as words of limitation, that is, they limit or describe the estate or interest given. When used as a word of purchase, the term "heirs," unless influenced by the context, has reference to the persons upon whom the law casts the estate immediately upon the death of the ancestor.[16] A devise of real estate to one and to his "heirs and assigns" is the safest method of creating a fee in the devisee,[17] but even in the absence of the word "heirs," other words in the will showing an intention to devise a fee simple estate are sufficient to pass such an estate.[18] But the intention must, in the absence of a statute changing the rule, appear in some way on the face of the will, and it is sometimes said that there must be words from which an intention to pass a fee may necessarily be implied.[19] It is to be noted with care, as explaining much of the law of estates, that the word "heirs," when used in its general sense, does not indicate that the heir or heirs of the devisee take any interest in the property by or through the will; but it is the technical, legal term necessary to express the fact that the devisee himself takes all the interest in fee simple.

Where the word "heir" or "heirs" is accompanied with qualifying words, such as "heirs now living," "heirs should he have any," "heirs then surviving," "heirs resident in the state," "heirs other than those hereinbefore mentioned," and the like, those answering the description will take to the exclusion of the general heirs.[20] A devise "to A and the heirs of his body" gives an estate

[16] Kellett v. Shepard, 139 Ill. 433, 28 N. E. 751, 34 N. E. 254; Lincoln v. Perry, 149 Mass. 368, 21 N. E. 671, 4 L. R. A. 215; Johnson v. Brasington, 156 N. Y. 181, 50 N. E. 859.

[17] Galloway v. Darby, 105 Ark. 558, 151 S. W. 1044, 44 L. R. A. (N. S.) 782, Ann. Cas. 1914D, 712; Reddick v. Lord, 131 Ind. 336, 30 N. E. 1085; Kendall v. Clapp, 163 Mass. 69, 39 N. E. 773.

[18] Schneer v. Greenbaum, 27 Del. 97, 86 Atl. 107; Ashby v. McKinlock, 271 Ill. 254, 111 N. E. 101.

[19] Wheaton v. Andress, 23 Wend. (N. Y.) 452.

[20] Graham v. DeYampert, 106 Ala. 279, 17 So. 355; Plummer v. Shep-

in fee tail to A. But any words which will show that the word "heirs" is to be restricted to the heirs of the body will suffice to restrict the inheritance to a fee tail.[21]

§ 465. Rule in Shelley's Case.—The Rule in Shelley's Case is this: Where a freehold estate is limited to one for life, and by the same instrument the inheritance is limited, either immediately or after another estate in freehold, to his heirs, or the heirs of his body, the whole estate vests in him, either in fee simple or in fee tail, in the same manner as if the estate had been given to him and his heirs, or to him and the heirs of his body; and the words "heirs" and "heirs of his body" are words of limitation and not of purchase.[22] The rule, though of feudal origin, has been repeatedly declared to be in accordance with the general policy of modern jurisprudence.[23] While the rule has been generally abolished by statute in this country, it remains a rule of property in the construction of both deeds and wills in several states.[24] In jurisdictions where the rule has been abolished, a devise that would formerly have vested a fee in the first taker now gives him a life estate only, with remainder in fee to his heirs.[25]

Generally speaking, the rule is not one of construction or interpretation, but a rule of property,[26] and is governed by the intention of the testator.[27] But it has been held that where the intention of the testator is clearly ascertainable, such intention will prevail even against the rule.[28] The rule is not regarded as a de-

herd, 94 Md. 466, 51 Atl. 173; Wood v. Bullard, 151 Mass. 324, 25 N. E. 67, 7 L. R. A. 304; Snider v. Snider, 160 N. Y. 151, 54 N. E. 676.

[21] Brown v. Addison Gilbert Hospital, 155 Mass. 323, 29 N. E. 625; Pollock v. Speidel, 17 Ohio St. 439.

[22] Holt v. Pickett, 111 Ala. 362, 20 So. 432; Norris v. Hensley, 27 Cal. 439; Goodrich v. Lambert, 10 Conn. 448; Seay v. Cockrell, 102 Tex. 280, 115 S. W. 1160.

[23] Starnes v. Hill, 112 N. Car. 1, 16 S. E. 1011, 22 L. R. A. 598.

[24] Hardage v. Stroope, 58 Ark. 303, 24 S. W. 490; Fowler v. Black, 136 Ill. 363, 26 N. E. 596, 11 L. R. A. 670; Lane v. Utz, 130 Ind. 235, 29 N. E. 772; Broliar v. Marquis, 80 Iowa 49, 45 N. W. 395; Thomas v. Higgins, 47 Md. 439; Starnes v. Hill, 112 N. Car. 1, 16 S. E. 1011, 22 L. R. A. 598; Carson v. Fuhs, 131 Pa. St. 256, 18 Atl. 1017; Carrigan v. Drake, 36 S. Car. 354, 15 S. E. 339.

[25] Copley v. Ball, 176 Fed. 682; Wilkerson v. Clark, 80 Ga. 367, 7 S. E. 319, 12 Am. St. 258; Cross v. Hoch, 149 Mo. 325, 50 S. W. 786.

[26] Baker v. Scott, 62 Ill. 86.

[27] Jones v. Rees, 6 Pennew. (Del.) 504, 69 Atl. 785, 16 L. R. A. (N. S.) 734; Robert v. West, 15 Ga. 122; Brown v. Bryant, 17 Tex. Civ. App. 454, 44 S. W. 399.

[28] Slemmer v. Crampton, 50 Iowa 302; Alhin v. Parmele, 70 Nebr. 740, 98 N. W. 29; Tendick v. Evetts, 38 Tex. 275.

vice to discover the intention of the testator, but is only applied after such intention has been discovered, when, by its own inexorable force, it unites in the ancestor any estate which his heirs are to take as such, after a precedent estate given to him, no matter what the purpose of the testator may have been; and there is a material and controlling distinction between a devise of an estate to a person named and his lawful heirs, and a devise to the lawful heirs of a person.[29]

§ 466. How particular words and phrases are interpreted. —In every case the words used in a will must be capable of bearing the meaning sought to be put upon them. Where a testator uses technical words, he is presumed to employ them in their legal sense unless the contents clearly indicate a contrary intention. Technical words do not have such a fixed legal meaning that a gift will fail because the testator does not use the words descriptive of the gift or act of giving with technical accuracy.[30] In seeking the intention of the testator courts will presume, in the absence of any language in the will repelling such presumption, that the words and expressions used were employed in the light of the settled meaning which the law attaches to such words;[31] and technical words will be given their legal effect unless, from subsequent inconsistent words, it is very clear that the testator meant otherwise, and the law will even supply words where to do so does not oppose the manifest intention of the testator.[32] We have said that the word "heirs," when used as a word of purchase has reference to the persons upon whom the law casts the estate immediately upon the death of the ancestor,[33] and usually refers to the heirs of the testator.[34] The word "heirs" may be so restricted by the context as to mean children or grandchildren.[35]

The term "next of kin" is limited in legal meaning, as in common use, to blood relations, and it ordinarily includes ancestors

[29] Conger v. Lowe, 124 Ind. 368, 24 N. E. 889, 9 L. R. A. 165n.

[30] White v. Massachusetts Inst. of Technology, 171 Mass. 84, 50 N. E. 512.

[31] Taylor v. Stephens, 165 Ind. 200, 74 N. E. 980.

[32] Fowler v. Duhme, 143 Ind. 248, 42 N. E. 623; Coulter v. Crawfordsville Trust Co., 45 Ind. App. 64, 88 N. E. 865.

[33] Lincoln v. Perry, 149 Mass. 368, 21 N. E. 671, 4 L. R. A. 215.

[34] Miller v. Metcalf, 77 Conn. 176, 58 Atl. 743; Abel v. Abel, 201 Pa. 543, 51 Atl. 333.

[35] Anthony v. Anthony, 55 Conn. 256, 11 Atl. 45; McCartney v. Osburn, 118 Ill. 403, 9 N. E. 210; Allen v. Craft, 109 Ind. 476, 9 N. E. 919, 58 Am. Rep. 425.

as well as descendants in the same degree of consanguinity.[36] It includes relatives of the half blood with those of the whole blood in the same degree.[37]

The primary and usual meaning of the term "issue," when used as a word of purchase, includes lineal descendants of every degree;[38] but where it is apparent from extrinsic circumstances, or from the provisions of the will, that the testator intended to use the word in the sense of "children" it will be so limited.[39]

The true meaning of the terms "representatives," "legal representatives," and "personal representatives," when used in wills, is to be gathered from the language of the entire will, read in the light of relevant circumstances. They may mean the heirs or next of kin of the testator or a person named,[40] but when used in connection with estates of deceased persons such terms primarily mean those artificial representatives, the executors and administrators, who, by law, represent the deceased, in distinction from the heirs who are the natural representatives.[41]

The term "husband" or "wife" may apply to the person who answers that description at the date of the will.[42] But a gift to the "widow" of a designated person includes such wife as may survive him.[43]

The word "descendants" includes all those who have issued from an individual, including his children, grandchildren, and their children to the remotest degree,[44] but does not include "next of kin" or "heirs at law" generally, as these terms comprehend descendants as well as ascendants and collaterals.[45] The term "offspring," as used in a will, is said to be synonymous with issue,[46] and includes lineal descendants of every degree.[47]

The word "children," in its technical as well as popular mean-

[36] Clark v. Mack, 161 Mich. 545, 126 N. W. 632, 28 L. R. A. (N. S.) 479n.

[37] Morse v. Lowe, 182 Mich. 607, 148 N. W. 970.

[38] Miller v. Miller, 151 Ky. 563, 152 S. W. 542; Union Safe Deposit & Trust Co. v. Dudley, 204 Maine 297, 72 Atl. 166.

[39] Clark v. Kittenplan, 63 Misc. 122, 118 N. Y. S. 404.

[40] Greene v. Huntington, 73 Conn. 106, 46 Atl. 883; In re Riesenberg, 116 Mo. App. 308, 90 S. W. 1170.

[41] Briggs v. Walker, 171 U. S. 466, 19 Sup. Ct. 1, 43 L. ed. 243.

[42] Johnson v. Webber, 65 Conn. 501, 33 Atl. 506; Van Syckel v. Van Syckel, 51 N. J. Eq. 194, 26 Atl. 156; Meeker v. Draffen, 137 App. Div. 537, 121 N. Y. S. 1051.

[43] Swallow v. Swallow, 27 N. J. Eq. 278.

[44] Lich v. Lich, 158 Mo. App. 400, 138 S. W. 558.

[45] Tompkins v. Verplanck, 10 App. Div. 572, 42 N. Y. S. 412.

[46] Barber v. Pittsburg &c. R. Co., 166 U. S. 83, 17 Sup. Ct. 488, 41 L. ed. 925.

[47] Allen v. Markle, 36 Pa. St. 117.

ing, includes the immediate legitimate offspring of the person indicated as the parent.[48] Usually it does not include grandchildren,[49] stepchildren,[50] adopted children,[51] or illegitimate children,[52] unless there be some word or expression in the will to show that the testator used the word in a broader sense,[53] or unless the extrinsic circumstances show that the testator intended to include such persons.[54]

Where the testator uses the word "brothers" or "sisters" in his will, he will be presumed prima facie to mean brothers or sisters of the half blood as well as those of the whole blood.[55]

"Nephews" and "nieces" mean the immediate descendants of brothers and sisters of the persons named,[56] and do not ordinarily include grandnephews or grandnieces,[57] unless the context shows that such was the plain intention of the testator.[58]

Prima facie, the word "cousin" means first cousin, and not a first cousin once or more times removed; still less does it mean a second or third cousin, which might go on indefinitely.[59]

The term "descend to them" in a will should be construed to mean "go to them."[60] A devise to a wife "during her natural life" means that she is given the use of all income, and can only enjoy it during her life without waste.[61]

The word "survivor," or "surviving," will be understood as the

[48] Duncan v. DeYampert, 182 Ala. 528, 62 So. 673; Carpenter v. Perkins, 83 Conn. 11, 74 Atl. 1062; Arnold v. Alden, 173 Ill. 229, 50 N. E. 704; Pugh v. Pugh, 105 Ind. 552, 5 N. E. 673.

[49] Phinizy v. Foster, 90 Ala. 262, 7 So. 836; West v. Rassman, 135 Ind. 278, 34 N. E. 991; Thomas v. Thomas, 97 Miss. 697, 53 So. 630; Kondolf v. Britton, 160 App. Div. 381, 145 N. Y. S. 791.

[50] Coon v. McNelly, 254 Ill. 39, 98 N. E. 218; In re Kurtz's Estate, 145 Pa. St. 637, 23 Atl. 322.

[51] Russell v. Russell, 84 Ala. 48, 3 So. 900; In re Woodcock's Appeal, 103 Maine 214, 68 Atl. 821, 125 Am. St. 291.

[52] Flora v. Anderson, 67 Fed. 182; Adams v. Adams, 154 Mass. 290, 28 N. E. 260, 13 L. R. A. 275.

[53] Edwards v. Bender, 121 Ala. 77, 25 So. 1010; Miller v. Carlisle, 90 Ky. 205, 12 Ky. L. 66, 14 S. W. 75.

[54] In re Schedel's Estate, 73 Cal. 594, 15 Pac. 297; Lichter v. Thiers, 139 Wis. 481, 121 N. W. 153.

[55] McAlister v. Burgess, 161 Mass. 269, 37 N. E. 173, 24 L. R. A. 158.

[56] In re Butler, 66 Misc. 406, 123 N. Y. S. 282.

[57] Willard v. Darrah, 168 Mo. 660, 68 S. W. 1023, 90 Am. St. 468; White v. Old, 113 Va. 709, 75 S. E. 182, L. R. A. 1916F, 787n, Ann. Cas. 1913E, 586n.

[58] Shull v. Johnson, 2 Jones Eq. (N. Car.) 202.

[59] White v. Massachusetts Inst. of Tech., 171 Mass. 84, 50 N. E. 512; Stevenson v. Abington, 31 Beav. 305, 9 Jur. (N. S.) 1063, 9 L. J. 74, 11 W. R. 935.

[60] Hayes v. Martz, 173 Ind. 297, 89 N. E. 303, 90 N. E. 309.

[61] In re Churchman's Appeal, 9 Sad. (Pa.) 423, 12 Atl. 6000.

equivalent of the word "other," where in any other sense it would lead to intestacy or inequality among those standing in the same degree of relationship to the testator, or to a distribution not in accordance with the general scheme of the will.[62]

The words "equally to be divided," or "share equally with," means a division per capita, and not per stirpes.[63]

§ 467. **Words passing real estate.**—In legal parlance the word "estate" was anciently confined to land, and meant degree, quantity, or extent of ownership rather than the land itself. As used in wills, however, the term is sometimes held to be synonymous with "property" when not qualified by the word "real" or "personal"; the presumption being that the testator used the term in its exclusive signification, unless the context restricts its meaning to some particular species of property.[64] When used in a will to describe property given, the word "estate" will include all of the property of the testator, both real and personal, unless the term is limited in meaning by the context.[65] When the term is intended to apply to real property, it may either express the quantity of interest devised or designate the thing devised or both.[66]

The term "property," when used in its most comprehensive sense, will include both real and personal property, unless restricted in its meaning by the context.[67]

The most comprehensive words of description applicable to real estate are "tenements" and "hereditaments," as they include every species of real property, corporeal as well as incorporeal.[68] The term "real estate" includes lands, tenements, and hereditaments, whether the latter be corporeal or incorporeal.[69]

The word "lands" is not so comprehensive as "real estate" or "tenements and hereditaments," as it would not comprehend incorporeal hereditaments,[70] nor would it include an advowson.[71]

The word "premises," when used in a will, means a separate

[62] In re Devine's Estate, 199 Pa. 250, 48 Atl. 1072.

[63] Kaufman v. Anderson, 31 Ky. L. 888, 104 S. W. 340.

[64] Powell v. Woodcock, 149 N. Car. 235, 62 S. E. 1071.

[65] Warner v. Williard, 54 Conn. 470, 9 Atl. 136; Smith v. Runnels, 97 Iowa 55, 65 N. W. 1002; Walker v. Hill, 73 N. H. 254, 60 Atl. 1017, 10 Prob. Rep. Ann. 650.

[66] Hart v. White, 26 Vt. 260.

[67] Fosdick v. Hempstead, 55 Hun 611, 8 N. Y. S. 772, 29 N. Y. St. 545.

[68] In re Handley, 208 Pa. 388, 57 Atl. 755.

[69] Gillett v. Gaffney, 3 Colo. 351.

[70] In re Handley, 208 Pa. 388, 57 Atl. 755.

[71] Westfaling v. Westfaling, 3 Atk. 460.

portion or parcel of land with all buildings, tenements and other appurtenances on it.[72] If the testator uses the term to describe a dwelling house, it will include not only the garden and land adjacent, with its stables, barns and outhouses, but whatever else is permanently annexed to the land devised.[73]

Other words which operate to pass real estate or interest therein are such as "freehold,"[74] "house,"[75] "homestead,"[76] "farm,"[77] "home place,"[78] "appurtenances,"[79] and the like. The words "property" and "estate," when used in a general sense, are always held sufficient to embrace all the testator's property, real as well as personal,[80] but when coupled with directions applicable only to personalty, they will not have this effect, nor when subsequent particulars clearly indicate that the testator had only personalty in contemplation.[81]

The word "effects," though savoring strongly of personalty, may, when the context clearly shows the intention, as when used in connection with the word "real," be sufficient to pass land.[82] The phrase "all my worldly goods," if used without specific enumeration, may reasonably be supposed to embrace lands, and in some instances has been so construed.[83]

§ 468. **Estates in remainder.**—An estate created to take effect upon the termination of a prior estate in the same property created by the same instrument is an estate in remainder. Such estate may be created by any expression which shows the testator's intention to dispose of his entire estate in the property in such manner that there is at the same time created a particular estate therein, less than a fee, followed by a limitation over to take effect upon the termination of such preceding particular estate.[84]

[72] Doe v. Willetts, 7 Mann. Gr. & S. 709.

[73] Powers v. Pomeroy, 21 Ohio St. 184.

[74] In re Steel, L. R. (1903), 1 Ch. 135, 72 L. J. Ch. 42, 87 L. T. Rep. 252.

[75] Richmond v. State, 5 Ind. 334.

[76] Smith v. Dennis, 163 Ill. 631, 45 N. E. 267; Morton v. Morton, 120 Ky. 251, 27 Ky. L. 661, 85 S. W. 1188.

[77] Scoville v. Mason, 76 Conn. 459, 57 Atl. 114.

[78] Burke v. Chamberlain, 22 Md. 298.

[79] Myers v. Norman, 20 Ky. L. 343, 46 S. W. 214.

[80] Korn v. Cutler, 26 Conn. 4; Fogg v. Clark, 1 N. H. 163; Monroe v. Jones, 8 R. I. 526.

[81] Smith v. Hutchinson, 61 Mo. 83.

[82] Page v. Foust, 89 N. Car. 447.

[83] Thompson v. Thompson, 27 Ky. L. 949, 87 S. W. 790; Krechter v. Grofe, 166 Mo. 385, 66 S. W. 358; McNally v. McNally, 23 R. I. 180, 49 Atl. 699.

[84] Smith v. Chadwick, 111 Ala. 542, 20 So. 436; Fleming v. Ray, 86 Ga. 533, 12 S. E. 944; Barclay v. Platt, 170 Ill. 384, 48 N. E. 972.

The essential characteristics of a remainder are: (1) There must be a precedent particular estate, whose regular termination the remainder must await; (2) the remainder must be created by the same conveyance, and at the same time, as a particular estate; (3) the remainder must vest in right during the continuance of the particular estate, or eo instanti that it determines; (4) no remainder can be limited after a fee simple.[85] The chief distinction between a remainder and an executory devise is that a remainder follows a particular estate, while an executory devise follows a fee.[86] So an estate in remainder can not be limited after an estate in fee simple,[87] whether it be a qualified or defeasible fee, or a conditional fee.[88] An estate in remainder is usually limited after an estate for life,[89] although it may be limited after an estate tail,[90] or an estate for years.[91]

§ 469. Executory devises.—An executory devise is such a limitation of a future estate and interest in lands as the law admits in the case of a will, though contrary to the rules of limitations in conveyances inter vivos at common law. It is an estate created by will to take effect at some future time subsequent to the death of the testator without reference to the existence or continuance of an intermediate estate.[92] Thus a will devising to testator's niece an estate in fee simple, with a provision that if she married and left no issue the estate should go to the testator's brothers and sisters or their children, and that if she left living issue at her death the estate should go to such issue, was given effect as an executory devise.[93] There are two kinds of executory devises: one, where an estate is devised to one, but upon some future event that estate is terminated, and the estate thereupon is to go to another; the other, when the estate is limited to commence

[85] Wells v. Houston, 23 Tex. Civ. App. 629, 57 S. W. 584.

[86] Sullivan v. Garesche, 229 Mo. 496, 129 S. W. 949, 49 L. R. A. (N. S.) 605n.

[87] Lambe v. Drayton, 182 Ill. 110, 55 N. E. 189; Watkins v. Watkins (Ky. App.), 120 S. W. 341; Simmons v. Cabanne, 177 Mo. 336, 76 S. W. 618.

[88] Sullivan v. Garesche, 229 Mo. 496, 129 S. W. 949, 49 L. R. A. (N. S.) 605n.

[89] Anderson v. Messinger, 146 Fed. 929, 7 L. R. A. (N. S.) 1094.

[90] Hall v. Priest, 6 Gray (Mass.) 18.

[91] Frazer v. Frazer, 24 Ky. L. 2517, 74 S. W. 259.

[92] St. John v. Dann, 66 Conn. 401, 34 Atl. 110; Glover v. Condell, 163 Ill. 566, 45 N. E. 173, 35 L. R. A. 360; In re Bank's Will, 87 Md. 425, 40 Atl. 268; Fisher v. Wister, 154 Pa. St. 65, 25 Atl. 1009.

[93] Ashby v. McKinlock, 271 Ill. 254, 111 N. E. 101.

in futuro, contrary to the rules of the common law. In the latter case the fee in the meantime remains in the heir of the devisor.[94] An executory devise may be contingent not only on the event that is to determine the fee, but also on the being of the person to take when the event occurs.[95] One of the distinctions between a remainder and an executory devise is that a remainder follows a particular estate, while an executory devise follows a fee.[96] Where there is doubt whether a certain disposition is an executory devise or a contingent remainder, the courts will favor the latter.[97] The first taker under an executory devise has no right to alienate or encumber the property as against those who may be entitled to succeed thereto upon the termination of his estate.[98] Care should be exercised that the testator has not, in creating an executory devise, postponed the vesting beyond the period fixed by the rule against perpetuities.[99]

§ 470. Gifts of the use, possession, rents, profits, and income of real property.—An unqualified and unlimited gift of the "rents," "income," or "profits" of real estate, if there be no disposition of the property itself, passes the absolute interest in the property to the beneficiary, for the reason that the value of the property lies in the rents, income, and profits thereof.[1] Also a gift of the "rents" and "profits" of land for life is a gift of the land itself for life,[2] and a gift of a part of the rents is a gift of a corresponding part of the land.[3] A gift of "rents and profits" has been held to pass real estate which was purchased with the proceeds of such rent.[4]

But the rule stated above is not applicable where the testator has expressly or by implication disposed of the corpus in some

[94] Nightingale v. Burrell, 15 Pick. (Mass.) 104, 111.

[95] Sullivan v. Garesche, 229 Mo. 496, 129 S. W. 949, 49 L. R. A. (N. S.) 605n.

[96] Doe v. Considine, 6 Wall. (U. S.) 458, 18 L. ed. 869; Bristol v. Atwater, 50 Conn. 402.

[97] Burleigh v. Clough, 52 N. H. 267, 13 Am. Rep. 23.

[98] Moody v. Walker, 3 Ark. 147; St. John v. Dann, 66 Conn. 401, 34 Atl. 110; Satterfield v. Tate, 132 Ga. 256, 64 S. E. 60.

[99] Chilcott v. Hart, 23 Colo. 40, 45 Pac. 391, 35 L. R. A. 41.

[1] Angus v. Noble, 73 Conn. 56, 46 Atl. 278, 5 Prob. Rep. Ann. 643; Drake v. Steele, 242 Ill. 301, 89 N. E. 1018; McCoy v. Houck, 180 Ind. 634, 99 N. E. 97.

[2] Mather v. Mather, 103 Ill. 607; Sampson v. Randall, 72 Maine 109; Brombacher v. Berking, 56 N. J. Eq. 251, 39 Atl. 134.

[3] Morrison v. Schorr, 197 Ill. 554, 64 N. E. 545; Durfee v. Pomeroy, 154 N. Y. 583, 49 N. E. 132.

[4] Roe v. Vingut, 117 N. Y. 204, 22 N. E. 933.

other way. Thus a gift of the "profits and benefits" of certain real estate, followed by a provision for the sale of such real estate at a fixed time, was held not to pass the fee.[5] While a gift of the use or the use and occupation of land will carry the fee, yet if the gift be to a trustee to permit the beneficiary to occupy without rent, the interest passing will amount to a license only.[6] If the use be restricted to life, during minority, during widowhood or during widowhood until marriage, until a certain age, and the like, only an estate or interest commensurate with the limitation prescribed will pass.[7]

§ 471. **Devise to a class.**—Whether a devise is to a class or to individuals as tenants in common must depend on the language employed by the testator in making the gift.[8] It is by no means an easy matter to formulate language necessary to constitute a gift to a class, and unless the language employed discloses an intention to create a class, the beneficiaries will take individually.[9]

Gifts to a class are usually made under such general terms as "children," "grandchildren," "brothers and sisters," "nephews and nieces," and the like; but they may be made under such technical terms as "heirs," "descendants," "issue," and "family."[10] Where the beneficiaries are designated by such words as "children" or "nephews," without indicating individuals by name or by description, the gift will be treated as one to a class;[11] but where the gift is made to persons who are designated individually, as by name or description, or where the property is devised severally to a number of persons, the gift is not one to a class, since the share of each does not depend upon the ultimate number of those who compose the class.[12] If a number of beneficiaries are indicated by name, and also by reference to a class to which they belong,

[5] Collier v. Grimesey, 36 Ohio St. 17.

[6] LeBreton v. Cook, 107 Cal. 410, 40 Pac. 552; Shindler v. Robinson, 150 App. Div. 875, 135 N. Y. S. 1056; Jackson v. Jackson, 56 S. Car. 346, 33 S. E. 749.

[7] Lewis v. Harrower, 197 Ill. 315, 64 N. E. 374; Fogler v. Titcomb, 92 Maine 184, 42 Atl. 360; Diament v. Lore, 31 N. J. L. 220.

[8] Mobley v. Mobley, 85 S. Car. 319, 67 S. E. 556; Saunders v. Saunders, 109 Va. 191, 63 S. E. 410.

[9] In re Russell, 168 N. Y. 169, 61 N. E. 166.

[10] In re Logan, 131 N. Y. 456, 30 N. E. 485.

[11] Dryer v. Crawford, 90 Ala. 131, 7 So. 445; Pendleton v. Kinney, 65 Conn. 222, 32 Atl. 331.

[12] Sturgis v. Work, 122 Ind. 134, 22 N. E. 996, 17 Am. St. 349; Horton v. Earle, 162 Mass. 448, 38 N. E. 1135; In re Markle's Estate, 187 Pa. St. 639, 41 Atl. 304.

the gift is prima facie a distributive gift and not a gift to a class.[13] There can be no survivorship in such cases.[14] But where it clearly appears that the names were added to the description for the purpose of greater certainty the gift will be treated as one to a class.[15] Where the language used indicates that the number of persons who are to take and the amounts of their shares are uncertain until the gift takes effect, the beneficiaries will generally take as a class;[16] while if the number of beneficiaries and the amounts of their shares are certain at the time of making the will, the gift will generally go to the individual beneficiaries distributively.[17]

Where a devise is made to a class, and there is nothing in the will showing a contrary intention, the numbers of the class will be determined upon the death of the testator.[18] If the time for determining the class is at the death of the testator, only the persons answering the description at that time will be included.[19] Unless there is something in the will showing a contrary intention, a gift to a class would seem to exclude those dying before the death of the testator,[20] and to include those born after the execution of the will.[21] Where the members of a class are to be determined at the death of the testator, those who have died before the testator's death can not be counted in the class so that the devise will inure to their heirs or representatives.[22] The will may expressly, or by necessary implication, fix the time when the members of a class are to be ascertained at a time other than the

[13] Bill v. Payne, 62 Conn. 140, 25 Atl. 354; Frost v. Courtis, 167 Mass. 251, 45 N. E. 687; Dildine v. Dildine, 32 N. J. Eq. 78.

[14] Hoppock v. Tucker, 59 N. Y. 202; Wildberger v. Cheek, 94 Va. 517, 27 S. E. 441.

[15] Bolles v. Smith, 39 Conn. 217; Rixey v. Stuckey, 129 Mo. 377, 31 S. W. 770.

[16] Fulghum v. Strickland, 123 Ga. 258, 51 S. E. 294; In re Raab, 79 Misc. 185, 139 N. Y. S. 869.

[17] In re Henderson, 161 Cal. 353, 119 Pac. 496; Staples v. Mead, 152 App. Div. 745, 137 N. Y. S. 847.

[18] Lancaster v. Lancaster, 187 Ill. 540, 58 N. E. 462, 79 Am. St. 234; Morgan v. Robbins, 152 Ind. 362, 53 N. E. 283; In re Nicholson, 115 Iowa 493, 88 N. W. 1064, 91 Am. St. 175; Hooper v. Smith, 88 Md. 577, 41 Atl. 1095.

[19] Parker v. Churchill, 104 Ga. 122, 30 S. E. 642; Ingraham v. Ingraham, 169 Ill. 432, 48 N. E. 561, 49 N. E. 320; Pierce v. Knight, 182 Mass. 72, 64 N. E. 692.

[20] Martin v. Mercer University, 98 Ga. 320, 25 S. E. 522; Downing v. Nicholson, 115 Iowa 493, 88 N. W. 1064, 91 Am. St. 175; Howland v. Slade, 155 Mass. 415, 29 N. E. 631.

[21] Gray v. Pash, 24 Ky. L. 963, 66 S. W. 1026; Coggins v. Flythe, 113 N. Car. 102, 18 S. E. 96.

[22] Hoadly v. Wood, 71 Conn. 452, 42 Atl. 263; Buzby v. Roberts, 53 N. J. Eq. 566, 32 Atl. 99.

testator's death.[23] The time of ascertainment may also be fixed at a date subsequent to the death of the testator, as long as the time so fixed is not so remote as to violate the rule against perpetuities.

§ 472. **Devise of life estate with power of disposition.**— The power of disposition in a tenant for life under a will must be expressly given, as it does not generally arise from implication.[24] It is usually construed strictly, and will be confined, for the protection of the remainderman, to the purpose for which it was given.[25] Thus where the life tenant is given the power of sale in case it becomes necessary for his support or maintenance, he can not exercise the power in the absence of such necessity.[26] But it has been held that where the wife of the testator is given a life estate with power to sell the property "for her own comfort and support" the power to sell is at her discretion, and it is not essential to the exercise of the power that the sale is necessary for her support and comfort.[27] Where the gift is for life with power of disposal for the necessary benefit of the life tenant, the power must be exercised during the active enjoyment of the life estate, and in aid of that enjoyment.[28] When real estate is given absolutely to one person, with a gift over to another of such portion as may remain undisposed of by the first taker at his death, the gift over is void, as repugnant to the absolute estate first given;[29] and it is also established law that, where an estate is given to a person generally, or indefinitely, with a power of disposition, it carries a fee, and any limitation over is void for repugnancy.[30] Where the testator, by residuary clause, leaves the rest and residue of his estate to one for his sole use and benefit during the term of his natural life and upon his death the remainder to be divided in a specified manner, but further provides that "it is my will" that

[23] In re Swenson's Estate, 55 Minn. 300, 56 N. W. 1115.

[24] Glore v. Scroggins, 124 Ga. 922, 53 S. E. 690; Bramell v. Cole, 136 Mo. 201, 37 S. W. 924, 58 Am. St. 619.

[25] McMillan v. Cox, 109 Ga. 42, 34 S. E. 341.

[26] Peckham v. Lego, 57 Conn. 553, 19 Atl. 392, 7 L. R. A. 419, 14 Am. St. 130.

[27] Griffin v. Nicholas, 224 Mo. 275, 123 S. W. 1063.

[28] Small v. Thompson, 92 Maine 539, 43 Atl. 509; Ford v. Ticknor, 169 Mass. 276, 47 N. E. 877.

[29] Mulvane v. Rude, 146 Ind. 476, 45 N. E. 659.

[30] Norris v. Hensley, 27 Cal. 439; Wiley v. Gregory, 135 Ind. 647, 35 N. E. 507; Bills v. Bills, 80 Iowa 269, 45 N. W. 748, 8 L. R. A. 696, 20 Am. St. 418; Combs v. Combs, 67 Md. 11, 8 Atl. 757, 1 Am. St. 359; Kelley v. Meins, 135 Mass. 231.

the first taker "be not restricted in any manner from using or disposing of all or any part" of the property, it was held that a life estate with power of disposition, and not a fee was created.[31]

Gifts for life with power of sale in the life tenant are a constant source of litigation, due mainly to the confused ideas respecting the scope of the power intended to be conferred. Such gifts generally subject the property to the payment of the life tenant's debts, and often give rise to contention and litigation between the life tenant and the remainderman.

§ 473. **Devise charged with payment of debts, legacies, and support.**—The will must be carefully examined to ascertain if the land devised is charged with the payment of debts, legacies, annuities or support. We have seen that such charge may be expressly made, or the intention thus to charge the devise may be implied from the whole will taken together. An endless variety of expressions have been employed to charge real estate with the payment of debts and legacies, and whether there is such a charge in any particular case depends upon the intention of the testator, to be determined by a consideration of the whole will. A gift of the testator's estate, "after" a certain legacy is paid, charges such legacy upon the real estate.[32] Also a specific direction to take a certain sum "out" of the real estate devised to a named devisee creates a charge on such real estate.[33] A charge upon real estate is clearly created by a provision in the will that certain property, part of which is realty, is "to be used for the payment of my debts."[34] Legacies may be charged upon real estate without the use of express words where an intention on the part of the testator to so charge his real estate is clearly manifested by the whole will.[35] A direction in the will to pay a legacy without sacrificing the real estate if possible, impliedly charges the real estate with such payment.[36] Also a charge is impliedly created on real estate by a power created by the will to sell the

[31] Mooy v. Gallagher, 36 R. I. 405, 90 Atl. 663, L. R. A. 1916C, 1040, Ann. Cas. 1916D, 395n.

[32] Atmore v. Walker, 46 Fed. 429; Cunningham v. Cunningham, 72 Conn. 157, 44 Atl. 41; Davidson v. Coon, 125 Ind. 497, 25 N. E. 601, 9 L. R. A. 584.

[33] In re Roberts' Estate, 163 Pa. St. 408, 30 Atl. 213.

[34] Watts v. Watts, 38 Ohio St. 480.

[35] Sistrunk v. Ware, 69 Ala. 273; Miller v. Cooch, 5 Del. Ch. 161; Reid v. Corrigan, 143 Ill. 402, 32 N. E. 387; Thissell v. Schillinger, 186 Mass. 180, 71 N. E. 300, 9 Prob. Rep. Ann. 290.

[36] Price v. Price, 52 N. J. Eq. 326, 29 Atl. 679.

real estate for the purpose of paying a legacy bequeathed;[37] and a direction to executors or trustees to pay an annuity during the life of the beneficiary impliedly charges such annuity upon the testator's entire estate.[38] Where the testator has no personal property at the time he executes a will and bequeaths specific legacies, the reasonable presumption is that he intended to charge them upon the land, for it is not to be presumed that he did no more than make an empty show of giving a bounty to the legatee. But this presumption does not prevail where there is personal estate at the time the will was executed, although it may subsequently be lost to the testator.[39] Real estate may be charged by will with the payment of an annuity, or the support of some person other than the owner. But a provision in a will for the support of the widow or others out of the estate or some portion of the property does not ordinarily give such widow or other person any title to any portion of the property even though a particular part thereof is charged with the performance of the obligation.[40] Such provisions usually constitute mere equitable liens in favor of the person entitled to the support or annuity, and are enforcible against the executor, testamentary trustee, residuary devisee or other person in possession of the estate as a trust obligation.[41] A mere recommendation or request that the devisee shall support and care for another does not impose a charge on the realty devised.[42] Where the care contemplated by a direction in the will is in the nature of personal attention merely, and can not be complied with by the payment of a sum of money to another, the charge is personal to the devisee and is not a charge upon the real estate.[43] On the other hand, if the direction to support another is imperative, the real estate is charged with the support.[44] A residuary clause, blending realty and personalty, does not charge specific legacies upon real estate specifically devised,[45] nor does

[37] Clark v. Marlow, 149 Ind. 41, 48 N. E. 359; Stevens v. Flower, 46 N. J. Eq. 340, 19 Atl. 777; In re Blake's Estate, 134 Pa. St. 240, 19 Atl. 850.

[38] Hunt v. Hayes, 19 Ohio C. C. 151, 10 Ohio C. D. 388.

[39] Duncan v. Wallace, 114 Ind. 169, 16 N. E. 137; In re Clotilde Lutz, 157 Mo. 439, 57 S. W. 1018, 50 L. R. A. 847.

[40] Farnam v. Farnam, 83 Conn. 369, 77 Atl. 70; Gross v. Sheeler, 7 Houst. (Del.) 280, 31 Atl. 812.

[41] In re Simons' Will, 55 Conn. 239, 11 Atl. 36; Whitehead v. Park, 53 Ga. 575; Blair v. Blair, 82 Kans. 464, 108 Pac. 827.

[42] Perdue v. Perdue, 124 N. Car. 161, 32 S. E. 492.

[43] South Mahoning Tp. v. Marshall, 138 Pa. St. 570, 21 Atl. 79.

[44] Bell v. Watkins, 104 Ga. 345, 30 S. E. 756; Clark v. Marlow, 149 Ind. 41, 48 N. E. 359.

[45] In re Peet's Estate, 99 Iowa 314, 68 N. W. 705.

a charge of legacies in general terms upon all the testator's real and personal property show his intention to charge realty specifically devised.[46]

§ 474. **Devise on condition precedent or subsequent.**—A condition in a devise is a qualification of the estate devised. The condition is precedent when it must be performed before the estate can commence, and it is subsequent when it is to be performed after the estate has vested in the devisee. A condition subsequent does not prevent the vesting of the estate, but may defeat an estate already vested if the condition be not performed.[47] Where the devise is upon condition, diligent inquiry should be made to ascertain if the condition has been performed. If the condition is subsequent, and has not been performed, the estate is liable to be defeated; and if the condition be precedent and has not been performed no estate has vested in the devisee. The same technical words of condition are appropriate to create either a condition precedent or a condition subsequent.[48] But whether a condition be precedent or subsequent is a question of intention to be gathered from the whole will.[49] If the thing to be done does not necessarily precede the vesting of the estate in the devisee, but may accompany or follow it, and may as well be done after as before the vesting of the estate, the condition is subsequent.[50]

The tendency of the courts is to construe a condition as subsequent, rather than as precedent, so as to give the devisee a present estate liable to be divested, rather than to defer the vesting.[51] The rule is that, if the act or event named must necessarily precede the vesting of the estate, it is a condition precedent, while, if the act or event may accompany or follow the vesting of the estate, it is a condition subsequent.[52]

When a condition precedent becomes impossible to be performed, the estate which depended upon it can never take effect;[53]

[46] Davenport v. Sargent, 63 N. H. 538, 4 Atl. 569; Kitchell v. Young, 46 N. J. Eq. 506, 19 Atl. 729.

[47] In re Tappan's Appeal, 52 Conn. 412; Alexander v. Alexander, 156 Mo. 413, 57 S. W. 110; Smith v. Smith, 64 Nebr. 563, 90 N. W. 560; Tilley v. King, 109 N. Car. 461, 13 N. E. 936.

[48] Hopkins v. Smith, 162 Mass. 444, 38 N. E. 1122.

[49] Burdis v. Burdis, 96 Va. 81, 30 S. E. 462, 70 Am. St. 825.

[50] Hawkins v. Hansen, 92 Kans. 73, 136 Pac. 1022, L. R. A. 1915A, 90n.

[51] Ege v. Hering, 108 Md. 391, 70 Atl. 221.

[52] Winn v. Tabernacle Inf., 135 Ga. 380, 69 S. E. 557, 32 L. R. A. (N. S.) 512; Burdis v. Burdis, 96 Va. 81, 30 S. E. 462, 70 Am. St. 825.

[53] Ransdell v. Boston, 172 Ill. 439,

and this is true even where the condition was beyond the control of the devisee, and he was entirely free from blame.[54] Where, however, a condition subsequent becomes impossible of performance, the general rule is that the estate granted upon it vests absolutely in the beneficiary as though no condition had ever attached.[55] Conditions as to support, payment of debts, etc., are generally construed as conditions subsequent.[56] A devise conditioned on the devisee's paying certain annuities, or furnishing support or care to another is ordinarily held to be a condition subsequent, and therefore does not defeat the devise on failure of performance caused by the death of the annuitant before time of payment,[57] or by a waiver of the provision.[58]

§ 475. **Conditional limitations.**—If a condition subsequent be followed by a limitation over in case the condition is not complied with, it is termed a conditional limitation, and takes effect without any entry or claim, and no act is necessary to vest the estate in the person to whom it is limited.[59] A condition determines a precedent estate after breach upon entry by the person next entitled, while a limitation determines the estate without entry, and, if a condition subsequent is followed by a limitation over upon breach, it is a conditional limitation and no entry is necessary.[60] Upon the happening of the prescribed contingency, the estate first limited comes at once to an end, and the subsequent estate arises.[61] This form of gift is of a mixed nature, and partakes of a condition and a limitation; of a condition, because it defeats the estate previously limited; and of a limitation, because upon the happening of the contingency the estate passes to the person having the next expectant interest, without entry or claim.[62]

50 N. E. 111, 43 L. R. A. 526; Conant v. Stone, 176 Mich. 654, 143 N. W. 39.

[54] Stark v. Conde, 100 Wis. 633, 76 N. W. 600.

[55] Harrison v. Harrison, 105 Ga. 517, 31 S. E. 455, 70 Am. St. 60; Hawkins v. Hansen, 92 Kans. 73, 139 Pac. 1022, L. R. A. 1915A, 90n.

[56] Gingrich v. Gingrich, 146 Ind. 227, 42 N. E. 101; Allen v. Allen, 121 N. Car. 328, 28 S. E. 513.

[57] Sherman v. American Cong. Assn., 98 Fed. 495; Morse v. Hayden, 82 Maine 227, 19 Atl. 443.

[58] Alexander v. Alexander, 156 Mo. 413, 57 S. W. 110.

[59] Stearns v. Godfrey, 16 Maine 158; Williams v. Jones, 166 N. Y. 522, 60 N. E. 240.

[60] Bean v. Atkins (Vt.), 89 Atl. 643.

[61] Brattle Square Church v. Grant, 3 Gray 142, 69 Mass. 142, 63 Am. Dec. 725.

[62] Fowlkes v. Wagoner (Tenn.), 46 S. W. 586; Lockridge v. McCommon, 90 Tex. 234, 38 S. W. 33.

A conditional limitation—an example of which is a grant to one so long as he occupies the premises, or to a widow during widowhood—differs from a condition subsequent, which is a contingency named on the happening of which a grant may be defeated, only in form, and the fact that re-entry is not necessary to terminate the grant.[63]

No precise language is necessary to create a conditional limitation, but the words most commonly used are "while," "so long as," "until," "provided that," "so that," "as long as," "whereso-ever," "as far as," "up to," and "so long." But the form or connection of the words used is immaterial, as the particular character of the provision may be determined from the intention of the testator manifest from the whole will.[64] Where an estate in fee is created on condition, the entire interest does not pass out of the testator. All that remains after the gift takes effect continues in the testator, and goes to his heirs; while in the case of a conditional limitation, the whole interest of the testator passes at once, and creates an estate to arise and vest in a third person upon a contingency, at a future and uncertain time.[65]

§ 476. **Gifts over on death of beneficiary or death without issue or heirs.**—As a general rule where a gift over is made contingent upon the death of a named beneficiary, the gift can not take effect unless the death referred to occurs after the date of the will.[66] When an absolute gift is made to one with a provision over in "case he die," or "if he should happen to die," or "if he die," or other like form of words, it may be assumed that the testator had in mind something else than merely to provide for the case of the devisee dying at the same time. In such case the courts will construe the devise over as intended to take effect in case the death referred to should occur in the testator's lifetime or before some period fixed for the enjoyment of the estate which is in such event to go over.[67] So when a devise over to a third person is made dependent upon the death of the first taker as a contingency, the death referred to is generally held to be a death

[63] Hague v. Aherns, 53 Fed. 58, 3 C. C. A. 426.

[64] Chapin v. School Dist. No. 2, 35 N. H. 445; Schaeffer v. Messersmith, 10 Pa. Co. Ct. 366.

[65] Summit v. Yount, 109 Ind. 506, 9 N. E. 582.

[66] Hoadly v. Wood, 71 Conn. 452, 42 Atl. 263; Grant v. Mosely (Tenn.), 52 S. W. 508.

[67] McClellan v. Mackenzie, 126 Fed. 701.

in the lifetime of the testator. Though when the devise is of a remainder the question is enlarged by the inquiry as to whether a death during the lifetime of the testator is referred to or a death before the remainder falls in.[68] The general rule is that, where the gift over is to take effect after a prior estate or at a time appointed, the death referred to means at any time before the vesting in possession, whether before or after the death of the testator.[69]

Where property is devised to a named devisee with the condition that if such devisee shall die "without issue" or "without heirs" the property shall go to another designated person and there is nothing in the will to indicate a different intention, the weight of authority is that the death referred to means death in the lifetime of the testator, and if the named devisee dies before the testator the estate goes to such other person, while, if he survives the testator, he takes the devise absolutely free of any condition.[70] Under such construction the words used are not strictly conditions, but directions for substitution in order to prevent lapse. The death without issue of such beneficiary after the death of the testator does not prevent the estate from going to his heirs or beneficiaries.[71] The use of such words of condition in connection with a limitation over creates a doubt respecting the testator's intention, and this doubt is accordingly settled by construing the will as creating an absolute estate, with a substitution of the beneficiary in case the primary beneficiary dies before the testator.[72] Many cases, however, do not restrict the words to death before the testator, but hold them to mean death at any time, either before or after the death of the testator.[73] But the testator may fix some other point of time as that upon which such death,

[68] Ferguson v. Thomason, 87 Ky. 519, 10 Ky. L. 562, 9 S. W. 714; Stokes v. Weston, 142 N. Y. 433, 37 N. E. 515.

[69] Hollister v. Butterworth, 71 Conn. 57, 40 Atl. 1044; Woolverton v. Johnson, 69 Kans. 708, 77 Pac. 559; Powell v. Cosby, 28 Ky. L. 619, 89 S. W. 721; Robards v. Brown, 167 Mo. 447, 67 S. W. 245; Paul v. Philbrick, 73 N. H. 237, 60 Atl. 282.

[70] First Nat. Bank v. DePauw, 86 Fed. 722; Smith v. Smith, 157 Ala. 79, 47 So. 220, 25 L. R. A.(N.S.) 1045n.

[71] Patterson v. Earhart, 6 Ohio S. & C. P. Dec. 16, 29 Wkly Law Bul. 313; In re Engel's Estate, 180 Pa. St. 215, 36 Atl. 727.

[72] Austin v. Bristol, 40 Conn. 120, 16 Am. Rep. 23; Fowler v. Duhme, 143 Ind. 248, 42 N. E. 623; Cornwall v. Falls City Bank, 92 Ky. 381, 13 Ky. L. 606, 18 S. W. 452.

[73] Summers v. Smith, 127 Ill. 645, 21 N. E. 191; Dorr v. Johnson, 170 Mass. 540, 49 N. E. 919; Naylor v. Godman, 109 Mo. 543, 19 S. W. 56; Durfee v. McNeil, 58 Ohio St. 238, 50 N. E. 721; Selman v. Robertson, 46 S. Car. 262, 24 S. E. 187.

or death without issue, is to occur in order to entitle the substitutionary beneficiary to take the estate.[74]

§ 477. **Conditions restraining marriage.**—As a general rule a condition in a gift restraining the marriage of a person who has never been married is void, as against public policy, and the person to whom the gift is made takes an absolute gift free of the condition;[75] and a subsequent marriage in violation of such condition does not defeat the donee's title to the gift.[76] This rule is applicable generally where the condition is a subsequent one; but where the condition is precedent, with a limitation over on breach of the condition, it is valid.[77] But a gift to the wife or husband of the testator or testatrix while the beneficiary shall continue unmarried or until he or she remarries is valid, without any limitation over, and the condition must be complied with. In such case the restriction is not treated as a condition subsequent divesting the beneficiary's estate upon breach of the condition, but as a conditional limitation or a qualification determining the duration of the donee's estate, so that the contingency upon which the gift depends, although there is no gift over, is good as a conditional limitation.[78] Conditions against marrying specified persons or persons of a specified class, have been upheld.[79] Likewise a gift with a condition that the beneficiary shall not marry until he or she arrives at the age of twenty-one years is lawful, and a violation of it with notice works a forfeiture of the estate devised.[80] Also a condition precedent requiring consent to marry generally without limitation of age is good if there is a gift over; and some cases hold that if there is no gift over, the condition must be considered in terrorem merely, and void.[81] However, a condition precedent in partial restraint of marriage, as not to

[74] Hollister v. Butterworth, 71 Conn. 57, 40 Atl. 1044; Kinney v. Keplinger, 172 Ill. 449, 50 N. E. 131.

[75] Vaughn v. Lovejoy, 34 Ala. 437; In re Alexander's Estate, 149 Cal. 146, 85 Pac. 308; Kennedy v. Alexander, 21 App. D. C. 424; Knost v. Knost, 229 Mo. 170, 129 S. W. 665, 49 L. R. A. (N. S.) 627n.

[76] Williams v. Cowden, 13 Mo. 211, 53 Am. Dec. 143.

[77] Collier v. Slaughter, 20 Ala. 263.

[78] Giles v. Little, 104 U. S. 291, 26 L. ed. 745; Helm v. Leggett, 66 Ark. 23, 48 S. W 675; Bennett v. Packer, 70 Conn. 357, 39 Atl. 739, 66 Am. St. 112; Rose v. Hale, 185 Ill. 378, 56 N. E. 1073, 76 Am. St. 40; Opel v. Shoup, 100 Iowa 407, 69 N. W. 560, 37 L. R. A. 583; Haring v. Shelton, 103 Tex. 10, 122 S. W. 13; In re Poppleton's Estate, 34 Utah 285, 97 Pac. 138, 131 Am. St. 842.

[79] Graydon v. Graydon, 23 N. J. Eq. 229; Phillips v. Ferguson, 85 Va. 509, 8 S. E. 241, 1 L. R. A. 837, 17 Am. St. 78.

[80] Shackelford v. Hall, 19 Ill. 212.

[81] Gough v. Manning, 26 Md. 347.

marry under a certain age, or requiring consent to marriage if under a certain age, is valid though there is no gift over.[82] If the testator makes provision for a beneficiary as long as she remains single, but upon her marriage the gift is to go over, such limitation has been held valid, and not in restraint of marriage.[83] Such a devise or bequest is merely a limitation as to the time of enjoyment, and therefore valid.[84]

§ 478. Conditions against alienation.—Conditions subsequent preventing any and all alienation of an estate in fee, even for a limited time, are generally declared void. But a devise of an estate for life or for years with a condition, either subsequent or precedent, restraining alienation, has been held valid.[85] Also a condition that the devisee shall not sell to a particular person or limited class of persons, has been held good.[86] But in order to make a valid restriction upon alienation, even for a limited time or to a limited class of persons, there must be a provision for a reversion or limitation over to a third person, in case of violation of the restriction.[87] A condition that the devisee shall not sell the land until he arrives at a certain age, as twenty-five years or thirty-five years, is valid, the restriction not being unreasonable.[88] Also a condition that the land devised shall not be sold or conveyed by the devisees until they have been in the possession of it for twenty years, has been held good.[89] It is generally held that a married woman may be restrained by will from the voluntary or involuntary alienation of her estate;[90] and the fact that she was unmarried at the time the restriction was made does not render it invalid.[91] The restriction, however, will have no bind-

[82] Phillips v. Ferguson, 85 Va. 509, 8 S. E. 241, 1 L. R. A. 837, 17 Am. St. 78.

[83] Nagle v. Hirsch, 59 Ind. App. 282, 108 N. E. 9; Mann v. Jackson, 84 Maine 400, 24 Atl. 886, 16 L. R. A. 707, 30 Am. St. 358.

[84] In re Bruch's Estate, 185 Pa. St. 194, 39 Atl. 813.

[85] Conger v. Lowe, 124 Ind. 368, 24 N. E. 889, 9 L. R. A. 165; Roberts v. Stevens, 84 Maine 325, 24 Atl. 873, 17 L. R. A. 266; Lampert v. Haydel, 96 Mo. 439, 9 S. W. 780, 2 L. R. A. 113, 9 Am. St. 358.

[86] Overton v. Lea, 108 Tenn. 505, 68 S. W. 250.

[87] Conger v. Lowe, 124 Ind. 368, 24 N. E. 889, 9 L. R. A. 165; Mandlebaum v. McDonell, 29 Mich. 78, 18 Am. Rep. 61.

[88] Wallace v. Smith, 113 Ky. 263, 24 Ky. L. 139, 68 S. W. 131.

[89] Call v. Shewmaker, 24 Ky. L. 686; 69 S. W. 749.

[90] Robinson v. Randolph, 21 Fla. 629, 58 Am. Rep. 692; Gunn v. Brown, 63 Md. 96; Simonton v. White, 93 Tex. 50, 53 S. W. 339, 77 Am. St. 824.

[91] Robinson v. Randolph, 21 Fla. 629, 58 Am. Rep. 692.

ing force so long as she is unmarried, but will become binding upon her marriage, unless the testator limits the restraint to a particular coverture.[92]

§ 479. Devise to separate use of married woman.—A testator may make a devise for the sole and separate use of a married woman, and such devise will be free from the claims of any present or future husband.[93] But in order to vest such gift in the beneficiary alone the intention must be clearly stated. This is usually done by making the gift to the beneficiary "to her sole and separate use" or "to her own use, independent of her husband."[94] It would seem that the use of language prohibiting her from alienating the property is not alone sufficient.[95] If the testator intended in creating a separate use to destroy the curtesy of the husband, such intention must be clearly stated. The mere fact that the estate is limited to her separate use, or that it shall be exempt from the husband's debts, or that she is given unlimited power to dispose of it by will, does not destroy his right of curtesy, unless she disposes of it by will.[96]

Real estate may also be devised in trust for the sole use of a married woman, and the husband's marital rights therein will be entirely barred. But such rights of the husband are not excluded by the intervention of a trustee, where the terms of the will do not expressly exclude them.[97] Where real estate is devised in trust for the sole use of a married woman she may dispose of it by sale, mortgage or devise, free from the control of the husband, unless the will expressly limits her power of alienation.[98]

§ 480. Devises in trust.—A trust is the general name applied to the relation between two persons, by virtue of which one of them, as trustee, holds property for the benefit of the other, the cestui que trust. In testamentary trusts, the legal title to the property devised is in one who is known as the trustee; while the equitable title is in another who is known as the cestui que

[92] Phillips v. Grayson, 23 Ark. 769.
[93] Brock v. Sawyer, 39 N. H. 547; Little v. Bennett, 58 N. Car. 156.
[94] Swain v. Duane, 48 Cal. 358; Wood v. Wood, 83 N. Y. 575; Holliday v. Hively, 198 Pa. 335, 47 Atl. 988.
[95] Stogdon v. Lee, 60 L. J. Q. B. 669, 1 Q. B. 661, 64 L. T. 494, 39 W. R. 476, 55 J. P. 533.
[96] Pool v. Blakie, 53 Ill. 495; Noland v. Chambers, 84 Ky. 516, 8 Ky. L. 557, 2 S. W. 121; Tremmel v. Kleiboldt, 75 Mo. 255.
[97] Pollard v. Merrill, 15 Ala. 169.
[98] Townshend v. Frommer, 125 N. Y. 446, 26 N. E. 805.

trust. During the existence of the trust relation the legal title is separated from the equitable.

To constitute a testamentary trust there must be sufficient language to sever the legal from the equitable estate, and to clearly identify the beneficiaries and the property out of which the trust is to take effect.

Testamentary trusts may be created for various purposes, such as, to prevent a spendthrift from squandering the estate, to protect a married daughter from the influence and importunity of her untrustworthy husband, to continue the administration of the estate beyond the time allowed by statute so as to protect the property from sacrifice or forced sale, to provide support for minors and incompetents, to establish charities, grant annuities, pay debts, and the like.

While no particular or technical words are required to create a testamentary trust, the words used for that purpose must clearly show an intention on the part of the testator to give to one the legal title to the property devised, and the other the equitable title thereto.[99] There must concur sufficient words or acts to show an unequivocal intention to devote the subject-matter to the object of the trust; the subject-matter must be definite in character and so at the disposal of the settler as to enable him to devote it to the object of the trust; and this object must be one that is lawful, certain, and ascertained.[1] The words "trust" and "trustee," though effective in creating a trust, are not necessary.[2] It is sufficient if the will as a whole shows a purpose of creating a trust though no special words be used.[3] The use of precatory words have often been held sufficient to create a trust in favor of the person or object sought to be benefited; but such words will not have this effect unless it clearly appears that the testator intended to make his desire, request, recommendation, or confi-

[99] In re Heywood's Estate, 148 Cal. 184, 82 Pac. 755; Hughes v. Fitzgerald, 78 Conn. 4, 60 Atl. 694; Quinn v. Shields, 62 Iowa 129, 17 N. W. 437, 49 Am. Rep. 141; Patrick v. Patrick, 135 Ky. 307, 122 S. W. 129; Robinson v. Cogswell, 192 Mass. 79, 78 N. E. 389; Pembroke Academy v. Epsom School Dist., 75 N. H. 408, 75 Atl. 100, 37 L. R. A. (N. S.) 646n.

[1] Lines v. Darden, 5 Fla. 51; In re Soulard's Estate, 141 Mo. 642, 43 S. W. 617; In re Smith's Estate, 144 Pa. St. 428, 22 Atl. 916, 27 Am. St. 641.

[2] Hughes v. Fitzgerald, 78 Conn. 4, 60 Atl. 694; Patrick v. Patrick, 135 Ky. 307, 122 S. W. 159.

[3] Ryder v. Lyon, 85 Conn. 245, 82 Atl. 573.

dence imperative upon the devisee, so that he will have no option to comply or refuse to comply with it.[4]

A trust may often be implied from the nature of the powers granted or duties imposed by the will. Thus a trust will be implied from an express authorization to the executor to pay certain annuities, as this would be impossible unless the executor has a trust estate in the property.[5] The same result will follow from a provision giving directions to manage, dispose of, or distribute property for the benefit of others.[6] Trusts will usually be created by a provision for the support, maintenance, or education of others;[7] especially where the direction for support, maintenance or education is imposed on the executor,[8] or guardian.[9] Generally speaking, an executor may always be regarded as a trustee. His duties as executor, being fiduciary in their character, courts of equity early exercised a superintending control over him in the administration of his trust. But probate courts now very generally superintend his acts, and courts of equity will extend their supervision only when the executor is acting as trustee under the will.[10] There is a difference between a devise to an executor to sell real estate and a devise to an executor of real estate with power to sell. In one case a naked authority is given to sell; in the other an authority to sell, coupled with an interest is given.[11] The legal title to the land devised does not pass to the executor unless there are express words to that effect or unless such title is essential to the performance of a trust imposed upon him.[12]

§ 481. **Designation of the devisee.**—To entitle a devisee to take under a will he must be named therein or described with such certainty that he may be distinguished from every other person. But where the beneficiary is inaccurately named or described, so that there is no one who fully answers the name or description,

[4] McDuffie v. Montgomery, 128 Fed. 105; Hayes v. Hayes, 242 Mo. 155, 145 S. W. 1155.

[5] United States Trust Co. v. Maresi, 33 Misc. 539, 68 N. Y. S. 918.

[6] Prince v. Barrow, 120 Ga. 810, 48 S. E. 412; Holmes v. Walter, 118 Wis. 409, 95 N. W. 380, 62 L. R. A. 986.

[7] In re Reith's Estate, 144 Cal. 314, 77 Pac. 942; Dexter v. Evans, 63 Conn. 58, 27 Atl. 308, 38 Am. St. 336.

[8] Succession of McCan, 48 La. Ann. 145, 19 So. 220; Barnes v. Marshall, 102 Mich. 248, 60 N. W. 468.

[9] Smithwick v. Jordan, 15 Mass. 113.

[10] Ball v. Tompkins, 41 Fed. 486; Proctor v. Dicklow, 57 Kans. 119, 45 Pac. 86.

[11] Smith v. Hunter, 241 Ill. 514, 89 N. E. 686, 132 Am. St. 231.

[12] Simmons v. Spratt, 26 Fla. 449, 8 So. 123, 9 L. R. A. 343; Wilmarth v. Reed, 83 Mich. 44, 46 N. W. 1031.

the court will, if possible, gather from the contents of the will and the surrounding circumstances who was meant.[13]

There is no rule in the construction of wills which prefers a name to a description. Often a correct name is given, coupled with an erroneous description. There is a person of the name given, but no one to whom the description applies. In such case the person named is the beneficiary. On the other hand, if there is no one who answers to the name, but there is a person who answers to the description, the person described is the beneficiary.

Misnomer is especially frequent in gifts to charitable corporations. As the real name of such corporation is seldom used and never known to the public at large, many testators do not feel the need of giving the real name of the proposed beneficiary. So where such a corporation is indicated in a will by an erroneous name, such mistake will not avoid the gift if it is possible by means of the name used, or by parol evidence, to identify the corporation intended as beneficiary with sufficient certainty.[14] A gift to a corporation is not rendered void by a mistake in naming the corporation, if it can be identified by a description of its buildings.[15] A gift to a corporation or association to be formed after the death of the testator will go to the corporation or association formed in conformity with the terms and conditions of the will,[16] and when he directs the creation of a corporation, he means a legal entity coming into being as the statute directs.[17]

It is not necessary that the testator, in his will, name the devisee, in order to give effect to the devise. It is sufficient if he is so described therein as to be ascertained and identified.[18] Where the designation of the devisee is by description instead of by name, the description must clearly distinguish the devisee from all others.[19] But it is not necessary that the beneficiary correspond in all respects to the description, it being held sufficient if he corresponds thereto in enough particulars to make it reasonably cer-

[13] American Dramatic Fund Assn. v. Lett, 42 N. J. Eq. 43, 6 Atl. 280.

[14] Reilly v. Union Protestant Infirmary, 87 Md. 664, 40 Atl. 894; Elwell v. Universalist General Convention, 76 Tex. 514, 13 S. W. 552.

[15] Tualatin Academy v. Keene, 59 Ore. 496, 117 Pac. 424.

[16] Nason v. First Bangor Christian Church, 66 Maine 100; St. John v. Andrews Institute, 191 N. Y. 254, 83 N. E. 981, 14 Ann. Cas. 708.

[17] Boyle v. John Boyle & Co., 136 App. Div. 367, 120 N. Y. S. 1048.

[18] Dennis v. Holsapple, 148 Ind. 297, 47 N. E. 631, 46 L. R. A. 168, 62 Am. St. 526.

[19] Brewster v. McCall, 15 Conn. 274; Condit v. DeHart, 62 N. J. L. 78, 40 Atl. 776; Button v. American Tract Soc., 23 Vt. 336.

tain that he was intended and no other person exists who corresponds sufficiently to the description to raise a doubt as to the identity of the beneficiary.[20] A devise will not fail because of the mere inaccuracy in the designation of the devisee, where the meaning of the testator can be gathered with reasonable certainty from the instrument itself, or where the identity of the object of his bounty can be shown by extrinsic evidence; and such evidence is always admissible for the purpose of identifying the beneficiary where there is uncertainty or ambiguity in the designation. This rule applies to corporations as well as to individuals, and to trustees as well as those taking for their own benefit.[21] A devisee may be sufficiently designated by his profession or occupation.[22] He may also be sufficiently designated by his fulfilling certain conditions mentioned in the will.[23]

§ 482. Perpetuities.—A perpetuity in law is a grant or devise of property wherein the vesting of an estate or interest is unlawfully postponed. The law allows the vesting of an estate or interest, and also the power of alienation to be postponed for the period of a life or lives in being and twenty-one years and nine months thereafter; and all restraints upon the vesting that may suspend it beyond that period are treated as perpetual restraints, and void, and the estates or interests which are dependent on them are void.[24] The above is the common-law rule, and prevails in all the states, excepting as it may have been modified by statute.[25] Statutes modifying the rule usually forbid the limitation for a longer period than the continuance: (1) Of lives in being, (2) of two lives in being, or (3) some other period. The limitation, in order to be valid, must be so made that the estate, or whatever is devised, not only may, but must necessarily, vest within the prescribed period. If by any possibility the vesting may be postponed beyond this period, the limitation over will be void.[26]

[20] Woman's Union Missionary Soc. of America v. Mead, 131 Ill. 33, 23 N. E. 603; Reilly v. Union Potestant Infirmary, 87 Md. 664, 40 Atl. 894.

[21] McDonald v. Shaw, 81 Ark. 235, 98 S. W. 952.

[22] In re Benson's Estate, 169 Pa. St. 602, 32 Atl. 654.

[23] Knowles v. Knowles, 132 Ga. 806, 65 S. E. 128; Dennis v. Holsapple, 148 Ind. 297, 47 N. E. 631, 46 L. R. A. 168, 62 Am. St. 526.

[24] Pulitzer v. Livingston, 89 Maine 359, 36 Atl. 635.

[25] In re Lawrence's Estate, 136 Pa. St. 354, 20 Atl. 521, 11 L. R. A. 85, 20 Am. St. 925.

[26] Fosdick v. Fosdick, 6 Allen (Mass.) 41.

The rule against perpetuities is not complicated or difficult of understanding, but like most rules of universal application, it is often found difficult of application to the facts of a particular case. If the object or purpose of the rule is kept in mind, and the kind of interests or estates which come under its operation, the proper application of the rule will be very much simplified. The rule is aimed against undue restraints or alienation, by prohibiting the clogging of the title with future interests dependent on contingencies which may not occur at all, or until a remote period. The rule covers the entire field of estates, interests, rights and possibilities. It applies to all trusts, whether created by will or deed, whether providing for remainders or executory devises, or merely restraining the power of alienation for a fixed period of years, and then providing for sale with gift over.[27] But it is generally held that the rule does not apply to the contingent right of entry for breach of condition, even though annexed to a fee.[28] Nor does the rule generally apply to a possibility of reverter after a determinable fee.[29] Also a public or charitable trust may be perpetual in its duration, and the rule against perpetuities is not applicable thereto.[30]

Many devises are void as being in contravention of the rule against perpetuities, and where the limitation over is void under the operation of this rule, the estate becomes vested in the first taker, discharged of the limitation or condition over, according to the terms in which it was devised; if for life, then it takes effect as a life estate; if in fee, then as a fee simple absolute.[31]

§ 483. **Lapsed devises.**—A devise is said to lapse when it fails because the beneficiary in some way becomes incapable of taking under the will before such devise vests.[32] This may result from the death of the beneficiary before the testator, or before the estate vests.[33] Where the lapse is caused by the death of the bene-

[27] In re Walkerly's Estate, 108 Cal. 627, 41 Pac. 772, 49 Am. St. 97.

[28] Hopkins v. Grimshaw, 165 U. S. 342, 17 Sup. Ct. 401, 41 L. ed. 739; In re Stickney's Will, 85 Md. 79, 36 Atl. 654, 35 L. R. A. 693, 60 Am. St. 308.

[29] First Universalist Soc. v. Boland, 155 Mass. 171, 29 N. E. 524, 15 L. R. A. 231.

[30] Mills v. Davison, 54 N. J. Eq. 659, 35 Atl. 1072, 35 L. R. A. 113, 55 Am. St. 594.

[31] Brattle Square Church v. Grant, 3 Gray (Mass.) 142, 156, 63 Am. Dec. 725.

[32] Hibler v. Hibler, 104 Mich. 274, 62 N. W. 361; Murphy v. McKeon, 53 N. J. Eq. 406, 32 Atl. 374; In re Waln's Estate, 189 Pa. St. 631, 42 Atl. 299.

[33] Galloway v. Darby, 105 Ark. 558,

ficiary before that of the testator, it is immaterial whether the testator had knowledge, in his lifetime, of the death of such beneficiary.[34] A devise will also lapse where the beneficiary dies after the testator, but before the time arrives for the devise to vest.[35]

A devise in trust or in the nature of a trust does not lapse by reason of the death of the trustee before the testator,[36] but lapses where the cestui que trust dies before the testator[37] in case there is no gift over.[38]

There is no lapse because of the death of a life tenant before the testator, where the will gives a remainder in fee.[39] Where the gift is to several as tenants in common, the death of one before the testator will occasion only his share of the gift to lapse.[40] But where the devise is made to several as joint tenants, or as a class, there is no lapse on account of the death of any member so long as any survive, but the entire gift goes over to the survivor or survivors.[41]

Where real estate devised is charged with the payment of a legacy, such legacy does not lapse by reason of the death of the devisee before the testator, but the heir takes subject to the charge.[42] A devise will also lapse where there is no one in existence at the testator's death capable of taking the gift,[43] or when the purpose of the gift fails,[44] or when it is void,[45] or where it becomes impossible,[46] or where the beneficiary, though competent to take the gift, refuses to do so.[47] Where the gift is to a corporation, and it ceases to have a corporate existence for the purpose

151 S. W. 1014, 44 L. R. A. (N. S.) 782n, Ann. Cas. 1914D, 712; Goebel v. Wolf, 113 N. Y. 405, 21 N. E. 388, 10 Am. St. 464.

[34] Dixon v. Cooper, 88 Tenn. 177, 12 S. W. 445.

[35] McClain v. Capper, 98 Iowa 145, 67 N. W. 102.

[36] In re Elmslie's Estate, 10 Pa. Dist. 397.

[37] Stanwood v. Stanwood, 179 Mass. 223, 60 N. E. 584.

[38] Thompson v. Thornton, 197 Mass. 273, 83 N. E. 880.

[39] Lacey v. Floyd, 99 Tex. 112, 87 S. W. 665.

[40] Bill v. Payne, 62 Conn. 140, 25 Atl. 354; Dorsey v. Dodson, 203 Ill. 32, 67 N. E. 395.

[41] Rudolph v. Rudolph, 207 Ill. 266, 69 N. E. 834, 99 Am. St. 211; Meserve v. Haak, 191 Mass. 220, 77 N. E. 377.

[42] Cady v. Cady, 67 Miss. 425, 7 So. 216; Gilroy v. Richards, 26 Tex. Civ. App. 355, 63 S. W. 664.

[43] New Orleans v. Hardie, 43 La. Ann. 251, 9 So. 12.

[44] Chadwick v. Chadwick, 37 N. J. Eq. 71.

[45] In re Russell's Estate, 150 Cal. 604, 89 Pac. 345; Wolfe v. Hatheway, 81 Conn. 181, 70 Atl. 645.

[46] Hall v. Smith, 61 N. H. 144.

[47] Sawyer v. Freeman, 161 Mass. 543, 37 N. E. 942.

of taking the gift prior to the death of the testator, the gift will lapse.[48] As a general rule, where a specific devise lapses on account of the death of the devisee before the testator, and such deceased devisee was also a residuary devisee, the lapsed devise falls into the residuum.[49] Where, however, the lapse is in the residuary clause, and the beneficiary dying before the testator is the sole beneficiary, or one of several who take as tenants in common, the gift which lapses is not reabsorbed into the residue, but goes to the heirs or next of kin of the testator as intestate property.[50]

§ 484. Equitable conversion.—Equitable conversion is a constructive alteration in the nature of property by which in equity real estate is regarded as personalty or personal estate as realty.[51] The doctrine is based on the rule that what is to be or ought to be done should be treated as if done already. It is a fiction, therefore, invented to sustain and carry out the intention of the testator, never to defeat it.[52] To constitute an equitable conversion, the direction to sell and convert the property must be absolute and imperative.[53] Where a testator orders his land to be sold, the conversion will, unless a contrary intention distinctly appears, be deemed to have been directed merely for the purposes of the will, and, consequently, if those purposes fail, or do not require it, it will, in equity, be considered land and be given to the heir.[54] While there need be no express direction in the will, in order that land shall be treated as money and money as land, yet it is requisite in all cases that an intention shall be clearly and positively expressed that the land shall be sold, and turned into money, or that money shall be expended in the purchase of land.[55] Where the will directs that all of the estate, real and personal, of the testator be sold and the proceeds divided the devises must be treated as devises of money and not land.[56] But under the doctrine as announced in some cases, until the time of sale arrives,

[48] Gladding v. St. Matthews Church, 25 R. I. 628, 57 Atl. 860, 65 L. R. A. 225, 105 Am. St. 904.

[49] Dresel v. King, 198 Mass. 546, 85 N. E. 77, 126 Am. St. 459; Givens v. Ott, 222 Mo. 395, 121 S. W. 23.

[50] Hamlet v. Johnson, 26 Ala. 557; Wentworth v. Read, 166 Ill. 139, 46 N. E. 777.

[51] Beaver v. Ross, 140 Iowa 154, 118 N. W. 287, 20 L. R. A. (N. S.) 65n, 17 Am. Cas. 640.

[52] Yerkes v. Yerkes, 200 Pa. 419, 50 Atl. 186.

[53] Fosdick v. Hempstead, 55 Hun 611, 8 N. Y. S. 772, 29 N. Y. St. 545.

[54] In re Alabone's Estate, 75 N. J. Eq. 527, 72 Atl. 427.

[55] In re Dull's Estate, 222 Pa. 208, 71 Atl. 9, 128 Am. St. 796.

[56] Pasquay v. Pasquay, 235 Ill. 48, 85 N. E. 316.

the land is treated as realty; title vesting in the devisees and being subject to any liens which may be created in the interim.[57] However, the true rule seems to be that, where there is a mandate to sell at a future time, equity, upon the principle of regarding that done which ought to be done, will for certain purposes, and in aid of justice, consider the conversion as effected at the time when the sale ought to take place, whether the land be then really sold or not. But whenever the direction is for a future sale, up to the time fixed the land is governed by the law of real estate.[58]

§ 485. Residuary devises.—A residuary devise is a gift of all the rest, residue or remainder of the testator's property generally or of a particular kind after certain specific or general legacies are discharged. No particular mode of expression is necessary to constitute such devise; it being sufficient if the language used clearly expresses the testator's intention that the surplus of the estate, after payment of debts and legacies, shall go to the beneficiary designated.[59] The expression commonly used to create a residuary devise is "give, devise, and bequeath all the rest, residue, and remainder," and is included in a clause at the end of the will. But the position of the residuary clause in a will is of no importance except as it bears on the intention of the testator.[60] In most jurisdictions a residuary devise carries all the real estate which the testator has attempted but failed to dispose of,[61] unless a contrary intention appears from the will.[62]

We have said that as a general rule, where a specific devise lapses on account of the death of the devisee before the testator, and such deceased devisee was also a residuary devisee the lapsed specific devise falls into the residuum.[63] It has been held in some jurisdictions, however, that lapsed devises pass to heirs as intestate property rather than under a general residuary clause.[64] In order that a residuary clause shall operate to pass after ac-

[57] Nelson v. Nelson, 36 Ind. App. 331, 75 N. E. 679; Shipman v. Rollins, 98 N. Y. 311, 15 Abb. N. C. 288.

[58] In re Walkerly's Estate, 108 Cal. 627, 41 Pac. 772; Underwood v. Curtis, 127 N. Y. 533, 28 N. E. 585; DeWolf v. Lawson, 61 Wis. 469, 21 N. W. 615, 50 Am. Rep. 148.

[59] In re Granniss' Estate, 142 Cal. 1, 75 Pac. 324; Giddings v. Giddings, 65 Conn. 149, 32 Atl. 334, 48 Am. St. 192; Hinzie v. Hinzie, 45 Tex. Civ. App. 297, 100 S. W. 803.

[60] Morton v. Woodbury, 153 N. Y. 243, 47 N. E. 283.

[61] Galloway v. Darby, 105 Ark. 558, 151 S. W. 1014, 44 L. R. A. (N. S.) 782n, Ann. Cas. 1914D, 712.

[62] Moss v. Helsley, 60 Tex. 426.

[63] See lapsed devises, § 483.

[64] Stockwell v. Bowman, 23 Ky. L. 2304, 67 S. W. 379.

quired real estate it should either be specifically referred to, or some such expression as "owned by me at the time of my death" should be used. The residuary clause will include devises which were originally void, either because the disposition was illegal, or because for any other reason it was impossible that it should take effect.[65]

In a number of states there are statutory provisions to the effect that real estate comprised in void or lapsed devises shall be included in the residuary devise. Even in the absence of a statute expressly making the residuary devise operative upon land included in a lapsed devise, the courts in a number of states have held that, since the passage of the statutes making a will pass after-acquired realty, the reason for treating the residuary devise as a specific provision no longer exists, and that consequently it covers all real estate included in a devise which has lapsed or become void.[66]

§ 486. Revocation of wills.—The testator has control over the property devised and power to revoke the instrument as long as he lives, and no title to the property under the will can vest in the beneficiary until the testator's death.[67] A testator may revoke his will by a writing not testamentary in character, by a subsequent will, by a codicil, by mutilation, cancelation, or destruction, and by alterations or additions. A will may also be revoked by operation of law resulting from a change in the circumstances of the testator after the making of the will, such as marriage of the testator, birth of issue, alteration of estate, or loss of estate.

The subject of revocation of wills, whether by act of the testator himself or by operation of law, is the occasion of many statutory enactments and legal rules. As a general rule, questions respecting the revocation of a will are concluded by the order or decree admitting the will to probate; certainly in cases in which the probate was resisted. An ex parte probate, however, ascertains nothing but the prima facie validity of the will and that the instrument is seemingly what it purports to be.[68] In examining a

[65] Drew v. Wakefield, 54 Maine 291; Molineaux v. Raynolds, 55 N. J. Eq. 187, 36 Atl. 276; Cruikshank v. Home for Friendless, 113 N. Y. 337, 21 N. E. 64, 4 L. R. A. 140.

[66] Thayer v. Wellington, 9 Allen (Mass.) 283, 85 Am. Dec. 753.

[67] Cozzens v. Jamison, 12 Mo. App. 452; Hart v. West, 16 Tex. Civ. App. 395, 41 S. W. 183.

[68] Burns v. Travis, 117 Ind. 44, 18 N. E. 45.

will the attorney should carefully note any fact or circumstance that would indicate a revocation of the instrument. Thus a difference in the name of a woman might suggest her subsequent marriage resulting in a revocation of her will.

§ 487. **Form and language of wills.**—Statutes generally provide that the will must be in writing, but they do not always attempt to prescribe what form the writing shall assume. A provision that the instrument shall be in writing is usually complied with if the instrument is typewritten, printed, engraved, lithographed, or by writing made with a lead pencil.[69] A will partly printed and partly written has been held sufficient compliance with the statute requiring wills to be written.[70] It would seem that it will be sufficient if the writing is made on any material capable of retaining the impression. But a will has been denied probate because written on a slate.[71]

It is not necessary that the instrument be designated a will. It will be admitted to probate as a will if it is intended to operate after the death of the maker, and it and the property remain under the maker's control, although the form be that of a contract or a deed.[72] It has been held, however, that an instrument may be testamentary in part and a contract in part.[73] Also an instrument in the form of a letter showing a testamentary intent may be probated as a will.[74] Likewise it has been held that an instrument executed with the formalities of a will may be admitted to probate as such, although it be in form an acknowledgment of indebtedness,[75] an assignment,[76] an indorsement,[77] a bank deposit,[78] or a promissory note.[79]

The form in which a will is found at the death of the testator

[69] Philbrick v. Spangler, 15 La. Ann. 46; In re Tomlinson's Estate, 133 Pa. St. 245, 19 Atl. 482, 19 Am. St. 637.

[70] Roush v. Wensel, 15 Ohio C. C. 133, 8 Ohio C. D. 141.

[71] Reed v. Woodward, 11 Phil. (Pa.) 541.

[72] Jackson v. Rowell, 87 Ala. 685, 6 So. 95, 4 L. R. A. 637; Smith v. Holden, 58 Kans. 535, 50 Pac. 447; Miller v. Holt, 68 Mo. 584; Gage v. Gage, 12 N. H. 371.

[73] Gomez v. Higgins, 130 Ala. 493, 30 So. 417; Powers v. Sharling, 64 Kans. 339, 67 Pac. 820.

[74] Barney v. Hays, 11 Mont. 571, 29 Pac. 282, 28 Am. St. 495; Cowley v. Knapp, 42 N. J. L. 297.

[75] In re Beard's Succession, 14 La. Ann. 121.

[76] Morrison v. Bartlett, 148 Ky. 833, 147 S. W. 761, 41 L. R. A. (N. S.) 39n.

[77] Hunt v. Hunt, 4 N. H. 434, 17 Am. Dec. 434.

[78] In re Armstrong's Estate, 2 Pa. Co. Ct. 166.

[79] Jackson v. Jackson, 6 Dana (Ky.) 257.

is presumed to be the same as when it was executed,[80] but this presumption may be rebutted, and it may be shown that one or more of the sheets of paper on which it was written have been destroyed, rewritten or transposed.[81] Where a will duly executed mentions certain other papers which the testator intended to attach to and make a part of the will, the absence of such papers invalidates the will.[82] Before an extrinsic document can be incorporated into a will by reference thereto, a description of it in the will must be so clear, explicit and unambiguous as to leave its identity free from doubt.[83] Such separate writing can be given effect only to the extent that it appears from the contents of the will to have been the intention of the testator.[84] The separate instrument must be shown to be the identical one referred to in the will;[85] and that it was in existence before the will was executed.[86]

Where the testator intended some further act to complete the instrument, it is not a will.[87] It must be clearly made to appear, upon a just view of all the facts and circumstances of the case, that the testator had come to a final resolution in respect to the will as far as it goes.[88]

It seems to be well settled that the testator may put his will in any language which he understands, or in any language not understood by him if so explained that he understands its import before executing the will.[89]

The examiner must give due attention to alterations and additions to the will. If they were made prior to the execution of the will and noted in the attestation clause, they are valid and effective.[90] If the will is complete without the alterations or additions, they are presumed, in the absence of evidence to the contrary, to have been made after the execution of the will, but if the will would be incomplete without them the presumption is that they were made prior to the execution of the will. The grammat-

[80] Barnewall v. Murrell, 108 Ala. 366, 18 So. 831.
[81] Varnon v. Varnon, 67 Mo. App. 534.
[82] St. John's Parish v. Bostwick, 8 App. D. C. 452.
[83] In re Young's Estate, 123 Cal. 337, 55 Pac. 1011.
[84] Hunt v. Evans, 134 Ill. 496, 25 N. E. 579, 11 L. R. A. 185.
[85] In re Baker's Appeal, 107 Pa. St. 381, 52 Am. Rep. 478.
[86] In re Shillaber's Estate, 74 Cal. 144, 15 Pac. 453, 5 Am. St. 433.
[87] Tabler v. Tabler, 62 Md. 601.
[88] Orgain v. Irvine, 100 Tenn. 193, 43 S. W. 768.
[89] In re Walter's Will, 64 Wis. 487, 25 N. W. 538, 54 Am. Rep. 640.
[90] Holman v. Riddle, 8 Ohio St. 384; In re Morrow's Estate, 204 Pa. 479, 54 Atl. 313.

ical construction, or the order of particular sentences, is never allowed to defeat the general intention of the testator, as clearly manifested by the provisions of the will taken as a whole.[91] But in every case the words used must be capable of bearing the meaning sought to be put upon them. The testator's intention is only to be ascertained from the language of the will, and words will be supplied only when necessary to carry out his apparent intention as gathered from the whole will.[92]

The formalities prescribed by statute for the execution of the will must be strictly observed, otherwise the instrument will be inoperative as a will. They usually are: (1) That the will shall be in writing, (2) that it shall be signed by the testator or some one in his presence and by his direction, and (3) that it shall be witnessed by a designated number of witnesses. The probate of the will, even in common form, is deemed sufficient to justify the establishment of the will as a muniment of title, but the examiner should carefully note every defect in form so that inquiry may be made concerning it.[93]

§ 488. **Abstracting the will.**—Where a will is relied upon as a muniment of title the attorney should have access to a verbatim copy of all clauses which in any way affects the land in question. The intention of the testator is not in all cases clear, and it often becomes necessary to peruse the entire instrument in order to determine such intention. For this reason it is thought preferable to set out a complete copy of the will in the abstract, and this is the practice of many abstracters. By some it is not deemed necessary that the entire instrument should appear, but only such parts as have reference to the land in question. The competent abstracter will be governed in this matter by the character of the will itself with reference to its having been drafted by a professional or nonprofessional person. If its appearance and language indicates that an unskilled hand had prepared the instrument, the safe course would be to copy the will in full. Matters contained in the preamble are usually of no special importance, and may be safely omitted. Also devises of other lands than those in question need not be included. Bequests and gifts

[91] Metcalf v. First Parish in Framingham, 128 Mass. 370.

[92] Butterfield v. Hamant, 105 Mass. 338.

[93] See digest of statutes of wills in appendix.

of personal property, unless made a charge on the real estate involved, may be advantageously omitted. Care should be exercised not to deviate from the language of the will, as it is the general rule that the testator's intention is only to be ascertained from the language used. The attorney's scrutiny will be mainly directed to ascertaining the meaning of the instrument from the language employed, and if the formal parts are not closely or even literally copied, an erroneous opinion of the title is apt to result therefrom. Particular attention is called to the necessity of setting out the names of the parties, testator, legatees and devisees; legacies, debts, and annuities which are a charge on the land; trusts and powers; executors, trustees and guardians, and their powers; the residuary clause; and the formal execution and attestation of the instrument. The particular words creating the estate devised must be given with literal exactness. "The points to be attended to are to show to whom the lands are devised; the words used in description of the lands; the words of limitation by which the estate is devised, the power, if any, in pursuance of which the devise is made; the words of modification, or of severance of the tenancy, if there be any; the words of qualification which may abridge or defeat the estate; the uses and trusts, if any are created; the conditions, or conditional limitations by way of executory devise, or otherwise, annexed to the devise or appointment; the charges imposed on the devisee; the indemnity, if any, against seeing to the application of the purchase-money, or mortgage money; such powers, if any, as are material to the title; and when leasehold lands are the subject of the title, the appointment of executors."[94]

§ 489. Method of abstracting will and proof of probate.— The abstract should contain an orderly arrangement of all the essential provisions of the will, together with the steps taken in the proceeding to probate same. It is suggested that the entry should begin with a statement of the testator's name, the date of the will, the date of the probate, the court in which probate was had, and the volume and page of the record where the will and probate proceedings are recorded. A synopsis of the contents of the will, so far as it affects the land in question, should follow. After this should come a summary of the proof adduced before

[94] Prest. on Abst. 180.

the probate court. Finally, all proceedings relative to the administration and settlement of the estate should be shown. This order, however, may be varied to suit the abstractor's individual notion, but the above is deemed to be the logical order of presentation. If the time allowed by law for contesting the probate has expired the examiner may safely assume that the testator had sufficient capacity to make the will, and that it was duly executed; but if the heirs at law are nonresidents, or under legal disabilities, or otherwise within the saving of the statute of limitations, the abstract should proceed to state all the facts which show a compliance with the statute of wills, such as the signing, the attestation of the witnesses, and the like. When heirs or devisees have made conveyances prior to probate or record, the chronological arrangement should come after the date of execution of the will, rather than of proof or record.

§ 490. **Example of an abstract of a will.**—A synopsis of a will and the proof of probate thereof may be shown as follows:

John Jones, testator,	Last will and testament.
to	Admitted to probate June 1, 1908.
Mary Jones, and Albert Jones, devisees and legatees.	Recorded Aug. 10, 1908. Book 150, page 75.

Directs payment of all debts and funeral expenses and expenses of administration.

Gives, devises, and bequeaths to Mary Jones, his wife, the sum of five hundred dollars, and the following described real estate (describe real estate devised).

Gives, devises and bequeaths to his son, Albert Jones, the following described real estate (here describe real estate devised to son).

Gives, devises, and bequeaths all the rest, residue, and remainder of his estate to his wife, Mary Jones, and his son, Albert Jones, in equal shares.

Appoints Samuel Grove executor of his estate.

Testimonium and attestation clauses added.

This synopsis may be followed by affidavit of death and proof of the will before the clerk of the court or before the judge of the court having jurisdiction of probate matters. The certificate

of probate may also be added. But a reference in the margin of the synopsis of the will to the fact and date of probate and the record where the proceedings may be found is all that is ordinarily required.

§ 491. Probate of wills.—To probate a will means to prove before some officer or tribunal, vested by law with authority for that purpose, that the instrument offered to be proved is the last will and testament of the deceased person whose testamentary act it is alleged to be, and that it has been executed, attested and published as required by law, and that the testator was of sound and disposing mind.[95] It is a proceeding in rem,[96] calling for the exercise of the judicial powers of the court.[97]

As the probate of a will of real estate was unknown to the common law, there is, in the absence of any statute, no necessity for its probate, and in order that it may operate as a conveyance of the land it must be proved in a suit by proof of the testator's signature.[98] But by statute in most of the states of this country wills of both real and personal property are expressly required to be probated, and they can have no force or validity until this is done.[99] Until a will is duly probated the courts will not recognize, in an action, any powers of a person named in a will as executor,[1] nor any title of a devisee under the will.[2] The will is wholly ineffectual as an instrument of title until it is duly probated.[3]

The probate of the will, in the first instance, should be made in the place of the testator's domicil at the time of his death, regardless of where he died,[4] or where the will was executed.[5]

[95] Pettit v. Black, 13 Nebr. 142, 12 N. W. 841.

[96] In re Davis' Estate, 151 Cal. 318, 86 Pac. 183, 90 Pac. 711, 121 Am. St. 105; State v. Twelfth Judicial Dist. Ct., 34 Mont. 96, 85 Pac. 866, 6 L. R. A. (N. S.) 617n, 115 Am. St. 510, 9 Ann. Cas. 418.

[97] Stowe v. Stowe, 140 Mo. 594, 41 S. W. 951; McClure v. Spivey, 123 N. Car. 678, 31 S. E. 857; Stout v. Young, 217 Pa. 427, 66 Atl. 659.

[98] Campbell v. Porter, 162 U. S. 478, 16 Sup. Ct. 871, 40 L. ed. 1044.

[99] Campbell v. Porter, 162 U. S. 478, 16 Sup. Ct. 871, 40 L. ed. 1044. Chilcott v. Hart 23 Colo. 40, 45 Pac. 391, 35 L. R. A. 41.

[1] Brock v. Frank, 51 Ala. 85; Johnes v. Jackson, 67 Conn. 81, 34 Atl. 709.

[2] McClaskey v. Barr, 54 Fed. 781; Knox v. Paull, 95 Ala. 505, 11 So. 156; Crow v. Powers, 19 Ark. 424; Turner v. McDonald, 76 Cal. 177, 18 Pac. 262, 9 Am. St. 189; Hartwell v. Parks, 240 Mo. 537, 144 S. W. 793; Lake v. Hood, 35 Tex. Civ. App. 32, 79 S. W. 323.

[3] Inge v. Johnston, 110 Ala. 650, 20 So. 757; Chidsey v. Brookes, 130 Ga. 218, 60 S. E. 529, 14 Ann. Cas. 975; Mackey v. Mackey, 71 N. J. Eq. 686, 63 Atl. 984.

[4] Shultz v. Houck, 29 Md. 24; Converse v. Starr, 23 Ohio St. 491.

[5] In re Olson, 63 Iowa 145, 18 N. W. 854.

Where a testator left real estate in a state other than that of his domicil, the will may be probated in any county in which any of the land lies. And where the only disposition in a will consists of real estate situated in another jurisdiction, the courts of the testator's domicile sometimes refuse to entertain probate jurisdiction thereof.[6]

An instrument which neither disposes of property nor appoints an executor is not testamentary in character, and, consequently, is not entitled to probate.[7] A codicil should be probated, even though it contains nothing but the revocation of a former will. But a will may be probated even though the codicil can not be found, for it may operate separate and apart from the codicil.[8]

Upon application made for admitting a will to probate, notice of the pendency thereof is usually required to be served upon persons interested. But where no notice of the original application is required by statute, and none is given, the judgment admitting the will to probate is valid if the statute makes ample provision for a contest by appeal or by some other mode.[9] A failure to give notice as required by statute may be objected to in the proceedings,[10] or the judgment may be reversed on appeal, or vacated in some other form of direct attack.[11]

In some states a will may be probated either in common form, or solemn form. A probate in common form is where the will is produced before the proper court or officer, and after proof by the attesting witnesses of the validity of its execution, is admitted to probate without notice to any person interested therein.[12] This form of probate is an ex parte proceeding, and does not contemplate a contest.[13] A will is said to be probated in the solemn form when all parties interested have been duly notified to appear at the time of its probate and the will then duly proved by the

[6] Succession of Earhart, 50 La. Ann. 524, 23 So. 476.

[7] Coffman v. Coffman, 85 Va. 459, 8 S. E. 672, 2 L. R. A. 848, 17 Am. St. 69.

[8] In re Sternberg's Estate, 94 Iowa 305, 62 N. W. 734.

[9] Knight v. Hollings, 73 N. H. 495, 63 Atl. 38.

[10] Leach v. Burr, 188 U. S. 510, 23 Sup. Ct. 393, 47 L. ed. 567; San Francisco Protestant Orphan Asylum v. Superior Ct., 116 Cal. 443, 48 Pac. 379.

[11] Floto v. Floto, 213 Ill. 438, 72 N. E. 1092; Duperier v. Berard, 107 La. 91, 31 So. 653.

[12] Bent v. Thompson, 5 N. Mex. 408, 23 Pac. 234.

[13] Wright v. Young, 75 Kans. 287, 89 Pac. 694.

witnesses.[14] This form contemplates that the probate of the will in the probate court may be opposed.[15]

§ 492. **Effect of probate.**—In a number of states a decree of probate is neither essential nor conclusive as to the validity of wills in proving title to real estates; such will may be contested, if it has been admitted to probate in the probate court, or proved originally if not, in all common-law courts in which the title to land is in issue.[16] But in other states neither courts of law nor of equity will take cognizance of testamentary papers, or of the rights depending upon them, until after the will has been properly probated.[17] It is the function of the probate court to determine whether the instrument offered for probate has been executed with all the formalities required by law, and whether the testator possessed sufficient testamentary capacity to make a valid will.[18] The probate proceeding does not construe or interpret the will, nor does it establish any of its provisions. Where the probate is in solemn form it establishes the validity of the will as against all the world,[19] and affirms the title of the devisee under the will from the time of the testator's death.[20] An ex parte probate, or probate in common form, ascertains nothing but the prima facie validity of the will and that the instrument is seemingly what it purports to be.[21] Such probate is conclusive as to the fact that the will was executed, and the proceeding can not be attacked collaterally; but such probate is conclusive only as to the fact of the valid execution of the will; it adjudicates nothing as to the meaning or operation of the will.[22] Questions of title to lands devised

[14] Roy v. Segrist, 19 Ala. 810; Petty v. Ducker, 51 Ark. 281, 11 S. W. 2; In re Middleton, 72 Iowa 424, 34 N. W. 193; Martin v. Perkins, 56 Miss. 204; Roberts v. Flanagan, 21 Nebr. 503, 32 N. W. 563; George v. George, 47 N. H. 27.

[15] Clough v. Clough, 10 Colo. App. 433, 51 Pac. 513.

[16] Darby v. Mayer, 10 Wheat. (U. S.) 465, 6 L. ed. 367; Campbell v. Porter, 162 U. S. 478, 16 Sup. Ct. 871, 40 L. ed. 1044; Janes v. Williams, 31 Ark. 175; Belton v. Summer, 31 Fla. 139, 12 So. 371, 21 L. R. A. 146; Corley v. McElmeel, 149 N. Y. 228, 43 N. E. 628.

[17] Ellis v. Davis, 109 U. S. 485, 3 Sup. Ct. 327, 27 L. ed. 1006; Wood v. Matthews, 53 Ala. 1; Pitts v. Melser, 72 Ind. 469.

[18] In re Bent's Appeal, 35 Conn. 523; Cox v. Cox, 101 Mo. 168, 13 S. W. 1055; George v. George, 47 N. H. 27.

[19] Brock v. Frank, 51 Ala. 85; Janes v. Williams, 31 Ark. 175; Tucker v. Whitehead, 58 Miss. 762; Orr v. O'Brien, 55 Tex. 149.

[20] Dublin v. Chadbourn, 16 Mass. 433; Sutphen v. Ellis, 35 Mich. 446; Allaire v. Allaire, 37 N. J. L. 312.

[21] Burns v. Travis, 117 Ind. 44, 18 N. E. 45.

[22] Faught v. Faught, 98 Ind. 470; Fallon v. Chidester, 46 Iowa 588, 26

are not affected by the probate proceedings, the will having no greater effect after probate than other legal conveyances.[23]

§ 493. **Probate of foreign wills.**—A will devising land situated in a state other than that in which the will was executed must be probated in the state where the land lies in order that the courts of the latter state may enforce its provisions.[24] This is true except in those states in which the statutes confer certain powers upon foreign executors, which powers may be exercised by virtue of such statutory regulations.[25] The probate of a will in the jurisdiction of the testator's domicile has no force in establishing the sufficiency or validity of a devise of real estate in a state other than the state of such probate, unless by virtue of a statute of the state in which the real estate is situated.[26] Thus the title to real estate in Kentucky does not pass by a will of a nonresident until it is probated in Kentucky according to its laws.[27]

It is provided by statute in many states that the will of a nonresident, admitted to probate according to the law of the testator's domicile at the time of his death, may be admitted to probate upon the production of a duly authenticated copy thereof, together with the probate, without other proof, or notice. In some states, however, notice is required to be given to interested parties of the production of such authenticated copies.[28] Such statutes were not intended to deny original probate of foreign wills in states where property disposed of by will is situated.[29] Where a will devising real estate in one state is probated in another state by a court having no authority to probate wills, a transcript of such will and probate filed in the state where the land lies has no effect to transfer the title to the devisee. A title traced through such will is defective, since the record does not show a proper establishment of the will.[30] Even in states making

Am. Rep. 164; Poplin v. Hawke, 8 N. H. 124; Evans v. Anderson, 15 Ohio St. 324.

[23] Fallon v. Chidester, 46 Iowa 588, 26 Am. Rep. 164.

[24] Ward v. Oates, 43 Ala. 515; Thieband v. Sebastian, 10 Ind. 454.

[25] Mansfield v. Turpin, 32 Ga. 260.

[26] Chidsey v. Brookes, 130 Ga. 218, 60 S. E. 529, 14 Ann. Cas. 975; Newcomb v. Newcomb, 108 Ky. 582, 22 Ky. L. 286, 57 S. W. 2, 51 L. R. A. 419; Martin v. Stovall, 103 Tenn. 1, 52 S. W. 296, 48 L. R. A. 130; Thrasher v. Ballard, 33 W. Va. 285, 10 S. E. 411, 25 Am. St. 894.

[27] Foster v. Jordan, 130 Ky. 445, 113 S. W. 490.

[28] See statutes of various states.

[29] Parnell v. Thompson, 81 Kans. 119, 105 Pac. 502, 33 L. R. A. (N. S.) 658n.

[30] Chew v. Tome, 93 Md. 244, 48 Atl. 701.

foreign probate exclusive as to real estate without probate anew it may become necessary to probate the will where the land lies in order to perfect the title. For instance, a person having a claim against the decedent is not required to make proof thereof in a foreign state, but may enforce his statutory lien against the land in the state of his domicil. These statutory liens can be extinguished only by a proper probate of the foreign will in the state of such creditor's domicile. Where no ancillary probate of a foreign will is shown this fact should be noted by the examining attorney and such objections founded thereon as are deemed proper.

§ 494. **Abstracting probate proceedings.**—Title to real property may change hands at frequent intervals by any method of alienation except through a devise, but it is only about once in every generation that the title to lands will pass by devise or descent. So, the title to real estate that has passed from the government will pass under the supervision of the probate courts about once in every twenty-five years. In case the owner of real estate dies siesed thereof leaving a will by which the land is devised to another, such will becomes a muniment of title to the land only upon its proper probate. It is important, therefore, that the abstract show the proceedings of the probate court respecting the land in question, and that all steps necessary to a proper probate of the will be set forth in chronological order. The proceedings in probate usually consists: (1) Of the petition for probate, (2) notice or service of summons to interested parties, (3) proof of due execution of the will, (4) acceptance or renunciation of trust by the executor, (5) qualification by executor, (6) issuance of letters testamentary, (7) inventory and appraisement of property, (8) adjustment or payment of claims, (9) final report of executor, and (10) order discharging executor and declaring estate settled. Where dower and homestead have been assigned this should be shown. Also any sale or partition of the land by the executor should appear. However, it is not necessary in all cases that all the different matters enumerated above be included in detail. A brief summary of such matters as have a direct influence on the title is all that is required.

CHAPTER XXI

MISCELLANEOUS INSTRUMENTS AFFECTING TITLE

SEC.
500. General considerations.
501. Municipal ordinances.
502. Approval and publication of ordinances.
503. Operation and effect of ordinances.
504. Resolutions of municipal bodies.
505. Official certificates.
506. Easements and servitudes.
507. Party wall agreements.
508. Letters, receipts and memoranda.
509. Affidavits.
510. Unrecorded evidence.

§ 500. General considerations.—There are a variety of instruments affecting the title to real estate which do not properly belong under any of the classifications heretofore given, and we have seen fit to treat them in this connection under the head of "miscellaneous instruments affecting title." They include all deeds in which the description of the land is in general terms though not ambiguous; all powers of attorney not expressing or implying a power to sell and convey; all releases, confirmations, etc., which do not describe the property but merely refers to the instrument which it purports to affect; affidavits, party wall agreements; easements and servitudes; letters; notes; memoranda; official certificates; municipal ordinances and resolutions; legislative enactments; corporate charters and resolutions, and all other instruments and documents affecting real estate, but which do not on their face describe the particular tract affected. Such instruments affect the title to real estate, and where they appear of record during the period covered by the examination they should be included in the abstract.

§ 501. Municipal ordinances.—Municipal corporations, while having a twofold aspect as instrumentalities of state government and local self-government, are mere instrumentalities of the state for the more convenient administration of local government and their powers are not only such as the legislature may confer, but may also, at least as to those granted as an agency of the state for public purposes, be enlarged, abridged or entirely withdrawn at its pleasure. The functions, powers, and

duties of the council are controlled entirely by the terms of the charter,[1] and persons dealing with it are bound to know the extent of its authority, whether determined by the statute or the common law.[2]

Ordinances must be definite, and in compliance with statutory or charter directions as to their enactment.[3] It is sometimes provided that ordinances shall not become effective until a specified time after their passage or publication; but in the absence of a charter provision, an authorized ordinance is effective from its enactment, neither publication nor promulgation being necessary to its validity.[4] Since a city council can only speak by its records, these, when properly read and signed, are the only evidence of its action.[5] A failure of the clerk to copy an ordinance into the record book correctly does not invalidate the ordinance.[6]

It is only when the real estate involved has been affected by the opening of a street or alley, or by a conveyance from the municipality that the ordinance or resolution authorizing it should appear in the abstract, and then only a brief recital of the important features need be set out. The following example is submitted:

Vacation	Ordinance No. 896.
by	Adopted Sept. 8, 1908.
	Recorded Sept. 15, 1908.
The City of Centralia.	Plat book 10, page 45.

Recites, that whereas, a petition was filed with the city council of the city of Centralia, in the state of Washington, signed by Elmer Jones and Susan Jones, representing that they are the owners of blocks 45 and 46 in Fairview addition to said city, and praying said council to vacate that part of Towner avenue lying between said blocks 45 and 46, commencing at Jefferson street and running to Randolph street.

And whereas, it having been shown to said council by satisfactory evidence that said Towner avenue was not used by the public or the adjoining property holders, and that public necessity re-

[1] Campbell v. Brackett, 45 Ind. App. 293, 90 N. E. 777.

[2] Barre v. Perry, 82 Vt. 301, 73 Atl. 574.

[3] Bye v. Atlantic City, 73 N. J. L. 402, 64 Atl. 1056.

[4] Greer v. Jackson, 127 Ga. 47, 56 S. E. 73.

[5] Mt. Pleasant v. Eversole, 29 Ky. L. Rep. 830, 96 S. W. 478.

[6] Kenaston v. Riker, 146 Mich. 163, 13 Det. Leg. N. 709, 109 N. W. 278.

quired its vacation, and after due notice of said petition had been given, and no objection appearing, therefore it is ordained by the said common council of said city that all of said Towner avenue in Fairview addition which lies between blocks 45 and 46, beginning at Jefferson street and running through to Randolph street, be and the same is hereby vacated.

Published September 9, 1908.

Proceedings to vacate or discontinue streets and highways are regulated by local statutes which differ materially in different jurisdictions. It is impossible, therefore, to state many rules of general application, and it would not be profitable to consider in detail the mode of procedure in any particular jurisdiction. In a majority of instances it is not necessary to set out a complete synopsis of the ordinance, but a reference to the record where the same may be found will suffice. For example:

T. L. record 313, page 591, contains a certified copy of action of the board of public works of the city of Indianapolis, Indiana, April 24, 1899, vacating Frank A. Maus' New York street subdivision in the city of Indianapolis. Plat of this vacation is in plat book 11, page 186.

§ 502. Approval and publication of ordinances.—The failure of the mayor to expressly approve or sign an ordinance has been held not to invalidate it, unless the statute requires such approval.[7] But the statute may be mandatory and require it,[8] and in such case the omission of the officer's approval and signature should be noted in the abstract.

The ordinance should be put in force as required by statute. Provisions requiring notice or publication of the ordinance for a certain time are usually mandatory and must be complied with.[9]

§ 503. Operation and effect of ordinances.—A municipality can not convey title to real estate by a simple ordinance or vote of its board of trustees or common council, but the conveyance should be in its corporate name and under its corporate seal.[10] They are operative with the same force and effect as

[7] McDonald v. Dodge, 97 Cal. 112, 31 Pac. 909; Martindale v. Palmer, 52 Ind. 411.

[8] Saxton v. St. Joseph, 60 Mo. 153.

[9] San Francisco v. Buckman, 111 Cal. 25, 43 Pac. 396; East St. Louis v. Davis, 233 Ill. 553, 84 N. E. 674.

[10] Jamison v. Fopiana, 43 Mo. 565, 97 Am. Dec. 414; Tiffin v. Shawhan, 43 Ohio St. 178, 1 N. E. 581; San Antonio v. Gould, 34 Te 49, 77.

statutes both against residents and nonresidents within the limits of the municipality.[11] While, strictly speaking, ordinances are not laws, if valid they have the force and effect of law within the corporate limits of the municipality.[12] The general rule is that an ordinance vacating a street or alley has the effect to revest the fee in the owner of the land covered by the street or alley vacated.[13] This general rule governs even in cases where a new and different way is substituted for the one abandoned or vacated.[14] Although an ordinance has no extra territorial effect, yet it usually becomes effective in the additional territory included within the limits of the municipality as extended and is operative in such territory when afterwards annexed.[15]

§ 504. Resolutions of municipal bodies.—A resolution of a city council is nothing more than the formal expression of the will of that body.[16] It is characterized by its enacting clause, "Be resolved," and if any other term be used it is not a resolution.[17] It is a very different thing from a law or ordinance. It is of a temporary character, while a law or an ordinance prescribes a permanent rule of conduct or government. But a municipal corporation may declare its will as to matters within the scope of its corporate powers by resolution or ordinance, unless its charter requires it to act by ordinance.[18] Acts of legislation by a municipal corporation, which are to have and continue in force and effect, must usually be embodied in ordinances, while mere ministerial acts may be in the form of resolutions.[19]

A conveyance of land by a municipal corporation, when regular upon its face, made by a corporation having power to dispose of its real estate, is presumed to have been executed in pursuance of that power, and it is not necessary to recite the authority in the deed. The seal of the corporation affixed to the deed is prima facie evidence that it was so affixed by the authority of the corporation. The officer executing the conveyance is not in the

[11] North Birmingham St. R. Co. v. Calderwood, 89 Ala. 247, 7 So. 360, 18 Am. St. 105.

[12] Chicago v. Pittsburg &c. R. Co., 146 Ill. App. 403.

[13] Harris v. Elliott, 10 Pet. (U. S.) 25, 9 L. ed. 333; Heard v. Brooklyn, 60 N. Y. 242; Knight v. Thomas, 35 Utah 470, 101 Pac. 383.

[14] Benham v. Potter, 52 Conn. 248.

[15] People v. Creiger, 138 Ill. 401, 28 N. E. 812.

[16] El Paso Gas, Electric Light & Power Co. v. El Paso, 22 Tex. Civ. App. 309, 54 S. W. 798.

[17] State v. Delesdenier, 7 Tex. 76.

[18] Alma v. Guaranty Sav. Bank, 60 Fed. 203.

[19] McDowell v. People, 204 Ill. 499, 68 N. E. 379.

position of a trustee acting under special power, and required in the deed to recite the power and show that the contingency has arisen which authorizes the sale.[20] But where the deed does not show on its face the authority in pursuance of which it was made, the abstract must disclose the resolution or ordinance authorizing the conveyance so that counsel may know from inspection and comparison that it was duly executed.

§ 505. Official certificates.—An official certificate is a documentary declaration of a public official regarding facts from the public authority, as an attestation of facts contained in a public record. They are usually appended to instruments affecting title to give affirmative and independent proof of matters within the certifying officer's jurisdiction. Certificates of acknowledgment to various instruments of title have been already alluded to, and we have also had occasion to speak of certificates of sale and purchase, but there are numerous other official certificates of evidentiary value which must not be overlooked in the examination of a title. We refer more particularly now to the certificates of keepers and custodians of public records. The certificates of such officers, when properly made, affirm the facts in the writing to which they are attached, or to which they relate, and render it valuable as evidence of the facts so authenticated. A certificate made by a public officer in pursuance of authority or duty imposed by law touching an act performed by him, or a fact ascertained by him in the course of his official duty, is presumptive evidence of the matters and things contained therein. Of these may be mentioned certificates of sale by masters in chancery and sheriff's certificates of levy and attachment.

When certificates are attached to other documents for the purpose of proof or verification of such documents they require little attention, but when the certificate stands alone and affirms some fact or facts appearing from the records of federal or state land offices, the original evidence of which is inconvenient or impossible to obtain, such certificate becomes important and should be set out in detail.

[20] Jamison v. Fopiana, 43 Mo. 565, 97 Am. Dec. 414.

The following synopsis of certificate is given as an example:

Certificate by John Davis, secretary of state, of the state of Indiana.	Proof of conveyance. Dated Jan. 12, 1849. Certifies that from the books, files and records of the office of secretary of state, it appears that on the 10th day of June,

1832, the following described real estate, situate in the state of Indiana, viz: [set out description] was duly transferred by the United States to the state of Indiana, and that on the 1st day of April, 1835, the above described real estate was duly transferred by the state of Indiana to Frank Thompson. Signed by said secretary and seal of state of Indiana affixed.

§ 506. Easements and servitudes.—An easement is a liberty, privilege or ownership of the soil, and can not exist in parol.[21] Contracts for the creation of a permanent right of way, for the right to overflow or drainage, or for any easement or servitude whatsoever, are within the statute of frauds and must be in writing.[22] It often happens that the grantor reserves a right of way or other easement for the benefit of other land of his in the vicinity of the land conveyed. This is accomplished by inserting in the deed the proper clauses of exception or reservation. An exception relates to something in existence at the time of the conveyance as a part of the thing granted, while a reservation creates some new interest for the grantor in the thing granted. An easement reserved, being a new right created for the grantor in property which he conveys, is often regarded as created by a re-grant or counter-grant, made by the grantee to the grantor.[23] A reservation operates by way of implied grant. It is either a right personal to the grantor, or is appurtenant to his lands for the benefit of which it is reserved. In the latter case it can not be separated from or transferred independently of the land to which it adheres. If it is a personal privilege, it is not

[21] Snowden v. Wilas, 19 Ind. 10, 81 Am. Dec. 370; Lawrence v. Spinger, 49 N. J. Eq. 289, 24 Atl. 933, 31 Am. St. 702.

[22] Tillis v. Treadwell, 117 Ala. 445, 22 So. 983; Plunkett v. Meredith, 72 Ark. 3, 77 S. W. 600.

[23] Whitney v. Fitchburg R. Co., 178 Mass. 559, 60 N. E. 384.

assignable, and does not pass to the grantor's heirs or personal representatives. It is a privilege strictly personal to the grantor.[24] There is a distinction between easements and servitudes that are personal and those that are real. The former exist in favor of a particular person, and upon the sale of his land the personal right does not go with it.[25] But if the right attaches to the land, it passes by the conveyance of the land, even without the use of any words descriptive of the right.[26]

The appropriate word or words for the creation of an exception are, "saving and excepting" or "excepting," alone, and for a reservation, "reserving." Generally, one conveying part of his land impliedly conveys with it an apparent and visible right of way, or other easement, over that part retained by him, which is reasonably necessary for the use of the part conveyed;[27] but in order to so pass by implication the easement must belong to the estate conveyed. A reservation by the grantor of a right or interest forever, gives him only a life estate. To create an estate of inheritance the word "heirs" must be used.[28] But an easement by exception may be created without words of limitation, because the estate or rights excepted remain the grantor's property, and inure to the benefit of his heirs and assigns, just as any of his property does.[29]

An easement or servitude unknown to the purchaser at the time of the conveyance, or subject to which he can not be reasonably presumed to have taken the premises, constitutes a breach of the covenant against incumbrances.[30] But a servitude imposed upon the land which is visible to the eye, is not really an incumbrance within the meaning of a covenant against incumbrances, because the real subject-matter of the dealings between the grantor and grantee is the land, subject to the visible easements.[31] Nor is an easement in the premises a breach of the covenant of seisin, since it does not operate as a divestiture of the grantor's

[24] Kister v. Reeser, 98 Pa. St. 1, 42 Am. Rep. 608.

[25] Cave v. Crafts, 53 Cal. 135; Tucker v. Jones, 8 Mont. 225, 19 Pac. 571.

[26] Engel v. Ayer, 85 Maine 448, 27 Atl. 352.

[27] Irvine v. McCreary, 108 Ky. 495, 56 S. W. 966, 49 L. R. A. 417.

[28] Koelle v. Knecht, 99 Ill. 396; Ashcroft v. Eastern R. Co., 126 Mass. 196, 30 Am. Rep. 672.

[29] Bumstead v. Cook, 169 Mass. 410, 48 N. E. 767, 61 Am. St. 293; Emerson v. Mooney, 50 N. H. 315.

[30] Teague v. Whaley, 20 Ind. App. 26, 50 N. E. 41.

[31] Kutz v. McCune, 22 Wis. 628, 99 Am. Dec. 85.

technical seisin.[32] But the covenants of warranty and for quiet enjoyment will be broken if a stranger establish a right to an easement in the warranted premises.[33] An easement by separate instrument should be literally transcribed in the abstract.

§ 507. Party wall agreements.—Two adjoining lot owners in a city or town generally agree, by an instrument executed with the formalities of a deed, purporting to bind themselves, their heirs and assigns, that a wall about to be built on the division line may be built by one of them, half on each lot, and that the other shall pay half the cost of the wall when he makes use of it. Such instruments, when properly acknowledged, may be recorded, and the record thereof will be constructive notice of their provisions to subsequent purchasers of either lot; and where they are not merely personal covenants between the immediate parties they may affect subsequent owners of the adjoining lots. Such agreements usually run with the land if they are evidently intended to do so.[34] Covenants in a deed in respect to the making and use of party walls are held to run with the land.[35]

If it appears that the intention of the parties in making the agreement was to charge upon the land rather than upon the person the burden and expense of the party wall; and also to confer on the owner of each of the lots the right to construct the wall, on condition that any owner of the adjoining lands using the wall should pay for what he uses, and that the agreement relates not merely to the present, but to the future—the agreement may be regarded as a covenant real, running with the land; but if the agreement is a present one, and the person who is to build on the one hand and the person who is to pay on the other, are clearly designated, and the land is not charged with the obligation, the covenant is personal and does not affect the assigns of the parties.[36] The right to use a party wall belonging wholly to another, is in the nature of an easement and can not be acquired by prescription, except by adverse user for the statutory period of

[32] Blondeau v. Sheridan, 81 Mo. 545.

[33] Lamb v. Danforth, 59 Maine 322, 8 Am. Rep. 426; Scriver v. Smith, 100 N. Y. 471, 3 N. E. 675, 53 Am. Rep. 224.

[34] Conduitt v. Ross, 102 Ind. 166, 26 N. E. 198; Kimm v. Griffin, 67 Minn. 25, 69 N. W. 634, 64 Am. St. 385.

[35] Richardson v. Tobey, 121 Mass. 457, 23 Am. Rep. 283; Platt v. Eggleston, 20 Ohio St. 414.

[36] Sebald v. Mulholland, 155 N. Y. 455, 50 N. E. 260.

limitation.[37] A wall standing equally on both lots, and held in common by the adjoining proprietors, is not an incumbrance, but a valuable appurtenant which passes with the title to the property.[38]

Where the party wall agreement is contained in a separate instrument, all the material parts thereof must be shown in the abstract. The following example is given:

A. B. with C. D.	Party wall agreement. Dated —— day of ——, 19—. Recorded —— day of ——, 19—. Misc. record ——, page ——.

Recites that first party is the owner of the following described real estate [describing same] and that second party is the owner of certain real estate adjoining same described as follows [describing same], and that whereas first and second parties desire that the wall that may be erected to separate the adjoining buildings which may be placed upon said parcels may be a party wall, and that whichever of said parties shall first build on their respective parcels shall make the wall on the side adjoining the land of the other party of the thickness of —— inches, and shall place the same one-half on the land of each party.

Whenever either of said parties shall use the whole or any part of said wall, the one so using shall pay to the other party, or those claiming under him or them, who may be owners for the time being of the land of the party who built such wall, one-half of the value at that time of so much of said wall.

The parties, for themselves, their successors, heirs, executors, administrators, and assigns, do covenant with each other that the agreements herein contained shall be covenants running with the land.

Signed and acknowledged by both parties on the —— day of ——, 19—.

§ 508. Letters, receipts and memoranda.—It is well settled that the form of a written agreement for the conveyance of

[37] Hodgkins v. Farrington, 150 Mass. 19, 22 N. E. 73, 5. L. R. A. 209, 15 Am. St. 168.

[38] Hendricks v. Stark, 37 N. Y. 106, 93 Am. Dec. 549.

land required by the statute of frauds is not material. The contract may be evidenced by one writing or more. It may be shown entirely by written correspondence. Whatever form the agreement may assume, if the writing or writings, viewed as a whole, constitute in essence or substance, upon their face, a note or memorandum in writing subscribed by the party sought to be charged, or his agent lawfully authorized in writing, showing who the contracting parties are, the subject-matter of the sale, and the consideration, the statute is satisfied.[39]

By the statutes of most states an express or direct trust in land must be in writing. In certain jurisdictions this includes not only trusts concerning lands but also trusts in any manner relating to lands. In the creation of a trust it is unnecessary to employ certain specific words or a prescribed form. To create a trust the deed conveying the property to be affected by the trust need not contain the declaration of the trust, and where by statute the trust must be in writing signed by the party to be charged or able to declare the same, setting forth the fiduciary relations, terms and conditions of the trust, any writing so signed and setting forth such matters is sufficient to establish the trust. Letters, receipts or other writings signed by the trustee may be sufficient to establish a trust.[40] All writings of the character indicated above, and which in any manner affect the title being examined, should be set out in full in the abstract.

§ 509. **Affidavits.**—The statutes of many states provide that affidavits explaining any defects in the chain of title to real estate may be recorded as instruments affecting the same. Such affidavits have the effect to render a title valid that would be invalid without it.[41]

Questions relating to deaths, marriages, births, etc., are explained and settled by these ex parte sworn statements when no other or better evidence is available. An unexplained break in the record chain of title would render the title doubtful; but it is obvious that such a break may be satisfactorily explained by an affidavit so as to leave no imputation upon the title. The nonperformance of conditions antecedent and subsequent and the

[39] Gray v. Smith, 76 Fed. 525; Jenkins v. Harrison, 66 Ala. 345.

[40] Nesbit v. Stevens, 161 Ind. 519, 69 N. E. 256.

[41] Hautz v. May, 137 Iowa 267, 114 N. W. 1042.

happening or nonhappening of contingencies upon which the title depends should be shown by affidavits. Also the occurrence of marriages, births and deaths, wherever they would affect the grantor's title, must be ascertained by inquiries dehors the record, and should be embodied in affidavits. If the abstract shows title in the grantor as heir his heirship should be sustained by the affidavits of persons having knowledge of the fact of inheritance. If the grantor claims title by adverse possession there should be affidavits to show such a possession under color of title for a period sufficient to bar the rights of all persons.

Affidavits of the character alluded to possess no legal validity, and are not strictly evidence for any purpose, but for want of better evidence they are accepted as evidence of the matters and things to which they relate. As a rule such affidavits may be sworn to before any officer authorized to take acknowledgments, and may be construed by the same rules that are applicable to the construction of affidavits in legal proceedings.[42] The jurat is no part of the affidavit, but simply evidence that the oath was made or the affidavit sworn to.[43] The affidavit is sufficient, though in place of the jurat there is attached a regular form of acknowledgment.[44] In the absence of a rule or statute requiring it, the affiant need not subscribe or sign his name, but it must be certified by the officer before whom the oath is taken.[45]

The abstract should set out all the essential parts of the affidavit. An example of which is as follows:

Affidavit	Subscribed and sworn to April 7, 1904.
by	Recorded April 13, 1914.
Samuel H. McIlvain.	Land record 43, page 139.

Recites that Elizabeth Hensley, formerly Elizabeth Hardin, the widow of Harrison Hardin, deceased, was mother of affiant's first wife. That said Elizabeth Hensley departed this life several years ago as he is informed and verily believes from his intimate knowledge with said decedent's family. That she is the same Elizabeth Hardin who held a life estate in a part of the S. E. ¼

[42] Harris v. Lester, 80 Ill. 307.
[43] Bantley v. Finney, 43 Nebr. 794, 62 N. W. 213.
[44] Turner v. St. John, 8 N. Dak. 245, 78 N. W. 340.
[45] Alford v. McCormac, 90 N. Car. 151.

of the S. W. ¼ of section 12, Tp. 16, north range 3 east, in Marion County, Indiana.

Jurat by George Carter, notary public.

Notarial seal affixed.

§ 510. Unrecorded evidence.—The title to a particular tract of land may depend as well on facts external to the records as upon the records themselves. But it is the duty of the abstracter to set out in the abstract the items of record which affect the title. The practice of abstracting instruments not of record is not to be commended, but many abstracters do not hestitate to make note of matters in pais affecting the title. Where the abstracter has knowledge of any such matters the better practice would be to have them embodied in some form of writing which may then be recorded if the recording act permit. When so recorded the instrument may be included in the examination. An abstracter is not liable in damages for omitting from the abstract any matter not appearing of record.

CHAPTER XXII

LIENS AND INCUMBRANCES

SEC.
515. Liens defined and classified.
516. Equitable liens generally.
517. Statutory liens.
518. Operation and effect of liens.
519. How liens exhibited in abstract.
520. Mortgage liens.
521. Dower rights as liens.
522. Judgment and execution liens.
523. Attachment not strictly a lien.
524. The lien of decedent's debts.
525. Liens arising under devises.
526. Liens for taxes.
527. Lien of municipal or corporation taxes.
528. Lien of officials' bonds.
529. Lease not strictly a lien.
530. Grantors' or vendors' liens.
531. Vendee's implied lien for purchase-money.
532. Liens arising under trusts.
533. Mechanics' liens in general.
534. Mechanics' liens of subcontractors.
535. Priority of mechanics' liens.
536. Estates or property subject to mechanics' liens.
537. Assignment of a mechanic's lien.
538. Assertion and enforcement of mechanics' liens.

§ 515. Liens defined and classified.—The term "lien" signifies an obligation, tie, or claim annexed to, or attaching upon property, without satisfying which such property can not be demanded by its owner.[1] A lien, in its proper sense, is a right which the law gives. But it is usual to speak of liens by contract, though that be more in the nature of an agreement for a pledge. And there are liens which exist only in equity, and of which equity alone can take cognizance. The existence of a lien, however, and the benefit which may be derived from it, as well as the mode in which that benefit may be obtained, depends upon principles of law and circumstances so various that it is always indispensably necessary to attend to those particulars by which its very substance may be materially affected.

Liens affecting real estate are either (1) equitable or (2) statutory. Liens are created upon lands either by the express declarations of the legislature to secure debts due to the state, as in the case of taxes and other debts due on public account; or, in consequence of the law raising estates in favor of the husband or wife as an incident of marriage, such as curtesy and dower; or, by the acts of courts adjudging that the lands of a judgment de-

[1] In re Maher, 169 Fed. 997; Ridgely v. Iglehart, 3 Bland (Md.) 540.

fendant be taken in execution or be subjected to a charge; or, in consequence of the voluntary act of the parties in making leases, granting mortgages, estates for life, and the like.

§ 516. Equitable liens generally.—At common law there is no such thing as a lien upon land; but in equity there are certain rights in respect to land not based on possession, yet of a character analogous to common-law liens, and known as equitable liens. An equitable lien arises either from a written contract which shows an intention to charge some particular property with a debt or obligation, or is declared by a court of equity out of general considerations of right and justice as applied to the relations of the parties and the circumstances of their dealings. An equitable lien usually rests upon the intent of the parties predicated upon their express declaration[2] or implied from their acts and agreements.[3]

An equitable lien on real estate arises in favor of a person who advances purchase-money,[4] a wife who advances money to make improvements on her husband's land,[5] a co-tenant who advances money to pay taxes on the joint property,[6] one performing services under an agreement that the property is to be devised to him,[7] a creditor in whose favor a will charges the real estate with the payment of a debt,[8] a creditor in whose favor a debtor's deed charges land with the payment of the debt,[9] a vendor who expressly reserves in his deed a lien for unpaid purchase-money,[10] and a vendee's lien for money paid on a contract of purchase.[11]

Equitable liens do not depend upon possession as do liens at law. They are in the nature of trusts, and bind the estate to which they relate. To create an equitable lien by agreement it must appear that the parties to it intended to create a charge upon the property.[12] Express equitable liens are as various as are contracts which parties may make.

[2] Barnard & Leas Mfg. Co. v. Smith, 77 Ark. 590, 92 S. W. 858.
[3] Rugg v. Lemley, 78 Ark. 65, 93 S. W. 570, 115 Am. St. 17.
[4] Trimble v. Puckett, 93 Ky. 218, 14 Ky. L. 181, 19 S. W. 591.
[5] Stramann v. Seheeren, 7 Colo. App. 1, 42 Pac. 191.
[6] Thiele v. Thiele, 57 N. J. Eq. 98, 40 Atl. 446.
[7] Thomas v. Feese, 21 Ky. L. 206, 51 S. W. 150.
[8] Smith v. Moore, 102 Va. 260, 46 S. E. 326.
[9] Craig v. Leslie, 3 Wheat. (U. S.) 563, 4 L. ed. 460.
[10] Markoe v. Andras, 67 Ill. 34; Heist v. Baker, 49 Pa. 9.
[11] Arnold v. Patrick, 6 Paige Ch. (N. Y.) 310.
[12] Knott v. Shepherdstown Mfg. Co., 30 W. Va. 790, 5 S. E. 266.

§ 517. **Statutory liens.**—In the different states many different liens have been created, and it would be impossible to notice them in detail in this treatise. They embrace liens of judgments, attachment liens, execution liens, mechanics' liens, liens for taxes and assessments, the lien of decedent's debts, statutory liens for improvements, the lien of a widow's allowance, and various liens on crops on land. Such liens may exist by force of a statute, either expressly providing for a lien in a certain contingency, or in effect doing so by making the land liable for the enforcement of an obligation, without reference to its transfer to one not originally liable on the obligation. To acquire a statutory lien the terms of the statute must be complied with,[13] and the party claiming such a lien must bring himself clearly within the statute.[14] General liens or charges which are wholly of statutory creation can be divested by the legislature at any time before rights thereunder have become vested.[15]

§ 518. **Operation and effect of liens.**—A lien confers no right of property upon the holder thereof. He has no estate in or title to the property subject to the lien. It is neither a jus ad rem nor a jus in re. It is simply a right of detainer.[16] "Liens are not founded on property, but they necessarily suppose the property to be in some other person, and not in him who sets up the right."[17] It constitutes a breach of the covenant against encumbrances.[18] Until discharged or satisfied a lien binds the estate not only in the hands of the owner at the time of its creation, but after the property has passed into the hands of a subsequent purchaser.

§ 519. **How liens exhibited in abstract.**—The abstract must show all unsatisfied liens of record which may in any manner affect the title to the real estate being examined. The prevailing practice is to exhibit all liens at the end of the abstract immediately preceding the certificate instead of in the regular course of title. An exception, however, is made respecting mortgages, which are shown in regular chronological order the same as conveyances of the legal estate. This arrangement tends to prevent

[13] In re Cramond, 145 Fed. 966.
[14] Palin v. Cooke, 125 Ga. 442, 54 S. E. 90.
[15] Snyder v. Thieme & Wagner Brew. Co., 173 Ind. 569, 90 N. E. 314.
[16] Jacobs v. Knapp, 50 N. H. 71.
[17] Lickbarrow v. Mason, 6 East. 20, 24.
[18] Hall v. Dean, 13 Johns. (N. Y.) 105.

confusion on the part of counsel, and to enable him to more readily determine the effect of liens. It must be borne in mind, however, that certain liens and incumbrances may appear by reason of covenants running with the land, or restrictions of various kinds by way of condition, or covenant, or reservation appearing in instruments directly in the chain of title.

§ 520. Mortgage liens.—In a few states the common law doctrine as regards the nature of the mortgage interest and the respective rights of the parties still obtains. The mortgage deed is regarded as passing at once the legal title to the mortgagee, subject to defeasance as a condition subsequent, which divests or defeats the estate on performance of it. The mortgagee's title is in the nature of a base or determinable fee, which continues only so long as the debt continues.[19] In most of the states, however, the common-law doctrine upon this subject has been wholly abrogated by statute, and both at law and in equity, and both before and after breach of condition, a mortgage is regarded as merely a lien upon the property. It passes to the mortgagee no title or estate, and gives him no right of possession before foreclosure.[20] In jurisdictions where the common-law doctrine of mortgages is still recognized, the instruments should be exhibited in the order of other conveyances, but where they are regarded simply as liens, and remain unsatisfied or foreclosed, they may be exhibited with other liens at the end of the abstract. But after foreclosure and extinguishment of the equity of redemption, the instrument, together with the entire proceedings had in foreclosure becomes a muniment of title, and should appear in regular chronological order in the chain. A mortgage that has been fully satisfied of record need not be noticed in the examination, as its effect as a conveyance or lien is at an end.

§ 521. Dower rights as liens.—It is generally considered that a right of dower, inchoate or consummate, is an encumbrance.[21] And the same rule has been applied to the statutory substitute for dower.[22] The claim of the wife, after a convey-

[19] Lightcap v. Bradley, 186 Ill. 510, 58 N. E. 221.

[20] McMillan v. Richards, 9 Cal. 365, 70 Am. Dec. 655; Drake v. Root, 2 Colo. 685; McMahon v. Russell, 17 Fla. 698.

[21] McCord v. Massey, 155 Ill. 123, 39 N. E. 592.

[22] Crowley v. C. N. Nelson Lumber Co., 66 Minn. 400, 69 N. W. 321.

ance by the husband alone, and before the husband's death, is altogether a contingent claim. She has a present right of dower in the land sold, which, if she survives her husband, may become an estate for life, incumbering, to the extent of a third of the value, the lands sold. If she dies first, the land is thereby disincumbered. This right is not generally treated as a lien on land; but it is an interest in it.[23] It has been held, however, that the right of dower is absolute, and fixes a lien on all lands of which the husband was seised of an estate of inheritance during marriage.[24] The rights of dower, or analogous statutory rights, do not appear of record, and their existence can be ascertained only by investigation dehors the record. Inasmuch as this right does not appear of record, it can only be shown by inference in the abstract. Thus a conveyance by a married man without his wife joining or without in any other way relinquishing her right will apprise the purchaser of the existence of the right.

§ 522. **Judgment and execution liens.**—A judgment does not, in the strict sense, constitute a lien upon the real estate of the debtor. It is only a general charge upon all his real estate to be enforced by an execution and levy upon some part or the whole of it. But a judgment is called a lien in the courts of law of many of our states.[25] A judgment lien is statutory, as none exists at common law.[26] A judgment is a general security, not a specific lien on the land of the defendant. A judgment creditor is not a purchaser within the recording acts, unless he is made so by statute. To become a lien a judgment must be docketed and indexed in accordance with the statute.[27] Judgments usually become a lien on the real estate of the defendant from the date of rendition thereof, while executions become a lien from the date of issue or levy. A further treatment of the subject of judgments and executions will be found elsewhere in this work.

§ 523. **Attachment not strictly a lien.**—An attachment on mesne process does not constitute a lien in any proper legal sense of the term. Though an attachment is sometimes spoken of as

[23] Enyard v. Enyard, 190 Pa. St. 114, 42 Atl. 526, 70 Am. St. 623.
[24] Tate v. Jay, 31 Ark. 576.
[25] Peck v. Jenness, 7 How. (U. S.) 612, 12 L. ed. 841; Kittredge v. Bellows, 7 N. H. 399.
[26] Collins v. Smith, 75 Wis. 392, 44 N. W. 510.
[27] Fulkerson v. Taylor, 100 Va. 426, 41 S. E. 863.

a lien, the term is then used only in a general sense, by way of analogy and illustration. It is a charge upon the land only when it has become absolute, fixed, and vested.[28] An attachment, though it be in its nature uncertain and dependent upon the final judgment to be rendered in the action, is a breach of the covenant against incumbrances;[29] the lien or charge which it creates remains a continuing security for any judgment that the plaintiff may obtain in the suit.[30] A further treatment of attachments will be found in the next chapter.

§ 524. The lien of decedent's debts.—The right of a creditor to his just proportion of the property of his deceased debtor vests at the instant of such debtor's death. This right may be enforced against not only the heirs or devisees of the land of the decedent, but against persons claiming by purchase, mortgage, or otherwise under such heirs and devisees.[31] Consequently, this liability of the land to sale constitutes, in effect, a lien on the land. The liability of the land for the debts of the ancestor is one of the burdens attaching to the inheritance, from which it can not be relieved by any act of the heir short of paying the debts.[32] A purchaser from the heirs of a decedent acquires precisely the same right and interest which the heir has from whom he takes a conveyance, and nothing more. He is, therefore, bound to know that, until the estate is finally settled, the sale of the real estate may become necessary for the payment of debts.[33] The bare possibility that a decedent may have left debts for which his property would be liable, does not render doubtful the title of the heir or one to whom the heir has conveyed the land, unless there is something to show the probable existence of such debts.[34]

§ 525. Liens arising under devises.—An equitable lien arises upon the devise of real estate subject to the payment of debts and legacies, or of specific debts or charges, though such legacies, debts, or charges be not in express terms made a charge

[28] Ex parte Foster, 2 Story (U. S.) 131, Fed. Cas. No. 4960.

[29] Kelsey v. Remer, 43 Conn. 129, 21 Am. Rep. 638.

[30] Johnson v. Collins, 116 Mass. 392.

[31] Nelson v. Murfee, 69 Ala. 598; Davis v. Van Sands, 45 Conn. 600, Fed. Cas. No. 3655; Myers v. Pierce, 86 Ga. 786, 12 S. E. 978.

[32] Moore v. Moore, 155 Ind. 261, 57 N. E. 242.

[33] Fiscus v. Moore, 121 Ind. 547, 23 N. E. 362, 7 L. R. A. 235.

[34] Garden City & Co. v. Miller, 157 Ill. 225, 41 N. E. 753; Moser v. Cochrane, 107 N. Y. 35, 13 N. E. 442.

upon the land devised.[35] Whether in a particular case there is a charge imposed by will depends upon the intention of the testator as gathered from the whole will in view of the existing circumstances.[36] The implication, however, must be a fair and reasonable one.[37] The testator may make his debts in general, or any particular debt, a lien upon the lands devised, and any one or more of the creditors in whose favor the charge is made may enforce the lien.[38] When a devise is made conditional upon the payment of a legacy, it is in the strongest terms made a charge upon the land devised. An express direction in any form of words to a devisee, to pay a legacy out of the land devised, makes the legacy an effectual charge upon the land.[39] The will when probated is notice to all the world of any liens created thereby, and subsequent purchasers of the property charged take it with notice of such liens.[40]

§ 526. **Liens for taxes.**—Taxes are generally made a lien by statute on the real estate assessed, but a right of prior payment does not constitute a lien. This lien for taxes is usually preferred to all payments and incumbrances. By statute in some states, taxes do not become a lien upon the land until a fixed time after the assessment. Under such a statute the assessment does not make the taxes an incumbrance.[41] But taxes are an incumbrance within the covenant against incumbrances from the time they become a lien upon the land, whether this be from the date of the assessment or from a time fixed by statute, though they have not become due and payable at the time of the conveyance.[42] Statutory authority is necessary to create a lien for taxes, and a strict compliance with the statutory requirements is necessary to the creation of such lien.[43] A more extensive treatment of the subject of taxes will be found in another part of this work.

§ 527. **Lien of municipal or corporation taxes.**—A city or

[35] Davidson v. Coon, 125 Ind. 497, 25 N. E. 601, 9 L. R. A. 584; Thayer v. Finnegan, 134 Mass. 62, 45 Am. Rep. 285; Brown v. Knapp, 79 N. Y. 136.

[36] Thayer v. Finnegan, 134 Mass. 62, 45 Am. Rep. 285.

[37] Owens v. Clayton, 56 Md. 129.

[38] Dill v. Wisner, 88 N. Y. 153.

[39] Manifold v. Jones, 117 Ind. 212, 20 N. E. 124.

[40] Wilson v. Piper, 77 Ind. 437.

[41] Bradley v. Dike, 57 N. J. L. 471, 32 Atl. 132.

[42] Hill v. Bacon, 110 Mass. 387; Lindsay v. Eastwood, 72 Mich. 336, 40 N. W. 455; Campbell v. McClure, 45 Nebr. 608, 63 N. W. 920.

[43] New Britain v. Mariners' Sav. Bank, 67 Conn. 528, 35 Atl. 505.

town has a lien on the real estate within its corporate limits for assessments made for various purposes beneficial to the health and well-being of the inhabitants thereof, if such assessments are made in pursuance of an ordinance authorizing same. But such taxes and assessments are not liens unless made so by charter, or unless the corporation is authorized by the legislature to declare them to be liens.[44] Statutes authorizing cities and towns to make improvements in streets generally provide that the expense thereof, or some part of such expense, may be assessed upon the land fronting upon such streets, and such assessments are made a lien upon the property.[45] The lien created by assessments for local improvements is inferior to the lien of general taxes.[46]

Until the amount of a tax for city improvements is ascertained in the manner prescribed by law, no lien or incumbrance exists by reason thereof.[47] But on the other hand, such assessments are a lien from the time the improvements were made, according to the decisions in some states.[48] A lien may be given a city or town for placing a water-meter in a building,[49] for water rates,[50] or for removing a nuisance.[51]

§ 528. Lien of officials' bonds.—By statute in many states the bonds of certain public officers are made a lien upon the real estate of the officer and his sureties. The most common of such bonds are those of collectors of taxes. Such a lien is a general lien like the lien of a judgment, and is subject to the equity of third persons.[52] A statutory lien in favor of the state upon the land of a collector of taxes and his sureties attaches not only to the lands owned by him at the time of the approval and recording of his bond, but also to after-acquired lands, the same as in the case of a judgment.[53] Where official bonds are made liens upon the real estate of the obligor and his sureties, such liens continue un-

[44] Ham v. Miller, 20 Iowa 450; Jefferson v. Whipple, 71 Mo. 519; Quimby v. Wood, 19 R. I. 571, 35 Atl. 149.

[45] Fitch v. Creighton, 24 How. (U. S.) 159, 16 L. ed. 596.

[46] Ballard v. Ross, 38 Wash. 209, 80 Pac. 439.

[47] Gotthelf v. Stranahan, 138 N. Y. 345, 34 N. E. 286, 20 L. R. A. 455.

[48] Lafferty v. Milligan, 165 Pa. St. 534, 30 Atl. 1030.

[49] Mofat v. Henderson, 18 J. & S. (N. Y.) 211.

[50] Provident Inst. for Savings v. Jersey City, 113 U. S. 506, 5 Sup. Ct. 612, 28 L. ed. 1102.

[51] Train v. Boston Disinfecting Co., 144 Mass. 523, 11 N. E. 929, 59 Am. Rep. 113.

[52] Crisfiel v. Murdock, 55 Hun (N. Y.) 143, 8 N. Y. S. 593, 28 N. Y. St. 460.

[53] Crawford v. Richeson, 101 Ill. 351; Kerr v. Hoskinson, 5 Kans. App. 193, 47 Pac. 172.

til the officer is discharged from his official obligation. Official bonds are required to be filed or recorded in some county office, and these should be ispected in every case to ascertain if any owner in the chain of title is under such bond or a surety thereon. Every properly conducted abstract office should keep an index of the names of bondsmen, arranged alphabetically, so that no time may be lost in compiling the abstract. If the name of the party appears, the record should be examined to ascertain if there has been a discharge, and if no discharge of the obligation appears, the abstract should recite all the material parts of the bond; otherwise it may be wholly disregarded.

§ 529. **Lease not strictly a lien.**—A lease outstanding is more in the nature of an incumbrance than a lien. A lease may be an actual benefit, rather than a detriment to the grantee or mortgagee. Nevertheless, on the ground that the purchaser does not obtain the full dominion and use of the property subject to a lease, the lease is generally held to be an incumbrance within the covenant against incumbrance.[54] A lease should be exhibited in the abstract along with other incumbrances at the end of the examination. Where the duration of the term covers a long period of years, and there has been numerous transfers of interests less than the original term, it would seem that a separate examination should be made.

§ 530. **Grantors' or vendors' liens.**—The doctrine prevails in a number of states that a vendor of real estate has a lien upon the premises for the purchase-money, as against the vendee and his heirs, although he has taken no distinct agreement or separate security for it. There is a natural equity, it is said, that the land shall stand charged with so much of the purchase-money as is not paid at the time of the conveyance.[55] In a few cases the vendor's right has been regarded as in the nature of a trust for the payment of the purchase-money.[56] The lien is presumed to exist in all

[54] Edwards v. Clark, 83 Mich. 246, 47 N. W. 112, 10 L. R. A. 659; Taylor v. Heitz, 87 Mo. 660; Pease v. Christ, 31 N. Y. 141; Cross v. Noble, 67 Pa. St. 74.

[55] Beal v. Harrington, 116 Ill. 113, 4 N. E. 664; Barrett v. Lewis, 106 Ind. 120, 5 N. E. 910; Phillips v. Schall, 21 Mo. App. 38.

[56] Dickerson v. Carroll, 76 Ala. 377; Morgan v. Dalrymple, 59 N. J. Eq. 22, 46 Atl. 664; Senter v. Lambeth, 59 Tex. 259.

cases unless an intention be clearly manifested that it shall not exist.[57]

Besides the purchaser and his heirs, the right exists against the dower rights of the purchaser's wife, against the purchaser's privies in estate, and against subsequent purchasers who have notice of the nonpayment of the purchase-money.[58] Ordinarily the lien is not waived by taking a note or bond or other personal obligation of the purchaser alone, for the amount of the unpaid purchase-money.[59] But the vendor's lien is presumptively lost by his taking a mortgage upon other property, or by taking other independent security for the purchase-money.[60] Such liens, being secret and implied, are not disclosed by the record, and, consequently, will not appear in the abstract.

Aside from vendor's liens which are implied, such liens may arise by contract or reservation. Thus a lien for the purchase-money expressly reserved by a vendor in his deed of conveyance is a lien created by contract, and not by implication of law. The lien, then, becomes a matter of record when the deed is recorded.[61] It is not waived by the taking of other security, as in the case of an implied vendor's lien.[62] It is governed by the same rules which govern a mortgage. It passes by an assignment of the note secured by it.[63] It is foreclosed as a mortgage; and there is the same right of redemption for a limited period after a foreclosure sale.[64] The vendee's title is imperfect until the debt is paid, though the debt for the purchase-money be barred by the statute of limitations.[65] All deeds in the chain of title should be carefully examined for any reservation or charge upon the estate conveyed.

§ 531. Vendee's implied lien for purchase-money.— Money paid by a vendee of land prematurely, or before receiving a conveyance, is a charge upon the estate in the hands of the vendor, or in the hands of his grantee with notice.[66] Whether the

[57] Seymour v. Slide & Spur Gold Mines, 42 Fed. 633.

[58] Wilson v. Plutus Min. Co., 174 Fed. 317, 98 C. C. A. 189.

[59] Lyon v. Clark, 132 Mich. 521, 94 N. W. 4; Manly v. Slason, 21 Vt. 271, 52 Am. Dec. 60.

[60] Rice v. Rice, 36 Fed. 858.

[61] Ober v. Gallagher, 93 U. S. 199, 23 L. ed. 829.

[62] Wilcox v. First Nat. Bank, 93 Tex. 322, 55 S. W. 317.

[63] Carpenter v. Mitchell, 54 Ill. 126.

[64] Markoe v. Andras, 67 Ill. 34.

[65] Hale v. Baker, 60 Tex. 217.

[66] Cooper v. Merritt, 30 Ark. 686; Stewart v. Wood, 63 Mo. 252; Chase v. Peck, 21 N. Y. 581; Elterman v. Hyman, 192 N. Y. 113, 84 N. E. 937, 127 Am. St. 862n, 15 Ann. Cas. 819;

foundation of this lien is natural equity, imputed intention, partial ownership, the implication of a trust, or a blending of some of these sources, the authorities, almost without exception in those jurisdictions which give a lien to the vendor, are clear that one exists. If a purchaser makes a deposit on account of the purchase-money, at the time of executing an agreement of purchase, which is not complete because the vendor is unable to give a good title, the purchaser has a lien upon the land for the money so paid.[67] In fact, in the majority of instances, the default which gives rise to the claim for the lien is because of the inability or wrongful refusal of the vendor to convey a good title. If the purchaser has assigned his contract, his assignee has a lien for what has been paid.[68] The lien has been allowed for moneys paid under parol contracts of sale.[69] The lien will cover interest on purchase-money paid,[70] or money spent by the vendee for improvements while in possession under the contract.[71] The contract being an essential basis of the lien, if the contract is destroyed or annulled, the lien is at an end.[72] Like the vendor's implied lien, the lien of the vendee does not appear of record, and consequently is not binding on subsequent purchasers and creditors without notice.[73]

§ 532. Liens arising under trusts.—It is everywhere the general rule that the expenses of properly administering a trust are a lien on behalf of the trustee on the estate in his hands; and he can not be compelled to part with his control of the estate until such expenses are paid. A resulting trust is sometimes spoken of as an equitable lien. Thus where one person's money is used to purchase land the title to which is taken in the name of another, the person furnishing the money has an equitable lien on the property so purchased for the amount paid therefor.[74] But where the entire land purchased is clearly the fruit of the trust fund,

Small v. Small, 16 S. Car. 64; Wickman v. Robinson, 14 Wis. 493, 80 Am. Dec. 789.

[67] Cleveland v. Bergen Bldg. &c. Co., (N. J. Eq.) 55 Atl. 117.

[68] Aberaman Iron Works v. Wickens, L. R. 4 Ch. 101.

[69] Vaughn v. Vaughn, 100 Tenn. 282, 45 S. W. 677.

[70] Rose v. Watson, 10 H. L. Cas. 672.

[71] Hickson v. Lingold, 47 Ala. 449; Murray v. Hill, 60 Ill. App. 80.

[72] Davis v. William Rosenzweig Realty Operating Co., 192 N. Y. 128, 84 N. E. 943, 20 L. R. A. (N. S.) 175n, 127 Am. St. 890.

[73] Newberry v. French, 98 Va. 479, 36 S. E. 519.

[74] Williams v. Rice, 60 Mich. 102, 26 N. W. 846; Sinclair v. Sinclair, 79 Va. 40.

the cestui que trust must, upon principle, have a right to take the land itself. Where a trustee misapplies trust funds and converts them into different property, they may be followed wherever they can be traced through their transformations, and subjected to an equitable lien in favor of the rightful owner or cestui que trust.[75]

§ 533. Mechanics' liens in general.—A mechanic's lien upon real property is wholly a creature of statute. At common law a mechanic has no lien upon a building for labor done upon it. Equity raises no lien upon it other than the grantor's lien for purchase-money.[76] A mechanic's lien is not a vested right, but an additional remedy provided by law, and it is always within the power of the legislature to take away such remedy provided it leaves the remedy at common law intact.[77] A mechanic's lien upon real property has been declared to be in the nature of a mortgage of the property,[78] though it is imposed by statute in favor of a whole class of persons. It has also been likened to an attachment, and to a lis pendens.[79] The repeal of a lien law without a saving clause as to pending cases destroys all right to a lien, as it is of entirely statutory origin and not dependent upon contract.[80]

A contract, express or implied, of the owner of the land is necessary to establish a mechanic's lien upon it. The lien, however, is created, not by the contract, but by furnishing the materials or doing the work under the contract. Yet a contract creating an indebtedness on the part of the person whose property is to be charged with a lien must exist in the first place, and then the performing of the labor or the furnishing of materials under the contract creates the lien.[81] It is not essential, however, that the owner should be personally liable for the work done or the materials furnished.[82] By written contract, independently of statute, a mechanic's lien may doubtless be reserved upon a building and the land connected with it. This lien would be valid between the

[75] Cook v. Tullis, 18 Wall. (U. S.) 332, 21 L. ed. 933; Ferris v. Van Vechten, 73 N. Y. 113, 9 Hun 12.

[76] Ellison v. Jackson Water Co., 12 Cal. 542.

[77] Durkheimer v. Copperopolis Copper Co., 55 Ore. 37, 104 Pac. 895.

[78] Curnow v. Happy Valley Blue Gravel Co., 68 Cal. 262, 9 Pac. 149.

[79] Robins v. Bunn, 34 N. J. L. 322.

[80] Wilson v. Simon, 91 Md. 1, 45 Atl. 1022, 80 Am. St. 427.

[81] Klondyke Lumber Co. v. Williams, 71 Ark. 334, 75 S. W. 854; Wendt v. Martin, 89 Ill. 139; Cole v. Clark, 85 Maine 336, 27 Atl. 186, 21 L. R. A. 714.

[82] Davis-Henderson Lumber Co. v. Gottschalk, 81 Cal. 641, 22 Pac. 860.

parties, and might be enforced as against others who might subsequently acquire an interest in the property, with notice of such reserved lien, which would be in the nature of a mortgage.[83]

§ 534. Mechanics' liens of subcontractors.—In most of the states, subcontractors equally with contractors are expressly given liens for labor done and material furnished. In some states a subcontractor in the second or more remote degree is not entitled to a lien given to a subcontractor, and not in terms given to contractors under a subcontractor.[84] A subcontractor, laborer, or material-man, in dealing with the contractor, is presumed to rely upon his lien upon the property.[85] The statutes giving the subcontractor a lien provide in general that no subcontractor, or other person acting under the principal contractor, shall be entitled to a lien as against the owner unless he gives notice to the owner within a specified time of his claim of lien. The statutes differ in terms and in many minor details; but in the object sought, and in their general effect, they are the same.[86] He is bound by the terms of the contract between the owner and the contractor.[87] If a principal contractor has agreed to erect a building and deliver it free of all liens to the owner, he can not himself file a lien,[88] nor can a subcontractor under him file a lien, because the subcontractor is bound by the original contract, and is presumed to have notice of its terms.[89] Generally, a subcontractor, laborer, or material-man can acquire a lien only to the extent of the sum due from the owner to the contractor at the time of giving notice to the owner or of filing the lien.[90] Notice in accordance with the statute is essential to a lien by a subcontractor.[91]

Payment in good faith to the principal contractor, pursuant to the terms of the contract, defeats the lien in behalf of a subcontractor who has given no notice of his claim.[92]

[83] Smith v. Kennedy, 89 Ill. 485; Martin v. Roberts, 57 Tex. 564.

[84] McGugin v. Ohio River R. Co., 33 W. Va. 63, 10 S. E. 36.

[85] Wolf v. Batchelder, 56 Pa. St. 87.

[86] Frank v. Hudson, 39 N. J. L. 347.

[87] Dingley v. Greene, 54 Cal. 333; Andrews v. Burdick, 62 Iowa 714, 16 N. W. 275.

[88] Scheid v. Rapp, 121 Pa. St. 593, 15 Atl. 652.

[89] Dersheimer v. Maloney, 143 Pa. St. 532, 22 Atl. 813.

[90] Trammell v. Hudmon, 78 Ala. 222; Turner v. Strenzel, 70 Cal. 28, 11 Pac. 389.

[91] Schmelzer v. Chicago Ave. Sash & Door Mfg. Co., 85 Ill. App. 596.

[92] Andrews v. Burdick, 62 Iowa 714, 16 N. W. 275.

§ 535. **Priority of mechanics' liens.**—A mortgage executed and put upon record in pursuance of a prior contract for a loan, and afterwards delivered to the mortgagee when the money is advanced on the mortgage, has priority over liens for work and materials furnished after the mortgage was recorded, for the erection of a building commenced between the time of recording the mortgage and its delivery, in case the mortgagee had no knowledge of the commencement of the building when he parted with his money.[93] Also a mortgage for the purchase-money of land, made simultaneously with the conveyance, takes precedence of any lien to which the purchaser may subject the land.[94] Whether a mortgage must be recorded as well as executed before a mechanic's lien has attached must depend very much upon the terms of the different statutes. Recording is not necessary to give the mortgage priority of such lien under recording acts which make the recording necessary only as against subsequent purchasers and mortgagees.[95] Actual notice by a lien claimant of an unrecorded mortgage has the same effect as a prior record of the mortgage.[96] In several states a prior mortgage retains its priority only upon the land, the mechanic's liens having priority upon the buildings or improvements erected upon the land, and then only in case the buildings can be removed without injury.[97] Under statutes by which a lien, so far as the building is concerned, is entitled to preference over a prior mortgage, a lien for machinery which is furnished for a mill in its construction, and becomes a part of it, in like manner takes precedence over a prior mortgage.[98] In several states the priority of a mechanic's lien depends upon the priority of the contract under which the labor is performed or the materials furnished. The lien has priority over a mortgage recorded after the making of the contract under which the lien is claimed. When the labor is performed or the materials are furnished under the contract the lien attaches and

[93] Jacobus v. Mut. Benefit Life Ins. Co., 27 N. J. Eq. 604; Title Guarantee & Trust Co. v. Wrenn, 35 Ore. 62, 56 Pac. 271, 76 Am. St. 454.

[94] Middletown Sav. Bank v. Fellowes, 42 Conn. 36; Ettridge v. Bassett, 136 Mass. 314; MacIntosh v. Thurston, 25 N. J. Eq. 242.

[95] Rose v. Munie, 4 Cal. 173; Miller v. Stoddard, 50 Minn. 272, 52 N. W. 895, 16 L. R. A. 288; Munger v. Curtis, 42 Hun (N. Y.) 465, 4 N. Y. St. 847.

[96] Miller v. Stoddard, 50 Minn. 272, 52 N. W. 895, 16 L. R. A. 288; Bradford v. Anderson, 60 Nebr. 368, 83 N. W. 173.

[97] Leach v. Minick, 106 Iowa 437, 76 N. W. 751.

[98] Hall v. St. Louis Mfg. Co., 22 Mo. App. 33.

relates back to the time of the contract, and takes priority of all mortgages subsequently made.[99]

In a majority of the states mechanics' liens attach in preference to all incumbrances upon the land subsequent to the commencement of the buildings or improvements, though the work was done or the materials for which the lien is claimed was furnished, subsequent to the incumbrance.[1] In the provisions in regard to priority, a subsequent conveyance is regarded as a subsequent incumbrance, though the statute in terms only refers to "liens and incumbrances."[2] If the lien attaches from the commencement of the building, it takes precedence of an attachment or judgment which becomes a lien subsequently to such commencement.[3]

Generally, there is no priority among different persons having mechanics' liens upon the same building.[4]

§ 536. Estates or property subject to mechanics' liens.— As a general rule, public property can not be subjected to a mechanic's lien.[5] But the real estate of a private owner, whether his estate be in fee or less than a freehold, may be subject to the lien. One having only a limited estate, however, can not create a lien more extensive than his own interest. If the ownership is in fee, the lien is upon the fee; but if the ownership is of a less estate, the lien is upon such smaller estate.[6] It attaches to a leasehold estate not only in the hands of the lessee, but also in the hands of his assignee.[7] It attaches even to the interest of one having only a verbal lease for a term of years,[8] and to the interest which one has under an agreement for a lease.[9] In general, the interest of a lessor can not be subjected by the lessee to a mechanic's lien for

[99] Thielman v. Carr, 75 Ill. 385; Dunklee v. Crane, 103 Mass. 470.

[1] Brooks v. Burlington & Southwestern R. Co., 101 U. S. 443, 25 L. ed. 1057.

[2] Fleming v. Bumgarner, 29 Ind. 424; Warden v. Sabins, 36 Kans. 165, 12 Pac. 520.

[3] In re Griel's Appeal, 7 Sad. (Pa.) 137, 9 Atl. 861.

[4] Long v. Abeles, 77 Ark. 156, 93 S. W. 67; Choteau v. Thompson, 2 Ohio St. 114.

[5] Albany v. Lynch, 119 Ga. 491, 46 S. E. 622; A. L. & E. F. Goss Co. v. Greenleaf, 98 Maine 436, 57 Atl. 581; Morganton Hardware Co. v. Morganton Graded School, 150 N. Car. 680, 64 S. E. 764, 134 Am. St. 953, 17 Ann. Cas. 130; W. T. Bradley Co. v. Gaghan, 208 Pa. 511, 57 Atl. 985.

[6] Choteau v. Thompson, 2 Ohio St. 114.

[7] Daniel v. Weaver, 5 Lea (Tenn.) 392.

[8] Nordyke & Marmon Co. v. Hawkeye Woolen Mills Co., 53 Iowa 521, 5 N. W. 693; Webster City Steel Radiator Co. v. Chamberlin, 137 Iowa 717, 115 N. W. 504.

[9] Montandon v. Deas, 14 Ala. 33, 48 Am. Dec. 84.

work done or materials furnished on the contract of the lessee, or of any one claiming under him. To bind the lessor's interest, his agreement or consent must be shown.[10] It has been held that a mechanic's lien can not be enforced against a building when the lienee has no interest in the land, or the land is exempt from sale under liens.[11] An equitable estate in lands may be subjected to a mechanic's lien.[12] Thus, the interest of a vendee under an executory contract for the sale of land is subject to a mechanic's lien for labor and material furnished under contract with the vendee.[13] A building erected on land not owned by the party employing a contractor is subject to the lien of such contractor, and if the lienee subsequently acquires title to the land, the land is also subject to the lien.[14] A lien may be enforced against community property for buildings erected under a contract with the husband.[15] A mechanic's lien may be enforced against the property of a college,[16] or a church.[17] But property exempt from execution upon grounds of public necessity can not be subjected to a mechanic's lien.[18]

§ 537. Assignment of a mechanic's lien.—The authorities are somewhat conflicting as to the assignability of a mechanic's lien. The prevailing rule is, except where the statute provides to the contrary, that a mechanic's lien is strictly a personal privilege, which can not be enforced by an assignee of the debt for labor and materials in his own name.[19] The above rule applies more particularly to the assignment of the mere right to assert a mechanic's lien. If the lien has been perfected it is assignable according to some authorities.[20] Some authorities hold that the lien

[10] Rothe v. Bellingrath, 71 Ala. 55.

[11] Green v. Tenold, 14 N. Dak. 46, 103 N. W. 398, 116 Am. St. 638.

[12] Carey-Lombard Lumber Co. v. Bierbauer, 76 Minn. 434, 79 N. W. 541.

[13] Monroe v. West, 12 Iowa 119, 79 Am. Dec. 524; Fullmer v. Proust, 155 Pa. St. 275, 26 Atl. 543, 35 Am. St. 881.

[14] Stewart Contracting Co. v. Trenton &c. R. Co., 71 N. J. L. 568, 60 Atl. 405.

[15] Douthitt v. MacCulsky, 11 Wash. 601, 40 Pac. 186.

[16] University of Lewisburg v. Reber, 43 Pa. St. 305.

[17] Presbyterian Church v. Allison, 10 Pa. St. 413.

[18] Hall's Safe & Lock Co. v. Scites, 38 W. Va. 691, 18 S. E. 895.

[19] Rauer v. Fay, 110 Cal. 361, 42 Pac. 902; Fleming v. Greener, 173 Ind. 260, 90 N. E. 73, 140 Am. St. 254, 21 L. R. A. 959; O'Connor v. Current River R. Co., 111 Mo. 185, 20 S. W. 16.

[20] Clarkson v. Louderback, 36 Fla. 660, 19 So. 887; Williams v. Weinbaum, 178 Mass. 238, 59 N. E. 626; Kerr v. Moore, 54 Miss. 286; Nottingham v. McKendrick, 38 Ore. 495, 57 Pac. 195, 63 Pac. 822.

is not destroyed by the assignment of the debt;[21] and while the lien must generally be enforced in the name of the assignor, in several states it has been declared by statute to be assignable. A mechanic's lien is assignable in equity either before or after suit to enforce it has been commenced.[22] No particular words are necessary to constitute an assignment of a debt or lien; it is sufficient if the intent of the parties to effect an assignment be clearly established.[23]

§ 538. **Assertion and enforcement of mechanics' liens.**—A mechanic's lien can be secured only by compliance with the statute in filing a notice, claim or statement of lien in the manner and within the time prescribed. No other notice or claim of lien, though brought to the knowledge of the owner, or of a purchaser from him, has any effect.[24] Some statutes require not only that a proper claim be filed, but that this claim be properly indexed and recorded. The filing of the account or claim is a prerequisite to the enforcement of the lien. It does not bring the lien into existence, for the lien exists inchoately from the time of the making of the contract, or from the time the building was commenced, or the work upon it was commenced, whichever the particular statute prescribes as the beginning of the lien.[25] The lien exists by virtue of statutory provisions, and the requirements prescribed for securing the benefits of this remedy must be observed.[26]

All the particulars required to be stated in the notice creating the lien are material. They are provided for in order that a proper record or index or docket may be made of the claim, and thereby notice of the claim given to the owner, and protection afforded to purchasers and mortgagees. The admission of any of the particulars required by statute to be stated is fatal to the lien.[27] Statutes generally provide that the notice must be filed within a specified time from the date of the completion of the work or the furnishing of the materials, and a notice or statement

[21] Midland R. Co. v. Wilcox, 122 Ind. 84, 23 N. E. 506.

[22] Cairo & Vincennes R. Co. v. Fackney, 78 Ill. 116; Murphy v. Adams, 71 Maine 113, 36 Am. Rep. 299.

[23] Soule v. Borelli, 80 Conn. 392, 68 Atl. 979; Skyrme v. Occidental Mill & Mining Co., 8 Nev. 219; Nottingham v. McKendrick, 38 Ore. 495, 57 Pac. 195, 63 Pac. 822.

[24] Shackleford v. Beck, 80 Va. 573.

[25] Douglas v. St. Louis Zinc Co., 56 Mo. 388.

[26] Reindollar v. Flickinger, 59 Md. 469.

[27] Cannon v. Williams, 14 Colo. 21, 23 Pac. 456; Robertson v. Moore, 10 Idaho 115, 77 Pac. 218.

filed after the expiration of the time limited is ineffectual to create a lien,[28] even as to a purchaser with notice.[29] As a general rule the statutes provide that action be brought to foreclose the lien within a specified time after the lien is filed,[30] or payment under the contract becomes due.[31] A lien which has lapsed, by failure to commence a suit to enforce it within the time prescribed, can not be revived. It becomes wholly void by lapse of time.[32]

[28] Hugg v. Hintrager, 80 Iowa 359, 45 N. W. 1035.

[29] Von Tobel v. Ostrander, 158 Ill. 499, 42 N. E. 152.

[30] Hughes Bros. v. Hoover, 3 Cal. App. 145, 84 Pac. 681; Service v. McMahon, 42 Wash. 452, 85 Pac. 33.

[31] Eisendrath Co. v. Gebhardt, 222 Ill. 113, 78 N. E. 22.

[32] Union Nat. Sav. Assn. v. Helberg, 152 Ind. 139, 51 N. E. 916; Weyer v. Beach, 79 N. Y. 409.

CHAPTER XXIII

LIS PENDENS AND ATTACHMENTS

SEC.
545. The doctrine of lis pendens.
546. Proceedings to which doctrine applies.
547. Commencement and duration of lis pendens.
548. Elements necessary to constitute a lis pendens.
549. Statutory provisions for record.
550. Requisites of a valid notice.
551. Persons charged with notice.
552. Attachment.
553. Proceedings to procure attachment.

§ 545. The doctrine of lis pendens.—Lis pendens may be defined to be the jurisdiction, power, or control which courts acquire over property involved in a suit pending the continuance of the action, and until final judgment therein.[1] Lis pendens is of legal origin and does not rest on equitable doctrines of notice,[2] nor in the doctrine peculiar to courts of equity.[3] The doctrine is entirely distinct from the doctrine which charges all parties to an action with notice of the orders and judgments therein.[4] The doctrine is founded upon the consideration that no suit could be successfully terminated if, during its pendency, the property of the defendant could be transferred so that it would not be bound by the decree or judgment in the hands of the assignee.[5] The doctrine is not, however, carried to the extent of making it constructive notice of a prior unregistered deed.[6] Thus a creditor filing a lis pendens in attachment proceedings does not thereby acquire priority over an unrecorded deed executed and delivered by the defendant before the filing of the attachment.[7]

§ 546. Proceedings to which doctrine applies.—The doctrine of lis pendens applies to both actions at law and suits in

[1] Dupee v. Salt Lake &c. Trust Co., 20 Utah 103, 57 Pac. 845, 77 Am. St. 902.

[2] Bridger v. Exchange Bank, 126 Ga. 821, 56 S. E. 97, 8 L. R. A. (N. S.) 463n, 115 Am. St. 118.

[3] Latta v. Wiley (Tex. Civ. App.), 92 S. W. 433.

[4] West Lumber Co. v. Lyon, 53 Tex. Civ. App. 648, 116 S. W. 652.

[5] Allen v. Poole, 54 Miss. 323; Turner v. Houpt, 53 N. J. Eq. 526, 33 Atl. 28; Arrington v. Arrington, 114 N. Car. 151, 19 S. E. 351.

[6] Douglass v. McCrackin, 52 Ga. 596.

[7] Kohn v. Lapham, 13 S. Dak. 78, 82 N. W. 408.

equity,[8] but applies only to actions and suits which directly affect property.[9] At common law it is applicable to all actions and suits directly affecting real estate.[10] Thus it applies to an action to set aside a deed[11] or mortgage,[12] or for specific performance of a contract of sale,[13] or to subject lands to a trust,[14] to enforce a vendor's lien,[15] or a suit to foreclose a mortgage,[16] or to charge the separate estate of a married woman with the payment of a debt,[17] or an action to set aside the probate of a will devising land.[18] Also persons who purchase real estate during the pendency of an action to recover the possession thereof takes or holds it subject to the judgment entered in such proceedings.[19] The rule has been held to apply to special proceedings affecting land.[20]

Administration proceedings in a probate court are not considered as lis pendens, so as to afford notice of all the property belonging to the estate.[21]

§ 547. Commencement and duration of lis pendens.—Notice from a lis pendens arises from the time of the service of the writ or summons,[22] and in the absence of a supersedeas or its equivalent, it terminates with final adjudication in the case and is not extended by appeal.[23] But it has been held that an action will be deemed to be pending so as to charge third persons with notice of the plaintiff's rights until the final determination of the cause

[8] Norton v. Birge, 35 Conn. 250; McIlwrath v. Hollander, 73 Mo. 105, 39 Am. Rep. 484; Lamont v. Cheshire, 65 N. Y. 30; Rollins v. Henry, 78 N. Car. 342.

[9] Greenwood v. Warren, 120 Ala. 71, 23 So. 686; Paine v. Root, 121 Ill. 77, 13 N. E. 541; Zoeller v. Riley, 100 N. Y. 102, 2 N. E. 388, 53 Am. Rep. 157.

[10] Di Nola v. Allison, 143 Cal. 106, 76 Pac. 976, 65 L. R. A. 419, 101 Am. St. 84.

[11] Leuders v. Thomas, 35 Fla. 518, 17 So. 633, 48 Am. St. 255; Bigelow v. Brewer, 29 Wash. 670, 70 Pac. 129.

[12] Ellis v. Sisson, 96 Ill. 105.

[13] Clark v. Farrow, 10 B. Mon. (Ky.) 446, 52 Am. Dec. 552.

[14] Friedman v. Janssen, 23 Ky. L. 2155, 66 S. W. 752.

[15] Pennington v. Martin, 146 Ind. 635, 45 N. E. 1111.

[16] Malone v. Marriott, 64 Ala. 486; Cooney v. Coppock, 119 Iowa 486, 93 N. W. 495.

[17] Boss v. Jordan, 118 Iowa 204, 89 N. W. 1070, 92 N. W. 111.

[18] McIlwrath v. Hollander, 73 Mo. 105, 39 Am. Rep. 484.

[19] Kirkland v. Trott, 75 Ala. 321; Equitable Securities Co. v. Green, 113 Ga. 1013, 39 S. E. 434.

[20] Rubel v. Title &c. Co., 101 Ill. App. 439; Shirk v. Whitten, 131 Ind. 455, 31 N. E. 87.

[21] Seibel v. Bath, 5 Wyo. 409, 40 Pac. 756.

[22] Franklin Sav. Bank v. Taylor, 131 Ill. 376, 23 N. E. 397; Allen v. Mandaville, 26 Miss. 397; Haughwout v. Murphy, 22 N. J. Eq. 531; Fuller v. Scribner, 76 N. Y. 190; Staples v. White, 88 Tenn. 30, 12 S. W. 339.

[23] Chicago & N. W. R. Co. v. Garrett, 239 Ill. 297, 87 N. E. 1009, 130 Am. St. 229.

on appeal,[24] and during the time allowed for a petition for a rehearing.[25] As to a cross-action or cross-complaint by the defendant, setting up affirmative rights against the plaintiff, the lis pendens begins from the filing of such cross-action or cross-complaint.[26] The lis pendens is notice of matters alleged in an amended bill.[27] A dismissal of the action defeats lis pendens as to a grantee of the holder of the legal title without notice.[28] When the litigation is ended, and the rights of the parties have been determined, the notice ceases.[29]

§ 548. Elements necessary to constitute a lis pendens.—In order to constitute a lis pendens so as to affect persons acquiring an adverse interest in specific property it is essential that four elements concur: (1) The suit must be prosecuted for the purpose of asserting some right in or relating to the identical property; (2) the property must be of a character to be subject to the rule; (3) the court must have jurisdiction both of the person and the property, and (4) the property must be sufficiently described in the proceedings. If any one of these essentials is wanting, there is no valid lis pendens.[30]

Where there is no statute permitting the filing of a notice of lis pendens in counties other than the one where the action is instituted, the action, in order to affect lands purchased or incumbered during its pendency, must be brought in the county where the land is situated.[31]

§ 549. Statutory provisions for record.—In many states the original doctrine of lis pendens has been modified by statutory provisions requiring a notice of lis pendens to be registered or recorded in some particular mode, in order to charge a purchaser or mortgagee with notice of the litigation.[32] Lis pendens acts limit the method of creating lis pendens. They abrogate the common law upon the subject; and, if the statutory mode be not fol-

[24] Olson v. Leibpke, 110 Iowa 594, 81 N. W. 801, 80 Am. St. 327.

[25] Bird v. Gilliam, 125 N. Car. 76, 34 S. E. 196.

[26] Bridger v. Exchange Bank, 126 Ga. 821, 56 S. E. 97, 8 L. R. A. (N. S.) 463n, 115 Am. St. 118.

[27] Turner v. Houpt, 53 N. J. Eq. 526, 33 Atl. 28.

[28] Karr v. Burns, 1 Kans. App. 232, 40 Pac. 1087.

[29] Page v. Waring, 76 N. Y. 463.

[30] McCampbell v. Mason, 151 Ill. 500, 38 N. E. 672; Harrison v. Shaffer, 60 Kans. 176, 55 Pac. 881; Leavell v. Poore, 91 Ky. 321, 13 Ky. L. 51, 15 S. W. 858.

[31] Benton v. Shafer, 47 Ohio St. 117, 24 N. E. 197, 7 L. R. A. 812.

[32] Smith v. Gale, 144 U. S. 509, 12 Sup. Ct. 674, 36 L. ed. 521; Todd v. Outlaw, 79 N. Car. 235.

lowed, there can be no lis pendens as to third parties.[33] The statutory method of filing formal notice of lis pendens is made constructive notice to the world of the litigation,[34] puts upon the purchaser or incumbrancer the duty of informing himself in that regard and binds him by the result thereof.[35] The notice provided by statute ordinarily takes the place of such notice as theretofore arose by operation of law,[36] being considered, not as constructive notice, but as affording a convenient method of enforcing the common-law doctrine of lis pendens.[37]

§ 550. Requisites of a valid notice.—Statutes usually provide that no lis pendens or attachment shall be valid as against a bona fide purchaser for value without actual notice, unless a memorandum thereof describing the premises, the title of the cause, and the names of the parties, shall have been entered upon the register of deeds. Generally, no particular form of notice is required; but it should state the name of the court in which the action is pending, the names of the parties to the action, the object of the action, and a description of the property sought to be affected by the action.[38] It is sometimes held that even where statutes provide for formal notice of lis pendens, failure or insufficiency of such notice may be immaterial where a purchase is made after suit has actually commenced,[39] but it is essential that there should have been some official record of the pendency of the action,[40] and in some states nothing but the statutory notice will be deemed constructive notice of an action pending.[41]

The provisions of state statutes with regard to notice do not apply to actions in federal courts, the action in itself being sufficient notice of lis pendens.[42] The statutes generally provide that notice of lis pendens, in order to affect subsequent purchasers, shall be filed in the registry of deeds where the land is situated.

Where the suit is pending at the time of the examination, the

[33] Pennington v. Martin, 146 Ind. 635, 45 N. E. 1111.

[34] Freedman v. Safran, 131 App. Div. 675, 116 N. Y. S. 113.

[35] Peninsular Naval Stores Co. v. Cox, 57 Fla. 505, 49 So. 191.

[36] Latta v. Wiley (Tex. Civ. App.), 92 S. W. 433.

[37] McVay v. Tousley, 20 S. Dak. 258, 105 N. W. 932.

[38] Potter v. Rowland, 8 N. Y. 448, Seld. Notes 133.

[39] Bryant Timber Co. v. Wilson, 151 N. Car. 154, 65 S. E. 932, 134 Am. St. 982.

[40] Barasch v. Kramer, 62 Misc. 475, 115 N. Y. S. 176.

[41] First Nat. Bank v. Farmers' & Merchants' Nat. Bank, 171 Ind. 323, 86 N. E. 417.

[42] In re Miller, 64 Misc. 467, 119 N. Y. S. 555.

notice lis pendens may be exhibited at the end of the abstract, but where a synopsis of the proceedings in the action is included, the notice properly belongs in connection with such synopsis. An example of a synopsis of a notice of lis pendens is as follows:

John Jones	Circuit Court of Marion County, Indiana.
v.	Notice of lis pendens. Filed Dec. 3, 1917.
Sam Smith.	Recorded Dec. 4, 1917. Vol. 45, page 250.

Recites that the above entitled action was commenced in the said court on the 3d day of December, 1917, and is now pending therein. Plaintiff sues defendant to foreclose a vendor's lien for purchase-money of the following described real estate in Marion County, Indiana, to wit [describe premises].

§ 551. **Persons charged with notice.**—Only those persons are charged with notice, or are affected by lis pendens who, pending the suit, purchase from a party to the suit,[43] or derive title from one so purchasing.[44] It is not notice to a purchaser whose conveyance was made before the commencement of the action,[45] though his deed is not recorded until after a notice of lis pendens is filed in the recorder's office.[46] It is primarily applicable to purchasers from parties to the action, and in general will not bind strangers, although where a judicial sale is absolutely void by reason of a lis pendens it can confer no title on a stranger.[47] While most usually applied to purchasers pendente lite, it is also applied to mortgagees, lienors, lessees, and attachment and judgment creditors pendente lite.

§ 552. **Attachment.**—An attachment, as affecting real property, is a provisional remedy, whereby a debtor's property, or any interest therein capable of being taken under a levy and execution, is placed in the custody of the law, to secure the interests of the creditor pending the determination of an action. It

[43] Bright v. Buckman, 39 Fed. 243; Green v. Rick, 121 Pa. St. 130, 15 Atl. 497, 2 L. R. A. 48, 6 Am. St. 760.

[44] Norton v. Birge, 35 Conn. 250.

[45] Farmers' Nat. Bank v. Fletcher, 44 Iowa 252.

[46] Warnock v. Harlow, 96 Cal. 298, 31 Pac. 166, 31 Am. St. 209.

[47] McDonald v. Rankin, 92 Ark. 173, 122 S. W. 88.

is purely a statutory proceeding and was unknown to the common law. It is a special proceeding in the nature of a proceeding in rem, and is collateral to and ancillary to the main action. It is not a fixed and vested charge on the property, but is a contingent, conditional charge thereon, until the judgment and levy.[48] It is a lien on the property attached to secure the satisfaction of any judgment that may be recovered.[49]

So long as the property attached remains in the custody of the law, the court has jurisdiction over it to make any proper order in reference thereto, but the property while in custodia legis is not subject to seizure and sale on execution. The lien of the attachment is preserved by the rendition of a final judgment in the action,[50] though it is sometimes merged in such judgment.[51]

As a rule, an attachment reaches only the debtor's interest in the property at the time of the levy, and the lien created thereby is subject to a prior attachment lien,[52] landlord's lien,[53] or mechanic's lien.[54]

§ 553. Proceedings to procure attachment.—Attachment proceedings are not precisely alike in any two of the states, but they are subject to the control of the same general principles. The procedure prescribed by the statute must be strictly followed in order to secure validity to the transaction,[55] and the court can act only under the special power limited by the statute and according to the forms of procedure it prescribes.[56]

The initial step in a proceeding to obtain a writ of attachment is an affidavit made by the plaintiff, or some person in his behalf, showing: (1) The nature of the claim, (2) that it is just, (3) the amount the plaintiff ought to recover, and (4) that there exists some one or more of the grounds enumerated in the statute for an attachment. This affidavit may be made at the time of the filing of the complaint or at any time afterward, and it has been

[48] Ex parte Foster, 2 Story (U. S.) 131, Fed. Cas. No. 4960.

[49] Potlatch Lumber Co. v. Runkel, 16 Idaho 192, 101 Pac. 396, 23 L. R. A. (N. S.) 536n, 18 Ann. Cas. 591.

[50] Hughes v. Farmers' Nat. Bank, 83 Vt. 386, 76 Atl. 33.

[51] Great Falls Nat. Bank v. McClure, 176 Fed. 208.

[52] Thompson v. Simpson (Mo. App.), 127 S. W. 620.

[53] Porter v. Rice (Ky.), 128 S. W. 70.

[54] Herrmann v. New York, 136 App. Div. 28, 120 N. Y .S. 146.

[55] Rudolph v. Saunders, 111 Cal. 233, 43 Pac. 619.

[56] Estlow v. Hanna, 75 Mich. 219, 42 N. W. 812.

held that a sworn complaint may subserve the purpose of both a complaint and affidavit.[57]

The general rule is that before a plaintiff can sue out a judicial attachment it is necessary to give a bond to indemnify the defendant for any injury he may sustain by reason of the abuse of the process. The bond is one of the prerequisites to jurisdiction and must be given before the attachment issues. The record must show that the bond was filed before the writ was issued.[58]

Upon the filing of a proper affidavit and bond in the office of the clerk of the court having jurisdiction in the main action, the court makes an order directing the clerk to issue and deliver to the sheriff a writ or order of attachment requiring such sheriff to seize and take possesion of the property of the defendant not exempt from execution. The order of attachment binds the property of the defendant from the time of its delivery to the sheriff in the same maner as an execution. The levy of the writ of attachment, to be sufficient, must be made in the presence and with the assistance of disinterested persons who must also appraise the property attached. The sheriff must make return of the order together with the inventory and appraisement of the property, and such return must contain a description of the property attached.[59] There can be no judgment in attachment until there is a judgment in the main action, and the lien created by the levy of an attachment has no force or effect after judgment has been rendered in the cause, unless there is a special judgment or order of sale of the propery attached, and a special execution.[60] In order to seize and hold the property of the defendant and acquire a valid lien thereon before judgment, the statute must be strictly followed in obtaining the order and in the service of the same.[61]

The statutes usually provide that no attachment shall be valid against a bona fide purchaser for value without actual notice, unless a memorandum thereof describing the premises, the title of the cause, and the names of the parties, shall have been entered upon the register of deeds. The levy of an attachment, when all

[57] Fremont Cultivator Co. v. Fulton, 103 Ind. 393, 3 N. E. 135.

[58] Snelling v. Bryce, 41 Ga. 513; Root v. Monroe, 5 Blackf. (Ind.) 594.

[59] Dronillard v. Whistler, 29 Ind. 552; White v. O'Bannon, 86 Ky. 93, 9 Ky. L. 334, 5 S. W. 346; Bucklin v. Crampton, 20 Vt. 261.

[60] Thomas v. Johnson, 137 Ind. 244, 36 N. E. 893.

[61] Harding v. Guaranty &c. Trust Co., 3 Kans. App. 519, 43 Pac. 835.

the statutory requirements are complied with, is notice to only those who buy of a party to the suit.[62]

In some states where real property is attached, it is required that a lis pendens be filed, and a failure to file same renders the attachment inoperative as constructive notice against bona fide purchasers.[63]

Where a memorandum or certificate of the levy is on file as required by the statute, this is sufficient notice of the pendency of the attachment proceeding, and its notation in the abstract is all that is required, but many capable abstracters prefer to include a synopsis of the entire proceedings. The following is an example of such synopsis:

John Taylor
v.
William Burns.

Circuit Court of Marion County, Indiana
Cause No. 7562
Attachment
Affidavit and bond filed, and writ issued March 4, 1917. Return of writ and appraisement on March 5, 1917, showing levy upon all the right, title and interest of said defendant in and to the following described real estate: [Here describe property as in return.]
Personal service. (Cause pending.)

John Taylor
v.
William Burns

Certificate of Levy
Recorded March 5, 1917
Book 78, page 200

Charles Coffin, sheriff of Marion county, Indiana, certifies that by writ of attachment, issued in cause No. 7562 of the Circuit Court of Marion County, Indiana, in favor of John Taylor, plaintiff, and against William Burns, defendant, dated March 4, 1917, he did on the 4th day of March, 1917, levy on the right, title and interest of said defendant in and to the following described real estate to wit: [Insert description.]

[62] Travis v. Supply Co., 42 Kans. 625, 22 Pac. 991.
[63] First Nat. Bank v. Farmers' & Merchants' Nat. Bank, 171 Ind. 323, 86 N. E. 417.

CHAPTER XXIV

JUDGMENTS AND DECREES

SEC.
560. Judgments in general.
561. Effect of judgments and decrees.
562. Lien of judgments.
563. Territorial extent of lien.
564. Duration of judgment lien.
565. Rank and priority of lien.
566. Property or interest liable to lien.
567. Docketing, indexing and recording judgments.
568. Requisites as to form of judgments.
569. Points to be noticed in the examination of a judgment record.
570. Judgment against deceased party.
571. Judgments against infants and insane persons.
572. Exemption of real estate from judgments.
573. Satisfaction and discharge of judgments.
574. Decrees in general.
575. Operation and effect of decrees.
576. Effect of decree in the absence of personal service.
577. Lien of decrees.
578. Form of decrees.
579. Abstracting the decree.
580. Effect of misnomer of parties generally.
581. Effect of error or omission of middle name or initial.
582. Doctrine of idem sonans.
583. Operation and effect of decrees of probate courts.
584. Foreign judgments and decrees.

§ 560. **Judgments in general.**—A judgment is the final decision pronounced by the court upon matters contained in the record before it.[1] It is a judicial act and constitutes the conclusion of the law upon the pleadings and evidence.[2] It is the final determination of the rights of the parties in an action, or proceeding. Strictly speaking, the term "judgment" is applicable to suits at law, while a "decree" is applied to suits in chancery. But "judgment" and "decree" are usually employed as convertible terms.[3] There is practically no difference between judgments at law and decrees in equity.[4] A decree is a sentence or order of the court pronounced on hearing and understanding of all the facts in issue, and determining the rights of the parties to the suit according to equity and good conscience.[5] The most numerous judgments are those in personam, or those which seek merely to fasten a per-

[1] Burke v. Burke, 142 Iowa 206, 119 N. W. 129; McGuire v. Bryant Lumber &c. Co., 53 Wash. 425, 102 Pac. 237.

[2] Rutter v. Carothers, 223 Mo. 631, 122 S. W. 1056.

[3] Lamson v. Hutchings, 118 Fed. 321, 55 C. C. A. 245.

[4] Cook v. Jennings, 40 S. Car. 204, 18 S. E. 640.

[5] Wooster v. Handy, 23 Fed. 49, 23 Blatchf. 112.

sonal liability upon the defendant, irrespective of any particular property. These are important only as statutory liens, and may be disregarded after satisfaction or limitation has run against them. On the other hand, decrees in equity usually give affirmative relief, or operate in some way upon the land of the defendant, and become a part of the chain of title.

§ 561. Effect of judgments and decrees.—The cause of action is merged in the judgment thereon,[6] and the parties and their privies are concluded thereby. A judgment in rem adjudicates the status of particular subject-matter and does not personally bind the judgment defendant.[7]

In determining property rights depending upon a judicial decree, the rights of the parties will be deemed fixed at the time of the rendition of the decision by the court.[8] A judgment or decree of a court of competent jurisdiction, which creates or changes a title, or any interest in an estate, is final as to the parties and all persons claiming under them.[9] But a judgment or decree which attempts to adjudicate matters not in isue is not binding on the parties attempted to be affected thereby.[10] Nor is a judgment conclusive between the parties as to immaterial and unessential facts, even though put in issue by the pleadings and directly decided.[11]

In the examination of a title we are concerned only in such judgments as are liens on the land involved created by the acts of courts adjudging that the land be taken in execution, or be subjected to a charge.

§ 562. Lien of judgments.—A judgment lien is the creation of statute,[12] and it is within the power of the legislature to abolish the lien before rights become vested under it.[13] It is not a specific lien on any particular real estate of the judgment defendant, but a general lien upon all his real estate, subject to all

[6] Knight v. Rothschild, 132 App. Div. 274, 117 N. Y. S. 26.

[7] Gassert v. Strong, 38 Mont. 18, 98 Pac. 497.

[8] Robinson v. Govers, 138 N. Y. 425, 34 N. E. 209.

[9] Prince v. Antle, 90 Ky. 138, 11 Ky. L. 927, 13 S. W. 436; Grevemberg v. Bradford, 44 La. 400, 10 So. 786.

[10] Stearns Ranchos Co. v. McDowell, 134 Cal. 562, 66 Pac. 724.

[11] House v. Lockwood, 137 N. Y. 259, 33 N. E. 595.

[12] Brier v. Traders' Nat. Bank, 24 Wash. 695, 64 Pac. 831.

[13] Williams v. Hutchinson & S. R. Co., 62 Kans. 412, 63 Pac. 430, 84 Am. St. 408.

prior liens, either legal or equitable, irrespective of any knowledge of the judgment creditor as to the existence of such liens.[14] It only confers a right to levy on the land of the judgment defendant to the exclusion of other adverse interests subsequent to the judgment, and when the levy is actually made on the same, the title of the judgment plaintiff, for this purpose, relates back to the time of his judgment, so as to cut out intermediate encumbrances.[15] The judgment lien attaches to all the real estate of the judgment debtor, title to which stands in his name and which is situated in the county where the judgment is rendered or recorded.[16] In some states issuance of an execution is a prerequisite to the attaching of the lien,[17] and in others proper docketing only is required.[18] Under some statutes judgments of inferior courts are not liens unless properly docketed.[19]

The judgment of a justice of the peace or of any other inferior court usually, by express statutory provision, becomes a lien only after the filing of a transcript thereof in the circuit or superior court.[20]

§ 563. **Territorial extent of lien.**—The judgment of a federal court is a lien upon the real estate of the judgment defendant throughout the state in which it is rendered to the same extent, and subject to the same conditions, as in the case of a judgment rendered by a state court.[21] And the statute of a state requiring judgments to be recorded in the county in which the land lies has no effect upon the lien of a judgment of a federal court.[22] But according to some authorities a judgment rendered by a federal court is a lien upon the real estate of the judgment debtor in the judicial district in which the judgment was rendered.[23] In 1888, however, congress enacted a law restricting the lien of such judgments primarily to the county where the court was sitting at

[14] Indiana School Dist. v. Werner, 43 Iowa 643; Rodgers v. Bonner, 45 N. Y. 379.

[15] Conard v. Atlantic Insurance Co., 1 Pet. (U. S.) 386, 7 L. ed. 189.

[16] Greenwood v. Trigg, Dobbs & Co., 143 Ala. 617, 39 So. 361.

[17] Bourn v. Robinson (Tex. Civ. App.), 107 S. W. 873.

[18] Curry v. Lehman, 55 Fla. 847, 47 So. 18.

[19] Haymond v. Murphy, 65 W. Va. 616, 64 S. E. 855.

[20] Petray v. Howell, 20 Ark. 615; American Ins. Co. v. Gibson, 104 Ind. 336, 3 N. E. 892; Easterling v. Chiles, 93 Ky. 315, 14 Ky. L. 287, 20 S. W. 227.

[21] Cooke v. Avery, 147 U. S. 375, 13 Sup. Ct. 340, 37 L. ed. 209.

[22] Doyle v. Wade, 23 Fla. 90, 1 So. 516, 11 Am. St. 334.

[23] Sellers v. Corwin, 5 Ohio 398, 24 Am. Dec. 301.

the time of its rendition,[24] but authorized their transfer under state laws to other counties of the federal district for the purpose of making them a lien on real estate in the county to which the transfer is made.[25]

In order that the judgment of a court in one county may become a lien on the real estate of the defendant in another county of the same state, the statutes usually provide that a transcript of the judgment must be recorded or docketed in such other county;[26] for, as a general rule, unless this is done the lien will bind only the lands within the territorial jurisdiction of the court rendering the judgment.[27]

In the absence of a statute to the contrary the lien of a judgment upon lands in an existing county is not affected by the creation of a new county out of a portion of such county including the land subject to such judgment lien.[28]

§ 564. Duration of judgment lien.—The duration of a judgment lien is generally fixed by statute, and in most states they are made to continue for the period of ten years from the date of the rendition thereof. The period fixed is not extended by the levy of an execution and the filing of a creditor's bill, nor by a stipulation contained in the judgment that the execution shall not issue for a certain time.[29] The courts have no power to extend the lien of a judgment beyond the period prescribed by statute.[30]

The lien of a judgment rendered in a justice's court, does not extend ten years from the date of filing the transcript with the clerk of the circuit court, but it extends ten years from the date of its rendition.[31] The lien of a judgment of a circuit court, filed in a county other than the one in which it was rendered, expires at the same time the lien expires in the county in which such judgment was rendered.[32]

[24] U. S. Comp. St. (1901) p. 701.

[25] Rock Island Nat. Bank v. Thompson, 173 Ill. 593, 50 N. E. 1089, 64 Am. St. 137.

[26] Curry v. Lehman, 57 Fla. 385, 49 So. 673; Yackle v. Wightman, 103 Ill. 169; Berry v. Reed, 73 Ind. 235; Bergen v. State, 58 Miss. 623; Perry v. Morris, 65 N. Car. 221.

[27] State v. Record, 80 Ind. 348; Close v. Close, 28 N. J. Eq. 472; Logan v. Pannill, 90 Va. 11, 17 S. E. 744.

[28] Garvin v. Garvin, 34 S. Car. 388, 13 S. E. 625.

[29] Gardenhire v. King, 97 Tenn. 585, 37 S. W. 548.

[30] McAfee v. Reynolds, 130 Ind. 33, 28 N. E. 423, 18 L. R. A. 211, 30 Am. St. 194.

[31] Mahoney v. Neff, 124 Ind. 380, 24 N. E. 152.

[32] Bradfield v. Newby, 130 Ind. 59, 28 N. E. 619.

Where the statute provides that no execution can issue to enforce a judgment which is a lien upon the real estate of a deceased judgment debtor until one year after his death, that year can not be counted as part of the ten years' limitation, and the lien of the judgment continues for eleven years.[33] A judgment ceases to be a lien on the proceeds of the sale of real estate of a deceased judgment debtor after eleven years from the date of its rendition.[34]

The lien of a judgment ceases at the expiration of the period fixed by statute, although an execution has been issued before that time.[35] The levy of an execution during the life of the judgment does not extend the lien of the judgment beyond the period fixed by the statute, nor does such levy create a new lien.[36]

The duration of a judgment of a federal court is regulated by the provision that "judgments and decrees rendered in a United States circuit or district court, within any state, shall cease to be liens on real estate or chattels real, in the same manner and at like periods as judgments and decrees of courts of such states cease, by law, to be liens thereon."[37]

§ 565. Rank and priority of lien.—A judgment lien is inferior to rights and liens existing at the time that it attaches,[38] except in so far as the rights of the prior claimant or encumbrancer may be affected by the recording acts.[39] It is inferior to the rights of a bona fide purchaser acquired before it becomes effective,[40] or before it is docketed in such manner as to give constructive notice to subsequent purchasers.[41] The lien of a judgment is superior to that of subsequent judgments,[42] mortgages,[43] or conveyances.[44] Where a statute requires indexes to be kept, and judgment liens to be entered therein, a judgment duly taken, but not correctly entered in such index, can not have priority over a sub-

[33] In re Holmes, 131 N. Y. 80, 29 N. E. 1003.

[34] Taylor v. McGrew, 29 Ind. App. 324, 64 N. E. 651.

[35] Harden v. Day, 29 Wash. 664, 70 Pac. 118.

[36] Smith v. Schwartz, 21 Utah 126, 60 Pac. 305, 81 Am. St. 670.

[37] U. S. Rev. Stat., § 967.

[38] Huff v. Sweetser, 8 Cal. App. 689, 97 Pac. 705; Prather v. Hairgrove, 214 Mo. 142, 112 S. W. 552; Durling v. Stillwell, 74 N. J. Eq. 697, 69 Atl. 978.

[39] Feinberg v. Stearns, 56 Fla. 279, 47 So. 797, 131 Am. St. 119.

[40] Allen-West Commission Co. v. Millstead, 92 Miss. 837, 46 So. 256, 131 Am. St. 556.

[41] Haring v. Murphy, 60 Misc. 374, 113 N. Y. S. 452.

[42] Buffalo Sav. Bank v. Hunt, 64 Misc. 643, 118 N. Y. S. 1021.

[43] Howard v. Rumble, 4 Ga. App. 327, 61 S. E. 297.

[44] Handford v. Edwards, 89 Ark. 151, 115 S. W. 1143, 23 L. R. A. (N. S.) 190n.

sequent mortgage taken without notice.[45] A specific equitable lien upon land is preferred to a subsequent judgment.[46] If the equitable lien and the judgment lien come into existence at the same time, the former is not entitled to preference in case it was created to secure an antecedent indebtedness, with no new consideration advanced at the time on the faith of it.[47]

Where judgments are held by different persons which are not liens upon the prpoerty of the debtor, the judgment creditor who first issues execution and levies upon the property secures a prior lien; and where the lien of different judgments attach to property at the same instant, as where the debtor acquires it subsequent to the rendition of all the judgments, then neither judgment has priority over the other.[48]

§ 566. Property or interest liable to lien.—As a general rule a judgment lien attaches to all the real estate of the judgment debtor in which he has any beneficial interest,[49] and which is situated in the county where the judgment is rendered or recorded.[50] In most states, however, the docketing and recording of a transcript of the judgment in a county other than that in which the judgment was rendered, extends the lien to lands of the judgment debtor in such other county.[51]

An estate for life is subject to a judgment lien, such estate being "real estate" within the meaning of the statute creating the lien.[52]

A leasehold estate is not generally subject to the lien of a judgment,[53] but sometimes statutes expressly provide for a lien on all terms which have more than a certain number of years to run.

In the absence of statutory provisions to the contrary, equitable estates or interests in lands are not generally subject to judgment liens.[54] Under statutes subjecting equitable interests to the lien,

[45] Ætna Life Ins. Co. v. Hesser, 77 Iowa 381, 42 N. W. 325, 4 L. R. A. 122, 14 Am. St. 297.

[46] Stevens v. Watson, 4 Abb. Dec. (N. Y.) 302.

[47] Dwight v. Newell, 3 N. Y. 185.

[48] Kisterson v. Tate, 94 Iowa 665, 63 N. W. 350, 58 Am. St. 419.

[49] H. B. Claflin Co. v. King, 56 Fla. 767, 48 So. 37.

[50] Greenwood v. Trigg Dobbs & Co., 143 Ala. 617, 39 So. 361; Lehigh & N. E. R. Co. v. Hanhauser, 222 Pa. 248, 70 Atl. 1089.

[51] Yackle v. Wightman, 103 Ill. 169; Hubbard v. Jones, 61 Kans. 722, 60 Pac. 743; Farmers' Bank v. Heighe, 3 Md. 357; Firebaugh v. Ward, 51 Tex. 409.

[52] Anderson v. Tydings, 8 Md. 427, 63 Am. Dec. 708; Verdin v. Slocum, 71 N. Y. 345.

[53] Northern Bank v. Roosa, 13 Ohio 334; Bismark Building & Loan Assn. v. Bolster, 92 Pa. St. 123. Contra, First Nat. Bank v. Bennett, 40 Iowa 537.

[54] Morsell v. First Nat. Bank, 91

mortgaged land of the judgment debtor, the "equity of redemption," is subject to the lien, even where the legal view of a mortgage is adopted, and in states where the mortgagee has merely a lien without the legal title, the mortgagor's interest in the land is so subject as a legal estate.[55]

In all of the states except Ohio and Pennsylvania, land acquired by the judgment debtor subsequent to the rendition or docketing of the judgment, are subject to the lien.[56] But it is held that a judgment creditor is not entitled to have the judgment declared a lien on land purchased by the debtor since the debt was contracted when the record title thereof is not in the debtor, although the land may be subjected to the payment of the judgment by other proceedings.[57]

§ 567. Docketing, indexing and recording judgments.— It is the settled policy of the law to require notice to be given to all the world of the title to and encumbrances upon real estate, to the end that an innocent purchaser, having no notice of liens or adverse claims not disclosed by the records in the manner prescribed by the statute, will hold land as against such claims and liens. Judgments and liens, in order to bind land as against persons having no actual notice thereof, must appear of record in the manner prescribed by law; that is, they must be found in the records wherein the statute requires them to be entered. It is plain that a judgment, though formally entered and signed upon a paper duly filed and attached to the court files, would not operate as a lien, for the reason that it is not found in the books provided by law as the receptacle of the records of judgments.[58]

In several states, in order that a judgment may become a lien on the real estate of the judgment debtor, it must be docketed and indexed in accordance with the statute.[59] But a statute requiring the docketing of a judgment to create a lien does not apply to a judgment foreclosing a mortgage.[60] Where dockets or records

U. S. 357, 23 L. ed. 436; Freedman's Sav. & Trust Co. v. Earle, 110 U. S. 710, 4 Sup. Ct. 226, 28 L. ed. 301.

[55] Pahlman v. Shumway, 24 Ill. 127; Macauley v. Smith, 132 N. Y. 524, 30 N. E. 997; Trimble v. Hunter, 104 N. Car. 129, 10 S. E. 291; Kinports v. Boynton, 120 Pa. St. 306, 14 Atl. 135, 6 Am. St. 706.

[56] Jackson v. Bank of United States, 5 Cranch C. C. 1, Fed. Cas. No. 7131.

[57] Sewell v. Drake, 27 Ky. L. 571, 85 S. W. 748.

[58] Ætna Life Ins. Co. v. Hesser, 77 Iowa 381, 42 N. W. 325, 4 L. R. A. 122, 14 Am. St. 297.

[59] Dewey v. Sugg, 109 N. Car. 328, 13 S. E. 923, 14 L. R. A. 393; Nye v. Moody, 70 Tex. 434, 8 S. W. 606; Fulkerson v. Taylor, 100 Va. 426, 41 S. E. 863.

[60] Huntington v. Meyer, 92 Wis. 557, 66 N. W. 500.

have been lost or destroyed it will be presumed that a judgment rendered was duly docketed.[61]

In some states the entry of a judgment in the proper court creates a lien upon all the debtor's lands in the county in which the judgment is rendered. In other states the judgment must be "docketed" in some book, either in the clerk's office of that court, or more frequently in the registry of deeds of that or another county, to become a lien on the lands of the debtor therein, at least as against purchasers or encumbrancers without notice. In the states which do not require the docketing of a judgment in the county where rendered, the lien of the judgment may run back not only to the moment of its rendition, but to the first day of the term at which it was rendered.[62]

The docket usually recites: (1) The full name of the defendant, (2) the name of the plaintiff, (3) the amount of the judgment, (4) the day, hour, and minute when the judgment roll was filed, (5) the day, hour, and minute when it was docketed, (6) the court wherein the judgment was rendered, and (7) the name of the plaintiff's attorney. The docket entry must be based on a final judgment, and the indexing of the docket, where the law requires it, on a valid docket.

§ 568. **Requisites as to form of judgments.**—Where there is no statute requiring a judgment to be in any particular form, it is sufficient if by the use of proper language it states what the prevailing party shall receive, and what the losing party is required to do, pay, or discharge.[63] Strict formality in the language is unnecessary, it being sufficient if the entry shows that the merits of the case have been finally adjudicated and determined. The judgment is tested by its substance, rather than by its form.[64] Even where the statute prescribes the form, a departure from this form is not necessarily fatal to the adjudication.[65] A judgment will be sufficient if it responds to the pleadings, proof, and findings, and is determinative of the issues submitted.[66] The judgment should also conform to the prayer,[67] but this rule has been

[61] American Mortgage Co. v. Hill, 92 Ga. 297, 18 S. E. 425.

[62] Hathaway v. Howell, 54 N. Y. 97.

[63] Robinson v. Salt Lake City, 37 Utah 520, 109 Pac. 817.

[64] Melton v. St. Louis I. M. & S. R. Co., 99 Ark. 433, 139 S. W. 289.

[65] Lester v. Brown, 57 Ga. 79.

[66] Stone v. Perkins, 217 Mo. 586, 117 S. W. 717; Smith v. Pitts (Tex. Civ. App.), 122 S. W. 46; Gross v. Bennington, 52 Wash. 417, 100 Pac. 846.

[67] Duff v. Combs, 132 Ky. 710, 117 S. W. 259.

greatly relaxed in many states,[68] and in equitable actions the prayer for general relief authorizes any judgment consistent with the proof.[69]

When the court has cognizance of the controversy as it appears from the pleadings and has the parties before it, then the judgment or order which is authorized by the pleadings, however erroneous, irregular or informal it may be, is valid until set aside or reversed upon appeal or writ of error.[70] The judgment should be definite, certain and consistent, but indefiniteness is no ground for reversal.[71] Mere errors or irregularities as to matters of form, which work no prejudice to third persons, is not ground for vacating or amending a judgment after it has become a finality.[72]

No particular directions can be usefully given as to the matter of setting out judgments in the abstract. The nature of the judgment will usually dictate whether it is proper to include a full synopsis, or to pass the matter with a brief reference to the name and title of the court, the number of the case, the names of the parties, plaintiff and defendant, the fact of the judgment, its amount, and the number and page of the record or docket where the case may be found. The record should be carefully perused, and any errors, omissions, and irregularities noted in connection with the minute made of the judgment. The following is an example of what is usually shown in an abstract:

State of Indiana, } ss:
Marion County }

John Davis

v.

William Smith

Superior Court of Marion County, Indiana
Case No. 5280
Action on account
Fee Book 25, page 40
Judgment rendered against defendant, April 12, 1917 for $500.00
Recorded April 20 in Judgment Docket 150, page 8

No execution issued.

When the lien of the judgment does not depend upon the is-

[68] Garrett v. Cohen, 63 Misc. 450, 117 N. Y. S. 129.

[69] Kimmerly v. McMichael, 83 Nebr. 789, 120 N. W. 487.

[70] Hope v. Blair, 105 Mo. 85, 16 S. W. 595, 24 Am. St. 366.

[71] Frederick v. Buckminster, 83 Nebr. 135, 119 N. W. 228.

[72] Loeser v. Savings Deposit Bank & Trust Co., 163 Fed. 212, 89 C. C. A. 64; Seaboard Air Line R. Co. v. Harby, 55 Fla. 555, 46 So. 590.

suance of an execution, the latter act need not be shown, unless it has resulted in a reduction or partial satisfaction of the judgment; but where the issuance of an execution is necessary to constitute the judgment a lien, or to prevent the lien from lapsing, the issuance of the execution becomes important, and should be shown. Where the examination does not disclose the issuance of an execution or other proceedings following the rendition of the judgment, these matters should be shown in continuations of the abstract, either by exhibiting the judgment and all proceedings attending it, or by noting the substance of the proceedings had under the judgment.

§ 569. Points to be noticed in the examination of a judgment record.—We have said that it is seldom necessary to give a full synopsis of the judgment, but that the entire record should be carefully examined for errors, omissions, and irregularities. This examination should cover such matters as (1) The title and name of the court; (2) the names of all parties, plaintiff and defendant; (3) the summons or other notice, or publication by which the defendants were brought into court; (4) the return of the writ, showing who were served, when served, and how served; (5) the nature of the claim as disclosed by the bill, petition, or complaint; (6) whether the defendant answered or suffered default, and if he answered, the nature of such answer; (7) if any of the parties were under legal disability, whether a guardian ad litem was appointed, and an answer filed as provided by law; (8) the date of the judgment; (9) the term of the court; (10) the number of the record and page where it is entered; (11) whether any notice of appeal, or bill of exceptions appears of record; (12) whether a writ of execution or order of sale was issued or made; (13) the return of such writ, or compliance with the order; (14) where there was a sale, the report and confirmation thereof; (15) and if the cause was removed to an appellate court, the proceedings had in connection therewith. The examiner should also be careful to see that the judgment lien has not been continued in favor of a surety, who has discharged the judgment and who is entitled to be subrogated to the benefit of the lien, even as against a purchaser without notice.[73]

[73] Hill v. King, 48 Ohio St. 75, 26 N. E. 988.

§ 570. Judgment against deceased party.—Although there is some conflict in the authorities, the greater weight seems to support the proposition that, where a court has obtained jurisdiction of the parties and the subject-matter during the lifetime of the parties to the suit, a judgment rendered for or against one of them after his death, although erroneous and liable to be set aside by proper direct proceeding, is simply voidable, and not void, nor subject to collateral attack.[74] Judgments for or against joint plaintiffs or defendants, one of whom is dead at the time of the rendition of the judgment, are, according to this rule, merely erroneous and voidable, but not absolutely void, nor subject to collateral attack.[75] But several cases hold that a judgment rendered against a defendant who is dead at the time is null and void.[76] This latter rule conforms to that of the common law, and where it obtains such judgment may be entirely disregarded by all parties. The representatives of the decedent, his creditors, or any one interested, need not take any steps to have the judgment vacated or reversed. It does not create any lien or estoppel, nor is it binding as adjudicating any rights. It can not operate to support or divest any right, title or interest.[77] Of course, if an action is commenced in favor of or against one already dead, the judgment rendered therein will be absolutely null and void for want of jurisdiction.[78]

§ 571. Judgments against infants and insane persons.—In judicial proceedings concerning the lands of infants or persons of unsound mind, such persons, in order that a judgment rendered for or against them may be valid, must be represented by guardian or next friend. A guardian ad litem may be appointed by the court for infants or others who are incapacitated to act for themselves by reason of some legal disability wherever such persons are made parties defendant in any legal proceeding. Process must generally be served upon infant defendants in the

[74] Todhunter v. Klemmer, 134 Cal. 60, 66 Pac. 75; Claflin v. Dunne, 129 Ill. 241, 21 N. E. 834, 16 Am. St. 263; Reid v. Holmes, 127 Mass. 326; Wood v. Watson, 107 N. Car. 52, 12 S. E. 49, 10 L. R. A. 541.

[75] Swasey v. Antram, 24 Ohio St. 87; Holt v. Thacher, 52 Vt. 592.

[76] Bauer v. Word, 135 Ala. 430, 33 So. 538; Greenstreet v. Thornton, 60 Ark. 369, 30 S. W. 347, 27 L. R. A. 735; Watson v. Adams, 103 Ga. 733, 30 S. E. 577.

[77] Succession of Hoggatt, 36 La. Ann. 337; West v. Jordan, 62 Maine 484; Young v. Pickens, 45 Miss. 553.

[78] Reid v. Holmes, 127 Mass. 326; Graves v. Ewart, 99 Mo. 13, 11 S. W. 971.

same manner as upon adults, and the guardian ad litem has no power to waive such process.[79] And it is error to render a judgment against an infant defendant without full proof of the matters in issue notwithstanding the admissions of his guardian ad litem.[80]

The real estate of an infant may be levied upon and sold upon an execution issued on a judgment against him.[81]

Statutes usually provide that an infant may, within a specified time after arriving at full age, upon proper proceedings being instituted by him, have any judgment, order or decree, opened or annulled, or set aside, if he can show that the same was obtained by mistake or through fraud. And a judgment rendered against an infant for whom no guardian ad litem or general guardian appeared, may be vacated by such infant on coming of age.[82]

§ 572. Exemption of real estate from judgments.—In a few states a judgment debtor, who is a householder, may claim as exempt from sale under an execution, property owned by him, the value of which does not exceed a specified amount. If the value of the land scheduled as exempt property exceeds the maximum amount allowed as exempt, the excess will be subject to the judgment lien. Such exempted property is in practice nearly always the debtor's homestead, though not so designated in the statutes.

In most states a quantity of land and buildings owned and occupied by a householder, or a person with a family or other dependents, is exempted from levy under execution, attachment or process against such owner, the quantity being defined either by area or by value, or both. This is usually designated as a "homestead." The estate or interest of the owner may be less than a fee, and it matters not that he holds the land jointly with others.[83]

As to the effect of the homestead right on the judgment lien, some cases hold that the lien does not attach at all to the property exempt by law, and intervening conveyances, incumbrances, or even later judgments and executions obtain preference.[84] In other

[79] Hughes v. Sellers, 34 Ind. 337.

[80] McEndree v. McEndree, 12 Ind. 97.

[81] Shaffner v. Briggs, 36 Ind. 55, 10 Am. Rep. 1.

[82] Childs v. Lanterman, 103 Cal. 387, 37 Pac. 382, 42 Am. St. 121; Cohee v. Baer, 134 Ind. 375; 32 N. E. 920, 39 Am. St. 270.

[83] Kaser v. Haas, 27 Minn. 406, 7 N. W. 824.

[84] Ketchin v. McCarley, 26 S. Car. 1, 11 S. E. 1099, 4 Am. St. 674.

cases, however, it is held that the lien is only suspended, and attaches itself to the land, when, by the abandonment of the homestead, by the death of the debtor, and of his dependents, or any other means, the homestead exemption is brought to an end.[85] Besides the state exemption laws, the federal government, in disposing of the public lands, has shielded the lands earned by settlement under the federal homestead law from sale for any debt contracted by the homesteader before the issue of the patent; and it remains secure against those debts, without any need for further occupancy by the grantee.[86]

§ 573. Satisfaction and discharge of judgments.—The lien of a judgment is terminated by an entry of satisfaction on the record; by a formal instrument of satisfaction filed in the cause; or by the return of an execution showing full satisfaction. It is obvious that a judgment fully satisfied and discharged need not be noticed in the abstract, but where a former examination discloses a judgment unsatisfied at the time such former examination was made, a discharge must be looked for in a subsequent continuation of the examination in order that the discharge may be exhibited affirmatively in the body of the continuation, or in the abstracter's certificate showing that no judgments remain unsatisfied.

While the certificate is often made to show satisfaction, the better practice is to embody in the abstract a note showing the manner of discharge. The following example is given:

Note.—Circuit Court, Marion County, Ind. Case No. 5,280. John Davis v. William Smith. Judgment against defendant rendered April 12, 1917, for $500.00. This judgment satisfied as shown by return of execution showing same fully satisfied.

§ 574. Decrees in general.—We have said that the term "decree" is applied to the determination of suits in equity. Like a judgment at law, it is the sentence pronounced by the court upon the matter of right and justice between the parties, and is founded on the pleadings and proof in the cause.

Decrees, like judgments, are either final or interlocutory. A decree is interlocutory when it decides some intermediate point or issue in the case, but without disposing of the final issue or

[85] Blose v. Bear, 87 Va. 177, 12 S. E. 294, 11 L. R. A. 705.

[86] Gile v. Hallock, 33 Wis. 523.

issues in the cause. The decree is final when it disposes of all the issues between all the parties to the suit, and awards the costs.[87] A decree adjudging deeds to be mortgages and appointing referees to take evidence as to the value of improvements, etc., is not final and could not be final until the report of the referee had been passed upon by the court.[88] Even though the rights of the parties are settled by the decree, the fact that something remains to be done by the court renders it interlocutory.[89]

§ 575. Operation and effect of decrees.—Among the most common occasions for invoking the aid of courts of equity may be mentioned the construction, enforcement, and administration of trusts; the administration of estates of decedents; the creation and foreclosure of liens; quieting title and the removal of clouds from titles; and cases involving fraud and mistake. Equity also has jurisdiction to compel accounting, specific performance, subrogation, reformation, cancellation, rescission, and marshaling of assets. The decrees rendered in all such matters has the same general effect as judgments, but their operation is not always the same. Thus, a decree of a court of competent jurisdiction is not only final as to the subject-matter, but also as to every other matter which the parties might have litigated in the case, and which they might have had decided.[90]

Under a prayer for general relief it is proper to grant the parties any relief consistent with the facts set up, to which they may appear entitled, and which is within the power of the court to grant.[91]

A decree does not operate as an estoppel in a subsequent action between the parties, as to immaterial and unessential facts, even though put in issue by the pleadings and directly decided; it is simply final as to the facts litigated and decided therein, having such a relation to the issue.[92]

Where the court has jurisdiction of the subject-matter and the parties, the decree is conclusive upon the parties until reversed on

[87] Hoit v. Hoit, 40 N. J. Eq. 551, 5 Atl. 103.

[88] State v. Riley, 219 Mo. 667, 118 S. W. 647.

[89] White v. Gibson, 61 Misc. 436, 113 N. Y. S. 983.

[90] Hawkins v. Taylor, 128 Ind. 431, 27 N. E. 1117; Hentig v. Redden, 46 Kans. 231, 26 Pac. 701, 26 Am. St. 91; Donnell v. Wright, 147 Mo. 639, 49 S. W. 874.

[91] Merillat v. Hensey, 34 App. (D. C.), 398; Alexander v. Owen County, 136 Ky. 420, 124 S. W. 386; Kinder v. Scharff, 125 La. 594, 51 So. 654.

[92] House v. Lockwood, 137 N. Y. 259, 33 N. E. 595.

appeal, impeached by an original bill for fraud or set aside by bill in review.[93] The decree is not binding on persons not parties to the suit.[94]

§ 576. Effect of decree in the absence of personal service. —Jurisdiction of the person, unless the parties waive service and voluntarily appear, can only be acquired by an observance of the modes of procedure prescribed by law.[95] The usual requirement with respect to obtaining jurisdiction over the person, prescribed by law regulating the proceedings of the court, is that the defendant must have due notice of the proceedings.[96] As equity acts primarily in personam, a personal decree can not be rendered against a defendant not served with process and who does not appear in person or by an attorney duly authorized.[97]

Whenever judicial proceedings in a state court involves the adjudication of the personal liability of a non-resident defendant, or the liability of his property without the state, he must be brought within the jurisdiction of the court by the service of process upon him within the state, or by voluntary appearance.[98] But in most states statutes have been enacted providing for constructive notice to parties who are nonresidents, or whose residence is unknown. This method of service is either by posting the notices or by publication in the manner prescribed, and in some states both posting and publication is required. It is sometimes provided that process may be personally served on a non-resident defendant. A decree rendered against a party who has been constructively served with process will be binding on such party, if the provisions of the statute in reference thereto have been strictly complied with.[99]

Constructive service can not be legally made unless some necessity therefor appears. It can only be made when personal service is impracticable.[1] Such service confers jurisdiction only for the purpose named in the bill.[2] A decree based on construct-

[93] Barbour v. Tompkins, 58 W. Va. 572, 52 S. E. 707, 3 L. R. A. (N. S.) 715n.

[94] Kelly v. Kelly, 126 Ill. 550, 18 N. E. 785.

[95] Williams v. Monroe, 125 Mo. 574, 28 S. W. 853.

[96] Boswell v. Sharp, 15 Ohio 447.

[97] Cloyd v. Trotter, 118 Ill. 391, 9 N. E. 507; Cassidy v. Woodward, 77 Iowa 354, 42 N. W. 319; Stephenson v. Davis, 56 Maine 73.

[98] Michigan Trust Co. v. Ferry, 175 Fed. 667.

[99] Calkins v. Miller, 55 Nebr. 601, 75 N. W. 1108.

[1] Bear Lake County v. Budge, 9 Idaho 703, 75 Pac. 614, 108 Am. St. 179.

[2] McGaw v. Gortner, 96 Md. 489, 54 Atl. 133.

ive notice to the party against whom it was rendered must show strict compliance with the statutory mode of obtaining jurisdiction. A decree rendered on service by publication which was based on a false affidavit of nonresidence, may be collaterally attacked.[3]

The utmost care should be exercised to see that the affidavit on which the publication was based was made by a person authorized to make same, that the affidavit set forth the cause of action, that the name of the party be sufficiently designated in the notice, and that the publication be for the full period prescribed by the statute.

§ 577. Lien of decrees.—The word "judgments," used in statutes making judgments a lien on the real estate of parties against whom they are rendered, is held to embrace decrees. "Judgments" and "decrees" being usually employed as convertible terms. So where there is a money decree in personam, a lien is thereby created on the real estate of the party against whom it is rendered.[4] A mere foreclosure decree, which does not provide for any deficiency, does not, as a general rule, create a lien upon the real estate of the defendant.[5] The decree for a deficiency of proceeds does not have the force and effect of a judgment at law so as to become a lien until the deficiency is ascertained.[6] A decree that a certain sum is due the plaintiff, and that the mortgaged property be sold and applied thereon, there being no provision for docketing a judgment for any deficiency, is not a personal judgment against defendant.[7]

§ 578. Form of decrees.—A decree should contain: (1) The title of the case; (2) a recital of the pleadings, proceedings, and in general language, the evidence; (3) the mandatory clause, and (4) the declaratory clause. The title should contain the name of the court, the term thereof, the names of the parties, and the date on which the decree was rendered. It is not necessary that the proceedings be recited at length, but premises on which the decree was predicated is sometimes required to be recited.[8]

[3] Eayrs v. Nason, 54 Nebr. 143, 74 N. W. 408.
[4] Yackle v. Wightman, 103 Ill. 169.
[5] Hamberger v. Easter, 57 Ga. 71; Kirby v. Runals, 140 Ill. 289, 29 N. E. 697.
[6] Winston v. Browning, 61 Ala. 80; Hershey v. Dennis, 53 Cal. 77; Roll v. Rea, 57 N. J. L. 647, 32 Atl. 214.
[7] Tolman v. Smith, 85 Cal. 280, 24 Pac. 743.
[8] Hartfield v. Brown, 8 Ark. 283.

It is sometimes said that the decree must contain findings of all the material facts necessary to sustain it,[9] but some cases hold that no findings of fact are necessary.[10] It must specify with certainty the persons in whose favor and against whom the decree was rendered.[11] The amount must be definitely fixed and stated,[12] and the property to be affected must be specifically described.[13]

In a suit to foreclose a mortgage the decree for the sale of the premises should contain a description of the property to be sold; a statement of the amount of the debt; a direction that the premises, or so much of them as may be necessary, shall be sold by an officer designated, who shall execute a deed to the purchaser; and that out of the proceeds of the sale he pay to the plaintiff the amount of his debt, interest, and costs, together with the expenses of the sale. If a personal judgment is asked for and is proper, the defendants who are personally liable for the debt, must be designated.[14] The decree should not attempt to give any relief not sought for in the pleadings,[15] and should be complete within itself.[16] But sometimes under the general prayer for relief, the court may grant relief not specifically asked for.[17] A decree is not generally final until it is reduced to writing, approved by the court, and filed for record in the clerk's office.[18] Though the practice exists of signing the decree, it is held that it may pass on oral direction by the judge in open court to enter it, the signature being only evidence to the clerk that it has in fact passed. The date of physical entry upon the minutes is of no consequence in determining the actual date of the entry of the decree.[19]

§ 579. **Abstracting the decree.**—It is the practice of most abstracters to set out a complete copy of the decree, and this method is recommended where the decree does not preserve the evidence on which it is based. Matters of minor importance,

[9] Weeden v. Hawes, 10 Conn. 50; Farrell v. Bouck, 60 Nebr. 771, 84 N. W. 260; Burbank v. Wiley, 66 N. Car. 58.

[10] Mason v. Daly, 117 Mass. 403; Kilroy v. Mitchell, 2 Wash. 407, 26 Pac. 865.

[11] Turner v. Dupree, 19 Ala. 198.

[12] Smith v. Trimble, 27 Ill. 152.

[13] Jones v. Minogue, 29 Ark. 637.

[14] Leviston v. Swan, 33 Cal. 480; Alling v. Nelson, 55 Nebr. 161, 75 N. W. 581.

[15] Lagrave v. Hellinger, 144 App. Div. 397, 129 N. Y. S. 291; Davis v. Davis, 81 Vt. 259, 69 Atl. 876, 130 Am. St. 1035n.

[16] Jessop v. Kittanning Borough, 225 Pa. 583, 74 Atl. 553.

[17] Sage v. Central R. Co., 99 U. S. 334, 25 L. ed. 394.

[18] Bascombe v. Marshall, 129 App. Div. 516, 113 N. Y. S. 991.

[19] Ommen v. Talcott, 180 Fed. 925.

such as the caption and parts that refer to costs, may be condensed. The following example is given:

State of Maine, }
—— County. } ss:

A. B.	Supreme Judicial Court.
	In Equity.
	Decree to foreclose mortgage.
v.	Docket number ——.
C. D.	Date of hearing ——.

Recites, that there is due to the plaintiff on said mortgage for principal and interest, the sum of —— dollars, and that if the defendant shall pay said sum with the costs of this suit to the plaintiff within six months from the date of this decree, the plaintiff shall thereupon enter a discharge of said mortgage upon the record thereof, but in default of such payment, it is ordered and decreed that said mortgaged premises be sold by the master at public auction to the highest bidder and the proceeds therefrom applied in satisfaction of said sum of —— dollars and the costs due the plaintiff, and that the balance, if any remaining therefrom, be paid to the defendant, but if the proceeds of said sale shall not be sufficient to satisfy said sum and costs, let execution issue against the defendant for such deficiency.

Y. Z.,
Justice Supreme Judicial Court.

Dated this —— day of ——, 19—.

§ 580. Effect of misnomer of parties generally.—The abstracter must be skilful in determining whether judgments of record are against persons in whom he is for the time interested, and whether the name of the judgment defendant is the same in legal effect as the name for which he is searching the record. He must be familiar with the rules which govern names and must have a thorough knowledge of the principles of idem sonans. The record of a judgment is constructive notice only of that which is contained within itself, and in order to charge the land of the judgment defendant as against subsequent purchasers, incumbrancers and judgment creditors, it must set forth his name with such reasonable accuracy that if they should examine it they would obtain from it actual notice of all the rights which were

intended to be created by it. Every error or defect apparent on the face of a judgment or decree must be noticed in the abstract. These are confined principally to matters of practice. The most serious defects, however, are not thus apparent, and may be classed with matters dehors the record. A judgment or decree is in no way conclusive upon a person against whom it was rendered by using a name not legally his, and is not constructive notice of a lien on his real estate. But a judgment or decree is not rendered void by its own misnomer of the defendant, where the record supplies data for its amendment, nunc pro tunc, so as to make it speak its rendition against the defendant by his true name.[20] Notwithstanding the misnomer of a defendant, if the writ is served upon the party intended to be sued, and he fails to appear and plead in abatement, and suffers judgment by default, he is concluded thereby.[21] The omission of the Christian name of the judgment defendant will not necessarily vitiate the judgment, if such name is disclosed by other parts of the record, or if the party can be connected with the judgment by proper evidence.[22]

It has been held that the names "Hesser" and "Hesse" are so dissimilar that one searching for incumbrances against the former would not be charged with notice of a judgment against the latter not put upon inquiry.[23] It has also been held that where the statute relative to the docketing of judgments requires the entry upon the book of "the name at length of each judgment debtor," the docket entry of a judgment against Edward Davis is not constructive notice of a lien on the real estate of either E. A. Davis or Edward A. David.[24] It is only through the medium of a sufficient and legal docketing of a judgment or decree that it can become a lien on the real estate of the person against whom it was rendered; and it is the duty of the person in whose favor it was rendered to see to it, if he would secure such lien, that the docket is properly made, for, as against a bona fide purchaser for value, any material defect or omission in this respect is the fault

[20] Ex parte Howard-Harrison Iron Co., 119 Ala. 484, 24 So. 516, 72 Am. St. 928.

[21] First Nat. Bank v. Jaggers, 31 Md. 38, 100 Am. Dec. 53.

[22] Goodgion v. Gilreath, 32 S. Car. 388, 11 S. E. 207.

[23] Ætna Life Ins. Co. v. Hesser, 77 Iowa 381, 42 N. W. 325, 4 L. R. A. 122, 14 Am. St. 297.

[24] Davis v. Steeps, 87 Wis. 472, 58 N. W. 769, 23 L. R. A. 818, 41 Am. St. 51.

of the judgment creditor, and the loss, if any, occasioned thereby will be regarded as his own.[25]

Where the name of the judgment debtor is not the same as that of the person whose title is under consideration, there is no occasion for including the judgment in the abstract; but where the judgment was entered against a person by his true name, although that is not the name by which he was sued, the judgment and proceedings upon which it was based must appear in order to show the repugnancy. If the abstracter should find the surname for which he is searching, but finds an entirely different Christian name from the one he is searching for, he is entitled to conclude that the judgment is not against the person in whom he is interested.

§ 581. Effect of error or omission of middle name or initial.—The common law recognizes but one Christian name, and failure in judicial proceedings in giving the name of the party to state his middle name, or the initial thereof as commonly used, is not fatal to their validity.[26] Under this rule it is no misnomer to improperly include or exclude the middle name or initial thereof; it is unimportant and suggests nothing.[27] But this rule, like most rules of judicial procedure, is not without exceptions.[28] It has often been held that the failure in any judicial proceeding to include the initial of the middle name is unimportant, and not fatal to its validity.[29] In most states it is held that an omission or the use of a wrong initial does not affect the jurisdiction of the court, where the right party is actually served with process and brought into court.[30] But some cases hold that the use of a wrong initial, or other error in defendant's name, not coming within the rule of idem sonans, where the summons is served by publication, is not a compliance with the statute, and is fatal to the jurisdiction of the court.[31] The omission of the mid-

[25] Johnson v. Hess, 126 Ind. 298, 25 N. E. 445, 9 L. R. A. 471; In re Hutchinson's Appeal, 92 Pa. St. 186.

[26] Beattie v. National Bank, 174 Ill. 571, 51 N. E. 602, 43 L. R. A. 654, 66 Am. St. 318; D'Autremont v. Anderson Iron Co., 104 Minn. 165, 116 N. W. 357, 17 L. R. A. (N. S.) 236, 124 Am. St. 615, 15 Ann. Cas. 114.

[27] Games v. Stiles, 14 Pet. (U. S.) 322, 10 L. ed. 476; Edmundson v. State, 17 Ala. 179, 52 Am. Dec. 169; Gross v. Grossdale, 177 Ill. 248, 52 N. E. 372; Schofield v. Jennings, 68 Ind. 232.

[28] State v. Higgins, 60 Minn. 1, 61 N. W. 816, 27 L. R. A. 74, 51 Am. St. 490.

[29] Cleveland, C., C. & St. L. R. Co. v. Peirce, 34 Ind. App. 188, 72 N. E. 604; King v. Clark, 7 Mo. 269.

[30] Casper v. Klippen, 61 Minn. 353, 63 N. W. 737, 52 Am. St. 604.

[31] Fanning v. Krapfl, 61 Iowa 417,

dle initial of the name of a judgment debtor on the index of judgments is fatal to the lien of the judgment creditor as against a subsequent bona fide grantee of such debtor for value and without notice.[32]

Omitting Christian names of judgment defendants in docketing a judgment, though it remains good between the parties, is fatal to the claim as regards subsequent purchasers or judgment creditors.[33] The abstracter's certificate should set out the names with middle initials, which he has and has not searched for.

§ 582. Doctrine of idem sonans.—"Idem sonans" means "of the same sound," or "sounding the same," and is said to exist if the attentive ear finds difficulty in distinguishing them when pronounced, or common and long-continued usage has by corruption or abbreviation made them identical in pronunciation.[34] In the matter of names in a judicial record, orthography is not important if the sound is the same. Idem sonans exists where a name when pronounced conveys practically the same sound as another name when pronounced; or if a name incorrectly spelled when ordinarily pronounced sounds like the correct name as commonly pronounced. So if the abstracter decides that two names are idem sonans and he searches both, the search against each must be complete within itself, and if he omits a judgment against one of them, he becomes liable for any loss occasioned thereby.[35] The doctrine of idem sonans does not apply to afford constructive notice of public records where two foreign names, pronounced alike, in fact begin with a different letter of the alphabet.[36]

§ 583. Operation and effect of decrees of probate courts.—Decrees of a probate court, made in matters and against parties within the sphere of its jurisdiction, not appealed from, are conclusive upon those to whom the right of appeal is given, and can not be collaterally attacked.[37] The determination of the title to

14 N. W. 727, 16 N. W. 293; Skelton v. Sacket, 91 Mo. 377, 3 S. W. 874; Enewold v. Olsen, 39 Nebr. 59, 57 N. W. 765, 22 L. R. A. 573, 42 Am. St. 557.

[32] Crouse v. Murphy, 140 Pa. St. 335, 21 Atl. 358, 12 L. R. A. 58, 23 Am. St. 232.

[33] In re Ridgway Budd & Co.'s Appeal, 15 Pa. St. 177, 53 Am. Dec. 586.

[34] Robson v. Thomas, 55 Mo. 581.

[35] Commonwealth v. Owen, 2 Wkly. N. Cas. (Pa.) 200.

[36] In re Heil's Appeal, 40 Pa. St. 453.

[37] In re Well's Estate, 69 Vt. 388, 38 Atl. 83.

real estate under the will of a testator made in a decree of distribution is conclusive of such title between the parties in interest or those claiming under them.[38] Decrees of probate courts are as conclusive upon the parties to the record, until reversed or annulled on appeal, writ of error, or direct proceedings in chancery for fraud, as decrees in chancery or judgments at law;[39] but if want of jurisdiction appears from the face of the proceedings, they are, like the judgments of any court, under like circumstances, merely void.[40]

In determining the extent of probate jurisdiction reference must usually be had to the statute, as the scope of such jurisdiction is limited and prescribed by the statute creating it, and "unless a warrant for the exercise of jurisdiction in a particular case can be found in the statute, given either expressly or by implication, the whole proceeding is void; but where jurisdiction is conferred over any subject-matter, and it becomes necessary in the adjudication thereof to decide collateral matters over which no jurisdiction has been conferred the court must of necessity decide such collateral issues."[41] A judgment probating a will entered by a court having jurisdiction of such matters is binding not only on the parties who stand in inheritable relationship to the testator, but as a proceeding in rem, as against all the world.[42] But it is held that a decree either probating or refusing to probate a will does not conclude the question of the validity of the testamentary devise of real property in a subsequent litigation involving the title thereto.[43]

Errors, defects and irregularities in probate proceedings for the sale of the real estate of a decedent, or persons under guardianship, are the occasion, perhaps, of more objections to title than any other ground. The order or decree of sale must be in strict compliance with the requirements of the statute, and this should be affirmatively shown by the record.[44] The sale will be void unless the order or decree authorizing the same is certain in

[38] McKenzie v. Budd, 125 Cal. 600, 58 Pac. 199.

[39] Watson v. Hutto, 27 Ala. 513; Dickinson v. Hayes, 31 Conn. 417; Cummings v. Cummings, 123 Mass. 270.

[40] Mohr v. Tulip, 40 Wis. 66.

[41] Woerner Law of Admin., § 142.

[42] Davies v. Leete, 111 Ky. 659, 23 Ky. L. 899, 64 S. W. 441.

[43] Corley v. McElmeel, 149 N. Y. 228, 43 N. E. 628.

[44] In re Rose's Estate, 63 Cal. 346; Gelstrop v. Moore, 26 Miss. 206, 59 Am. Dec. 254; Teverbaugh v. Hawkins, 82 Mo. 180.

its terms,[45] is in accord with the petition,[46] describes the land to be sold with sufficient accuracy for its identification,[47] specifies the place of sale,[48] and prescribes the method and terms thereof,[49] as well as directs the manner of advertising.[50] An order made subsequent to the sale is void;[51] nor can a sale without an order be subsequently confirmed on the ground of the necessity of the sale as having been made for the benefit of the heirs.[52]

§ 584. Foreign judgments and decrees.—Full faith and credit is required by the federal constitution and statutes, to be given, in each state, to final judgments and decrees, rendered in other states by courts having jurisdiction both of the subject-matter and of the parties in actions in personam, and of the res in proceedings in rem. This merely obliges the courts to give such judgments equal recognition and effect, in matters of pleading and evidence, with that accorded to similar judgments of the domestic courts, and does not purport to give to such judgments any extraterritorial force as a judgment.[53] Real property, being exclusively subject to the laws of the state within whose territory it is situate, and being subject only to the jurisdiction of the courts of the state where it is situated, can not be directly affected by the judgment or decree of a court of any other state.[54] So it is held that a decree probating a will in one state does not establish its validity as a will devising real property in another state, unless the laws of the latter state permit it.[55] Such decree can not operate beyond the state in which the jurisdiction is exercised.[56] Most states have adopted statutes which in effect make the foreign probate conclusive when duly authenticated, even with respect to real property, but it is held that the certified record of probate must show that the will

[45] Graham v. Hawkins, 38 Tex. 628.
[46] Williams v. Childress, 25 Miss. 78.
[47] Crawford v. McDonald, 88 Tex. 626, 33 S. W. 325.
[48] Brown v. Brown, 41 Ala. 215.
[49] In re Baily Appeal, 32 Pa. St. 40.
[50] Parker v. Allen, 4 Atl. (N. J.) 300.
[51] Ludlow v. Park, 4 Ohio 5.
[52] Bjmerland v. Eley, 15 Wash. 101.
[53] Elizabethtown Sav. Inst. v. Gerber, 34 N. J. Eq. 130.
[54] Clarke v. Clarke, 178 U. S. 186, 20 Sup. Ct. 873, 44 L. ed. 1028; In re Clark's Appeal, 70 Conn. 195, 39 Atl. 155; McCartney v. Osburn, 118 Ill. 403, 9 N. E. 210; Cooper v. Hayes, 96 Ind. 386; Blackman v. Wright, 96 Iowa 541, 65 N. W. 843; Short v. Galway, 83 Ky. 501, 7 Ky. L. 504, 4 Am. St. 168.
[55] Clayson v. Clayson, 24 Ore. 542, 34 Pac. 358.
[56] Lindley v. O'Reilly, 50 N. J. L. 636, 15 Atl. 379, 1 L. R. A. 79, 7 Am. St. 802.

was executed in compliance with the lex rei sitae, unless the statute expressly or by clear implication changes this rule.[57] In some states, foreign judgments properly transcribed constitute liens on real estate in the jurisdiction where the transcript of such judgment is recorded.[58]

[57] State v. District Court, 34 Mont. 96, 85 Pac. 866, 6 L. R. A. (N. S.) 617, 115 Am. St. 510.

[58] Curry v. Lehman, 57 Fla. 385, 49 So. 673.

CHAPTER XXV

JUDICIAL SALES

SEC.
590. Judicial sales defined and distinguished.
591. Validity and effect of judicial sales.
592. Purchaser's title under judicial sale.
593. Rights of purchaser at judicial sale.
594. Rights of grantee of purchaser.
595. Refusal to complete purchase.
596. Order confirming the sale.
597. Effect of confirmation.
598. Certificate of purchase at judicial sale.
599. Proof of title under judicial sales.
600. Presumptions pertaining to judicial sales.
601. Sales under orders and decrees of probate courts.
602. Probate procedure to sell real estate.
603. How probate sales shown in abstract.

§ 590. Judicial sales defined and distinguished.—A judicial sale is one made under an order or decree of a court having competent authority and jurisdiction to order it by an officer legally appointed and commissioned to make the sale.[1] Some of the cases hold that a sale may be considered a judicial sale only where made pendente lite, and this may perhaps be considered the general rule.[2] The fact that the sale is made pending the litigation distinguishes it from an execution sale, the latter being made after the suit is terminated.[3]

Execution sales are based on a general judgment for so much money, and a judicial sale is based on an order to sell specific property. "The former are conducted by an officer of the law in pursuance of the direction of a statute; the latter are made by the agent of the court in pursuance of the court's directions. In the former the sheriff is the vendor; in the latter the court. In the former the sale is usually complete when the property is struck off to the highest bidder; in the latter it must be reported to and approved by the court."[4] Where the sheriff in an execution sale is not required to report the sale to the court for its approvel, the title passes to the purchaser upon the execution and

[1] Williamson v. Berry, 49 U. S. 495, 12 L. ed. 1170.
[2] Lawson v. De Bolt, 78 Ind. 563; Terry v. Cole, 80 Va. 695.
[3] Alexander v. Howe, 85 Va. 198, 7 S. E. 248.
[4] Norton v. Reardon, 67 Kans. 302, 72 Pac. 861, 100 Am. St. 459.

delivery of the officer's deed; whereas if the sale is a technical judicial sale, no title passes to the purchaser until the court has approved the sale.[5] When the sale is confirmed it becomes the act of the court, or, in other words, a judicial sale. In a judicial sale of lands, all the proceedings pertaining to the sale are under the direction and control of the court.[6]

The transfer of an estate in lands occurs by judicial sale in the case of: (1) Sales by order of a court of equity at the instance of creditors; (2) sales under mortgage foreclosures; (3) sales of lands of decedents; (4) sales of lands of infants and insane persons; (5) sales and transfers for the purpose of partition; (6) equitable decrees, under state statutes, transferring title, and (7) adjudications of bankruptcy, by which title passes to the bankrupt's trustee.

§ 591. Validity and effect of judicial sales.—The officer making a judicial sale of land has no power to vary from the directions given in the decree under which the sale is made,[7] but confirmation of the sale is conclusive as to all objections which were raised or which might have been raised thereto;[8] and though a sale may be irregular as not in compliance with the decree, it may be ratified by confirmation where the variance consists in something which the court could have initially required.[9]

No error, defect or irregularity in the proceedings, short of absolute want of jurisdiction on the part of the court, or fraud or mistake, to an extent that would vitiate the proceedings, can affect the title of the purchaser. The purchaser at a judicial sale may always, before confirmation, object that the title is bad, but, as a general rule, no such objection can be interposed after confirmation.[10] When the sale is confirmed it relates back to the time of the sale, and cures all defects and irregularities, except those founded on fraud or want of jurisdiction.[11] The same grounds are required to set the sale aside as would be required to set aside a sale between individuals.[12] If there be a defect in the title, un-

[5] Noland v. Barrett, 122 Mo. 181, 26 S. W. 692, 43 Am. St. 572.

[6] Sessions v. Peay, 23 Ark. 39.

[7] Iseman v. McMillan, 36 S. Car. 27, 15 S. E. 336.

[8] Barnes v. Henshaw, 226 Ill. 605, 80 N. E. 1076.

[9] Bechtel v. Wier, 152 Cal. 443, 93 Pac. 75, 15 L. R. A. (N. S.) 549n.

[10] Cox v. Cox, 18 D. C. 1; Wilson v. White, 109 N. Y. 59, 15 N. E. 749, 4 Am. St. 420.

[11] Nevada Nickel Syndicate v. National Nickel Co., 103 Fed. 391.

[12] Virginia Fire & Marine Ins. Co. v. Cottrell, 85 Va. 857, 9 S. E. 132, 17 Am. St. 108.

known to the purchaser at the time of sale, and of which he had neither actual nor constructive notice, the court will not ordinarily compel him to take a deed and complete the purchase.[13]

§ 592. **Purchaser's title under judicial sale.**—The doctrine of caveat emptor is said to apply in all its force to judicial sales, that is, that it will be conclusively presumed that the purchaser agrees to take the title, such as it is, and if he permits the sale to be confirmed without objection, he can not afterward refuse to pay the purchase-money because of imperfections in the title,[14] or errors and irregularities in the proceedings under which he purchased.[15] He is charged with notice of such material facts as the record of the proceedings under which he derives title discloses, and he will be presumed to have examined the same before becoming a purchaser.[16] If all persons having any claims or interest in the property have been made parties to the proceedings, and the court has jurisdiction, the purchaser will be required to take the title, although the court may have made an erroneous decision upon the merits, since all parties are bound by the decree, and no one else could question the purchaser's title.[17]

If the decree was valid, and the sale and deed are regular, a purchaser in good faith acquires a good title to the property; and even though the order of sale under the decree is issued without authority, such irregularity will not affect the title of a purchaser without notice thereof, who has paid the purchase-money and received a deed.[18] While the purchaser under a judicial sale submits himself to the jurisdiction of the court, and may be compelled to carry out his contract, he is also entitled to the protection of the court in respect to the avoidance of the purchase, if by reason of imperfections in the title or otherwise he is freed from his agreement.[19]

The purchaser at a judicial sale is charged with notice of every fact appearing upon the face of the record affecting the title acquired by him.[20] But it is held that he need only inquire if upon

[13] Union Trust Co. v. Electric Park Amusement Co., 168 Mich. 574, 135 N. W. 115; Oakley v. Shaw (N. J. Eq.), 69 Atl. 462.

[14] Wood v. Mann, 3 Sumn. (U. S.) 318.

[15] Jennings v. Jenkins, 9 Ala. 285; Wilcox v. Raben, 24 Nebr. 368, 38 N. W. 844, 8 Am. St. 207.

[16] Huber v. Hess, 191 Ill. 305, 61 N. E. 61.

[17] Ogden v. Walters, 12 Kans. 282; Forest v. Farley, 62 N. Y. 628.

[18] Splahn v. Gillespie, 48 Ind. 397.

[19] Hoffman's Referees, p. 240.

[20] Board of Education v. Berry, 62 W. Va. 433, 59 S. E. 169, 125 Am. St. 975.

the face of the record the court apparently had jurisdiction of the parties and the subject-matter in order to be protected, provided he buys in good faith, and without notice of any actual defect.[21] The sale being by the court, made through its authorized agent, there is no warranty of title.[22] The purchaser obtains only the title and interest held by the original owner, subject to like equities and defects of title.[23]

There are no covenants to which the purchaser may resort in case he acquires no title. The officer making the sale is vested with a mere naked power to sell such title that the original owner had, without warranty, or any terms except those imposed by law.[24] The title of the purchaser relates back to the date of the sale,[25] and where there is an appeal from the order of confirmation, the title relates back, on affirmance at least, as far as that order.[26] Although the judgment or decree may be reversed, yet all rights acquired at a judicial sale while the decree or judgment were in full force, and which they authorized will be protected. It is sufficient for the purchaser to know that the court had jurisdiction and exercised it, and that the order, on the faith of which he purchased, was made, and authorized the sale.[27] The rule is the same although the purchaser was one of the parties to the suit;[28] or even if he had notice at the time of the sale that an effort would be made to obtain a reversal of the decree.[29]

§ 593. Rights of purchaser at judicial sale.—A purchaser at a judicial sale has a right to avail himself of a prior covenant of warranty.[30] Where, through a mistake, the quantity of land is materially less than what was intended, the purchaser is entitled to a pro rata reduction in the price.[31] An innocent purchaser at a judicial sale is not bound by a secret equity in favor of a third person,[32] nor is he bound to take notice of errors in the trial of the proceeding leading up to the decree under which he

[21] Rackley v. Roberts, 147 N. Car. 201, 60 S. E. 975.
[22] Williams v. Glenn, 87 Ky. 87, 9 Ky. L. 941, 7 S. W. 610, 12 Am. St. 461.
[23] Gray v. Denson, 129 Ala. 406, 30 So. 595.
[24] Bishop v. O'Conner, 69 Ill. 431.
[25] Purser v. Cady, 120 Cal. 214, 52 Pac. 489.
[26] Clark & Leonard Inv. Co. v. Way, 52 Nebr. 204, 71 N. W. 1021.
[27] Gray v. Brignardello, 1 Wall. (U. S.) 627, 17 L. ed. 692.
[28] Splahn v. Gillespie, 48 Ind. 397.
[29] Irwin v. Jeffers, 3 Ohio St. 389.
[30] Thomas v. Bland, 91 Ky. 1, 12 Ky. L. 640, 14 S. W. 955, 11 L. R. A. 240.
[31] Cooper v. Hargis, 20 Ky. L. 41, 45 S. W. 112.
[32] Scarboroug v. Holder, 127 Ga. 256, 56 S. E. 293.

purchased.[33] The general doctrine applying to all judicial sales is that, where one buys in good faith he is entitled to a vendee's lien to the extent of the sum paid by him, although the sale be void. This doctrine is based upon the principle of subrogation.[34] Where the court had general jurisdiction, but no jurisdiction to appoint the particular officer who made the sale, and the proceeds of the sale were properly applied by such officer, the purchaser who paid the purchase-price, relying in good faith on the order made in the matter, will be protected in the title thus acquired.[35] The purchaser has a right to insist upon the terms of the purchase being complied with. He is not obliged to pay cash where the sale was made on time payments.[36]

The purchaser acquires title to the fixtures as a part of the realty. If they are wrongfully severed by any one after the sale, though before the execution of a deed to the purchaser, he may sue for them in trover, take them by replevin, may recover damages in an action of waste, or may enjoin their removal.[37] If the sale is made to discharge liens, the purchaser takes title freed from such liens, and the liens attach to the proceeds of the sale.[38]

§ 594. **Rights of grantee of purchaser.**—A bona fide grantee for value from a purchaser at a judicial sale takes a title unaffected by irregularities, mistakes, or fraud, of which he had no notice,[39] although the sale was liable to be set aside as to his grantor; and on the other hand if his grantor was a bona fide purchaser at such sale, he can transfer to his grantee all the rights of a bona fide purchaser, although such grantee has notice of fraud sufficient to vitiate the sale.[40] This is upon the principle that a purchaser with notice from a purchaser without notice is treated as a bona fide purchaser.[41] While the title of a purchaser's grantee is not defeated by a vacation of the judgment for error or irregularity, he is chargeable with notice of all juris-

[33] Hansford v. Tate, 61 W. Va. 207, 56 S. E. 372.
[34] Jones v. French, 92 Ind. 138.
[35] Decker v. Fessler, 146 Ind. 16, 44 N. E. 657.
[36] Rhodes v. Dutcher, 6 Hun (N. Y.) 453.
[37] Dutro v. Kennedy, 9 Mont. 101, 22 Pac. 763.
[38] Ryker v. Vawter, 117 Ind. 425, 20 N. E. 294.
[39] Davis v. Watson, 54 Miss. 679; Fowler v. Poor, 93 N. Car. 466.
[40] Wilson v. Hoffman (N. J. Ch.), 50 Atl. 592.
[41] Equitable Sureties Co. v. Sheppard, 78 Miss. 217, 28 So. 842.

dictional defects.[42] Where the grantee of a purchaser at a judicial sale has notice that the purchase-money is unpaid, the lien on the land in favor of the original owners still subsists against the property in the hands of such grantee.[43] But a grantee of a purchaser under an erroneous decree in his own favor, stands in the position of his grantor, and a subsequent reversal of the decree defeats his title.[44]

§ 595. Refusal to complete purchase.—The purchaser at a judicial sale, who, before paying the price or entering into possession, discovers illegalities in the proceedings which have led to the sale, and which are calculated to throw a cloud upon his title, may refuse to execute the purchase.[45] Where the sale was had under an erroneous judgment liable to be reversed, he can not be compelled to accept the title.[46] He may refuse to complete his purchase on account of the existence of incumbrances which were not known to him at the time of making the bid.[47] He can not be compelled to complete his purchase where he was misled as to the identity of the property upon which he was bidding by false representations of the person conducting the sale;[48] or where there is a deficiency in the quantity of land intended to be sold.[49] But he will not be relieved from complying with the terms of the sale on account of defects of title of which he had notice at the time of the purchase.[50]

The acceptance of the bid confers no title upon the purchaser, and not even any absolute right to have the purchase completed. He is nothing more than a preferred bidder, or proposer for the purchase, subject to the sanction of the court afterward.[51] He is under no obligation to accept the deed from the officer conducting the sale, until the sale is reported to and confirmed by the court.[52] Until confirmation by the court, the contract of purchase is executory, is open to objection, and will not be enforced if to

[42] Albers v. Kozeluh, 68 Nebr. 522, 94 N. W. 521, 97 N. W. 646.
[43] Barnes v. Morris, 39 N. Car. 22.
[44] Singly v. Warren, 18 Wash. 434, 51 Pac. 1066, 63 Am. St. 896.
[45] Succession of Nash, 48 La. 1573, 21 S. E. 254.
[46] Young v. Rathbone, 1 C. E. Green (N. J.) 224, 84 Am. Dec. 151.
[47] In re Box, 11 Wash. St. 90, 39 Pac. 240.
[48] Clay v. Kagelmacher, 98 Ga. 149, 26 S. E. 493.
[49] Cooper v. Hargis, 20 Ky. L. 41, 45 S. W. 112.
[50] Stewart v. Devries, 81 Md. 525, 32 Atl. 285.
[51] Wells v. Rice, 34 Ark. 346; Jones v. Williams, 155 N. Car. 179, 71 S. E. 222, 36 L. R. A. (N. S.) 426n.
[52] Martin v. Kelly, 59 Miss. 652.

do so would be against equity and good conscience. But by bidding at the sale one subjects himself to the jurisdiction of the court, and in effect becomes a party to the proceeding, and he may be compelled to complete his purchase by an order of the court, and by its process for contempt if necessary.[53] Judicial sales are not within the statute of frauds, and are binding upon the purchaser without any written contract or memorandum of the terms of sale.[54] This rule is not universal, however,[55] and it has been held that a sale of real estate by an administrator is within the statute.[56] The bidder may withdraw his bid at any time before the officer makes the memorandum necessary to make the sale binding.[57] But after the bid has been accepted it becomes a binding contract, and can not be withdrawn or changed except under such circumstances as would justify the rescission or reformation of other contracts.[58]

Where the purchaser makes default in payment and the property is resold, under an order of court, at his risk, he is entitled to any excess in the proceeds at the resale just as he is responsible for any deficiency, being therefore a person interested in the property and is entitled to file exceptions to the resale as reported.[59] It is not proper for the officer who has made the sale to resell the property without an order of court, on the failure of the purchaser to comply with the terms of sale; but if he does resell upon his own responsibility, there is not necessarily sufficient ground for holding the second sale void.[60]

§ 596. **Order confirming the sale.**—Until a sale under the order or decree of court has been reported to the court by the officer making the sale, and such report has been approved by the court, the sale is incomplete and no title either legal or equitable passes to the purchaser.[61] The report of the sale is required to inform the court of the acts of the officer in respect to the sale,

[53] Halleck v. Guy, 9 Cal. 181, 70 Am. Dec. 643; Chandler v. Morey, 195 Ill. 596, 63 N. E. 512; Warfield v. Dorsey, 39 Md. 299, 17 Am. Rep. 562.

[54] Watson v. Violett, 63 Ky. 332; Warehime v. Graf, 83 Md. 98, 34 Atl. 364.

[55] Jackson v. Scott, 67 Ala. 99; Gossard v. Ferguson, 54 Ind. 519.

[56] Bozza v. Rowe, 30 Ill. 198, 83 Am. Dec. 184.

[57] Dunham v. Hartman, 153 Mo. 625, 55 S. W. 233, 77 Am. St. 741.

[58] Continental Ins. Co. v. Reeve, 135 App. Div. 737, 119 N. Y. S. 901.

[59] Aukam v. Zantzinger, 94 Md. 421, 51 Atl. 93.

[60] Dills v. Jasper, 33 Ill. 262.

[61] Smith v. Wert, 64 Ala. 34; Apel v. Kelsey, 47 Ark. 413, 2 S. W. 102; Pool v. Ellis, 64 Miss. 555, 1 So. 725; Henry v. McKerlie, 78 Mo. 416.

and to determine whether the orders in reference thereto have been complied with. Upon the report being made, the court may, before confirming the sale, inquire into the proceedings attending it, and if they appear for any reason to be unfair, or irregular, or the land misdescribed, the sale should not be confirmed.[62] An order of confirmation can not be properly made before the coming in of the report.[63]

Confirmation is usually made by a formal order approving and confirming the action of the officer who made the sale, and where the sale was regularly made in compliance with all the provisions of the statute, no objections being made thereto, the court can not arbitrarily withhold the order of confirmation.[64] The usual order nisi, that the sale stand confirmed unless cause to the contrary be shown within a specified time, is sufficient order of confirmation of the sale.[65] In all cases where an order confirming the sale is necessary to pass title to the purchaser, the abstractee must examine the record therefor, and note its existence or nonexistence.

§ 597. Effect of confirmation.—We here reiterate that the sale is incomplete until confirmed by the court.[66] When confirmation is had, it relates back to the time of sale, and carries the legal title from the delivery of the deed and the equitable title without a deed.[67] The bidder is under no obligation to accept the deed from the officer conducting the sale, until the sale is reported to and confirmed by the court.[68]

Confirmation operates to cure mere irregularities in the proceedings to obtain the sale, and in the conduct of it,[69] but does not make good a defect arising from want of jurisdiction of the court either of the case or of any party interested; and, moreover, fraud, accident, or mistake, which will invalidate a contract generally, are grounds for setting aside the sale after confirmation.[70] And where there are facts in the record which show that the sale was absolutely void, a confirmation will not make the sale

[62] Cruikshank v. Luttrell, 67 Ala. 318.

[63] Citizens' Sav. Bank v. Bauer, 49 Hun 238, 1 N. Y. S. 450, 17 N. Y. St. 81, 14 Civ. Proc. R. 340.

[64] Roberts v. Robinson, 49 Nebr. 717, 68 N. W. 1035, 59 Am. St. 567.

[65] Torrans v. Hicks, 32 Mich. 307.

[66] Cady v. Barnes, 208 Fed. 361.

[67] Stang v. Redden, 28 Fed. 11.

[68] Dills v. Jasper, 23 Ill. 262; Martin v. Kelly, 59 Miss. 652.

[69] Connor v. McCoy, 83 S. Car. 165, 65 S. E. 257.

[70] Jenkins Land & Live Stock Co. v. Attwood, 80 Nebr. 806, 115 N. W. 305.

valid.[71] Confirmation of the sale is conclusive upon the purchaser where he had notice that the title was defective,[72] or where he might have obtained notice by the exercise of reasonable diligence, as where the defect appears from records or documents accessible to him.[73]

After the sale has been confirmed the purchaser is entitled to the possession of the premises sold, and to all the rents and profits arising therefrom; and assumes all the risk and hazard occurring to the property after the sale.[74]

§ 598. Certificate of purchase at judicial sale.—It is customary for the officer, upon accepting the purchaser's bid, to execute and deliver to him a writing certifying the fact of the sale, and describing the property sold and the terms and conditions of the sale. This is especially the practice where the land is sold under a decree foreclosing a mortgage. In such case the purchaser has no legal title until the time allowed for redemption has expired. The certificate of sale is not a deed and does not pass title to the land, but it supersedes the mortgage and is a superior lien.[75]

The purchaser can not maintain ejectment or other possessory action on his certificate of purchase.[76] He is not entitled to possession until a deed has been executed to him by the officer selling.[77] It would seem that no certificate of purchase is issued to the purchaser at a sale by a mere fiduciary under order of court, the purchaser taking only a memorandum of his bid from the officer making the sale. Such purchaser may assign his bid before the deed is made, and the assignee will be entitled to have the deed made directly to himself.[78]

§ 599. Proof of title under judicial sales.—"It is a general principle that the party who sets up a title must furnish the evidence necessary to support it. If the validity of a deed depends on an act in pais, the party claiming under that deed is as much bound to prove the performance of the act as he would be bound

[71] Templeton v. Falls Land &c. Co., 77 Tex. 55, 13 S. W. 964.
[72] Jennings v. Jenkins, 9 Ala. 285.
[73] Smith v. Winn, 38 S. Car. 188, 17 S. E. 717, 751.
[74] Ball v. First Nat. Bank, 80 Ky. 501, 4 Ky. L. 400.
[75] Von Arx v. Boone, 193 Fed. 612, 113 C. C. A. 480.
[76] Lightcap v. Bradley, 186 Ill. 510, 58 N. E. 221.
[77] O'Brian v. Fry, 82 Ill. 87.
[78] Campbell v. Baker, 51 N. Car. 255.

to prove any matter of record on which its validity must depend. It forms a part of his title. It is a link in the chain which is essential to its continuity, and which is incumbent on him to preserve. These facts should be examined by him before he became a purchaser, and the evidence of them should be preserved as a necessary muniment of title."[79] So in order to show title under a deed obtained at a judicial sale the claimant is required to produce the entire record of the proceedings leading up to the execution and delivery of the officer's deed.[80] And in order that counsel may determine the validity of a deed made in pursuance of an order or decree of sale, the abstract should contain, as a preliminary statement to the abstract of such deed, a synopsis of the proceedings upon which the validity of the deed depends.

Counsel need only ascertain if the court had jurisdiction to render the decree under which the sale was had. This should appear from the face of the proceedings; as where the pleadings state a case not within the jurisdiction of the court, or where there is nothing to show service of process on the defendant, or where the pleadings omit some formality required to give the court jurisdiction.

§ 600. Presumptions pertaining to judicial sales.—To a certain extent, every title depends upon rebuttable presumptions. Where a title is based on a deed made under order or decree of court, it will be presumed that the court, in making the order of sale, adjudged every question necessary to justify such order or decree. If the record shows the jurisdictional facts, the order or decree can not be assailed collaterally, but can only be reviewed by appeal in a direct proceeding.[81] It is presumed that the records of a court are regular and true, and that its officers performed their duties properly.[82] Thus where notice is required by statute, and the record of the proceedings in a court of general jurisdiction, while silent upon the question as to whether such notice was given or not, discloses nothing inconsistent with the fact of such notice having been given, in the absence of proof to the contrary,

[79] Williams v. Peyton's Lessee, 4 Wheat. (U. S.) 77, 4 L. ed. 518.

[80] Dorrance v. Raynsford, 67 Conn. 1, 34 Atl. 706, 52 Am. St. 266.

[81] Manson v. Duncanson, 166 U. S. 533, 17 Sup. Ct. 647, 41 L. ed. 1105; Moore v. Cottingham, 113 Ala. 148, 20 So. 994, 59 Am. St. 100; Montgomery v. Johnson, 31 Ark. 74; Burris v. Kennedy, 108 Cal. 331, 41 Pac. 458.

[82] Ayers v. Roper, 111 Ala. 651, 20 So. 460.

notice will be presumed to have been properly given.[83] Also if the purchaser has taken possession and has received from the officer a deed to the premises, a long possession thereunder will raise in his favor a presumption of the approval of the sale.[84]

But some courts hold that no presumptions are allowed in favor of the orders and decrees of probate courts, and that the record must show the existence of every fact which was necessary to authorize such order or decree, or it is void when questioned either directly or collaterally.[85]

§ 601. Sales under orders and decrees of probate courts.— Sales of real estate by executors, administrators, and guardians, made under order or decree of a probate court, and where such sales are required to be reported to the court for approval, are judicial sales.[86] The validity of such sales is made dependent upon a very rigid and literal compliance on the part of the courts, as well as of such fiduciaries, with statutory requirements. In jurisdictions where probate courts are regarded as courts with judicial functions in the common-law sense, their orders and decrees within the scope of the subject-matters over which their authority extends, are conclusive against all the world, unless reversed on appeal, or avoided for error or fraud in a direct proceeding. But where the functions of such courts are ministerial only, or where they have no authority beyond special powers for the performance of specific duties not relating to the general administration of justice, it is obvious that, to give validity to its acts, it must affirmatively appear that everything necessary to such end has been observed. Where particular forms are required for the execution of a power, however immaterial they may appear in themselves, these forms are conditions that can not be ignored with any degree of safety. Very slight deviations therefrom, or negligence on the part of the court or its officers in making the record entries, have been held sufficient to avoid the sale. So it is obviously of the gravest importance to see that every step taken in subjecting the real estate to sale be as nearly as possible in literal

[83] Horner v. Doe, 1 Ind. 130, 48 Am. Dec. 355.

[84] Smith v. Wert, 64 Ala. 34; Neill v. Cody, 26 Tex. 286.

[85] Vance v. Maroney, 4 Colo. 47; Seymour v. Seymour, 22 Conn. 272; Gaines v. Kennedy, 53 Miss. 103; Wright v. Edwards, 10 Ore. 298.

[86] Noland v. Barrett, 122 Mo. 181, 26 S. W. 692, 43 Am. St. 592; Maul v. Hellman, 39 Nebr. 322, 58 N. W. 112.

compliance with the method pointed out by the statute upon which the proceeding was based.[87]

The rule of caveat emptor applies in all its strictness to sales by fiduciaries under decrees of probate courts, whether in respect to inherent defects in the title or to those which result from errors and irregularities in the proceedings whence the authority to sell is derived. The sale is of the title such as it is, good or bad, and the purchaser is conclusively presumed to have purchased with that understanding.[88]

One who asserts title to land under a deed from an executor, administrator, or guardian must make proof of the proceedings whereby such officer was authorized to make the sale. The recitals in the deed are insufficient, and the court will not take judicial knowledge of such proceedings. The party who produces such deed must show that its execution was authorized.[89]

§ 602. Probate procedure to sell real estate.—By force of statute in most states, the real estate of a decedent is subject to the payment of his debts where the personal estate is insufficient for that purpose. These statutes not only give the personal representative the right, but make it his duty, when the personal property is not sufficient, to convert the real estate into assets for the payment of debts. Where this right is asserted and the lands are sold and conveyed, the title to the land which descended to the heir is completely divested.[90] The law does not confer upon an executor or administrator any authority to sell and convey the real estate of his decedent except by order of the proper court, in the absence of a testamentary provision authorizing such sale.[91] The application to sell can only be made by the executor or administrator, and a sale, when ordered, can only be made by such officer. But if the executor or administrator neglects or refuses to file such application he may be compelled to act upon the petition of any creditor of the estate whose claim has been filed and allowed.[92]

[87] Alabama Conference v. Price, 42 Ala. 39; Gross v. Howard, 52 Maine 192; Long v. Long, 142 N. Y. 545, 37 N. E. 486; Haywood v. Haywood, 80 N. Car. 42.

[88] Bolling v. Jones, 67 Ala. 508; Jones v. Warnock, 67 Ga. 484; Tilley v. Bridges, 105 Ill. 336; Riley v. Kepler, 94 Ind. 308; Hale v. Marquette, 69 Iowa 376, 28 N. W. 647.

[89] La Plante v. Lee, 83 Ind. 155.

[90] Nelson v. Murfee, 69 Ala. 598; Fiscus v. Moore, 121 Ind. 547, 23 N. E. 362, 7 L. R. A. 235.

[91] Duncan v. Gainey, 108 Ind. 579, 9 N. E. 470.

[92] In re Pirie, 133 App. Div. 431, 117 N. Y. S. 753; Yarboroug v. Moore, 151 N. Car. 116, 65 S. E. 763.

The petition or application for an order to sell the real estate of a decedent must allege the necessity for the sale by setting forth that the debts which the decedent had contracted during his lifetime are still unpaid, and that there are not personal assets sufficient to discharge them, but real estate which is liable for their payment. A schedule or detailed account of the personal property available, or that can be made available, for such payment, is usually required to be filed with or made a part of the petition;[93] also a list of the debts due and remaining unpaid,[94] and an inventory of the real estate.[95] The petition should describe the real estate of the deceased liable to be made assets for the payment of his debts; the title of the decedent therein at his death, and the probable value thereof exclusive of liens, and the particular lien, if any, against the real estate.

The statutes usually declare who are necessary parties to the petition of an executor or administrator to sell lands of his decedent, and who are proper parties, and a strict compliance with the statute in this respect must be had. The widow or widower, the heirs or devisees, and lienholders are usually necessary parties. It is necessary to make the heirs parties to a petition, for in no other way can their title to the land be divested;[96] and such heirs should be named individually in the petition, if their names be known. But an heir who has conveyed his interest in a decedent's real estate is not a necessary party to an application to sell real estate.[97]

As in ordinary adversary proceedings, there must be some kind of notice to, or a voluntary appearance of, all who are necessary parties defendant to the petition. If it shall appear that any of the heirs or devisees of the deceased are minors, the court, before hearing the petition shall appoint a guardian ad litem for such minors, and such guardian ad litem must also be properly notified.[98] The executor or administrator is usually required to give a bond before making the sale, and a failure to comply with this requirement has been held to be ground for avoiding the sale.[99]

[93] Gregory v. Taber, 19 Cal. 397, 79 Am. Dec. 219; Rapp v. Matthias, 35 Ind. 332; Bray v. Neill, 21 N. J. Eq. 343; Ford v. Walsworth, 15 Wend. (N. Y.) 449.

[94] In re Haxtum, 102 N. Y. 157, 6 N. E. 111.

[95] Maeck v. Sinclair, 10 Vt. 103.

[96] Wood v. Wood, 150 Ind. 600, 50 N. E. 573.

[97] Platt v. Brickley, 119 Ind. 333, 21 N. E. 906.

[98] Comparet v. Randall, 4 Ind. 55.

[99] Clay v. Field, 115 U. S. 260, 6

Such officer is sometimes required to take an oath before selling the land upon the order of the probate court, and sales are sometimes held void where this is not done.[1]

§ 603. How probate sales shown in abstract.—Sales of real estate by executors and administrators are shown either in connection with the settlement of the decedent's estate, or as an independent exhibit. If a former examination discloses the death of the decedent, the institution of probate proceedings, etc., but does not show a sale of the real estate or any portion thereof, such sale, if any had, must be shown in a subsequent examination, but without re-exhibiting the proceedings already shown in the former examination. But where all the proceedings pertaining to the sale of a decedent's real estate fall within one examination, there should appear a connected and brief history of all the probate proceedings, from their inception to the court's approval of the sale.

The following example is submitted:

Eliza S. Yohn, Admrx. of the estate of James C. Yohn, deceased, v. Mary E. Yohn, Charles G. Yohn, and Albert F. Yohn, heirs of said James C. Yohn, deceased.	Circuit Court of Marion County, Indiana. Case No. 1621. Order Book 102, pages 400, 500. Petition to sell real estate filed Sept. 10, 1893, by said administratrix.

Petition shows among other things that said James C. Yohn departed this life on the 1st day of March, 1893, intestate, the owner in fee of the following described real estate situate in Marion County, Indiana, to wit: [here describe real estate], and that the same is of the probable value of $3,000. That the personal estate of decedent, as shown by an inventory and appraisement filed herewith and made a part hereof, is insufficient to pay claims allowed against said estate in the sum of $1,000, besides the costs and expenses of administration. That said intestate left

Sup. Ct. 36, 29 L. ed. 375; Foster v. Birch, 14 Ind. 445; Moody v. Moody, 11 Maine 247; Hannum v. Day, 105 Mass. 33.

[1] Campbell v. Knights, 26 Maine 224, 45 Am. Dec. 107.

surviving the said Eliza S. Yohn, his widow, and Mary E. Yohn, Charles G. Yohn, and Albert F. Yohn, his children and only heirs at law, and who are of full age and unmarried. That all of said defendants and heirs answered, consenting to such sale. That the said real estate was appraised for $3,000.

Court ordered private sale, for not less than the appraised value, after notice given, etc.

Proof of notice filed.

Sept. 16, 1893, administratrix filed report, showing private sale of realty, Sept. 15, 1893, for $3,000.00, being the full appraised value, to William Thron; said purchaser paying in cash the full purchase-price.

The court finds that said administratrix has in all things complied with the orders of the court; the sale is confirmed, and the administratrix directed to make deed to purchaser in fee simple. Said deed is approved in open court, and ordered delivered to said purchaser.

CHAPTER XXVI

EXECUTION SALES

SEC.
610. Execution sales defined and distinguished.
611. Validity and effect of execution sales.
612. Title under execution sale.
613. When title vests in purchaser at execution sale.
614. The writ of execution.
615. Levy and return of execution.
616. Notice of sale.
617. Proof of publication of notice.
618. Effect of death of judgment plaintiff on defendant before execution.
619. Exemption of real estate from execution.
620. Effect of execution sale on dower rights.
621. Certificate of purchase at execution sale.
622. Assignment of officer's certificate.
623. Proof of title under execution sale.

§ 610. **Execution sales defined and distinguished.**—Execution sales are based on a general judgment for so much money, and are conducted by an officer of the law in pursuance of the direction of a statute. In our treatment of judicial sales we included all cases where real estate is sold under an order or decree of a court designating the same, and authorizing its sale. In this connection we propose to discuss only such sales as are made in pursuance of statute for the recovery of a specific sum of money in satisfaction of a judgment for such sum. These sales are not judicial sales. They must, it is true, be supported by a judgment or decree; but the judgment or decree is not for the sale of any specific property. It is only for the recovery of a designated sum of money. The court gives no directions, and can give none, concerning what property can be levied on. It usually does not attempt any control over the sale beyond setting it aside for failure to comply with some statutory requirement. In most of the states the officer making the sale is not required to report the sale to the court for confirmation. After complying with the statute respecting levy and notice, he sells the property, executes a deed to the purchaser, and the transaction is ended. The officer stands in the place of the execution debtor, and sells merely such title or interest as the debtor may have in the property. He is merely a ministerial officer, acting under the writ,

and the court has no control over his actions. Such sales are made by operation of law, in which the will and consent of the judgment debtor is never consulted. But such sales are required, for the protection of the debtor, to be made in conformity with all the statutory requirements.

§ 611. **Validity and effect of execution sales.**—A sale by a sheriff under a writ of execution is by force of a statutory power, and a material departure from the requirements of the statute will render the sale void. In order that the sale may vest title in the purchaser, the officer making the sale must be vested with authority conferred by statute. [1]

The general rule is that, unless the contrary appears on the face of the record through which the title is claimed, the sheriff is presumed to have complied with every statutory requirement in making the sale.[2] But mere errors and irregularities in judicial proceedings do not, as we have stated elsewhere, expose a judgment to collateral attack, and, therefore, do not affect the title of a purchaser at an execution sale, and the reversal of an erroneous judgment does not affect the title of a purchaser under the judgment[3] unless the judgment plaintiff was himself the purchaser.[4] Nor do mere irregularities in the proceedings subsequent to judgment,[5] though there are matters occurring after judgment that will render a sale under execution absolutely void, for example, a levy and sale after the return day of the process under which the officer acts.[6]

A complete want of title on the part of the execution defendant to the property sold, renders the title of the purchaser worthless.[7] If the judgment under which the officer professes to act is void for want of jurisdiction in the court, or for some other reason was open to collateral attack, the title of the purchaser at a sale under execution on such judgment, is worthless.[8]

It is essential to the validity of an execution sale that it be made

[1] Hurt v. Nave, 49 Ala. 459; Bell v. Chandler, 23 Ga. 356.

[2] Holmes v. Jordan, 163 Mass. 147, 39 N. E. 1005; Grand Rapids Nat. Bank v. Kritzer, 116 Mich. 688, 75 N. W. 90.

[3] Shultz v. Sanders, 38 N. J. Eq. 154.

[4] Bryant v. Fairfield, 51 Maine 149; Mullin v. Atherton, 61 N. H. 20.

[5] Forrest v. Camp, 16 Ala. 642; State v. Salyers, 19 Ind. 432.

[6] Smith v. Mundy, 18 Ala. 182, 53 Am. Dec. 221; Jefferson v. Curry, 71 Mo. 85.

[7] Thomas v. Glazener, 90 Ala. 537, 8 So. 153, 24 Am. St. 830; Danley v. Rector, 10 Ark. 211, 50 Am. Dec. 242.

[8] Collins v. Miller, 64 Tex. 118.

in the county where the land is situated and by an official of that county,[9] to a person having a right to purchase,[10] and that it be based on a valid levy[11] under an execution issued upon a valid[12] subsisting judgment.[13]

Mere irregularities in the method of appraisement and other steps preliminary to an execution sale do not render the sale void.[14] Thus an execution sale is not rendered invalid because of the failure to sell property in portions when divisible,[15] or where property other than that subject to the judgment lien is prematurely levied on and sold,[16] or because of a mere irregularity in the notice.[17] The purchaser's title can not be prejudiced by the officer's return or by an entire absence of return.[18]

§ 612. Title under execution sale.—The purchaser at an execution sale acquires such title as the judgment defendant had[19] and no more,[20] subject to the equities[21] and rights of third parties,[22] and to the defendant's right to be relieved from the effect of any fraud by the purchaser.[23]

A purchaser can not recover the amount of the bid from the creditor when the title fails, but he may be subrogated to the rights of the creditor,[24] and, while the creditor is held responsible for the validity of the judgment and proceedings employed to collect the debt, such creditor is not estopped to assert an after-acquired title against the purchaser at the sale.[25]

The purchaser takes only the interest of the judgment debtor at the time the judgment became a lien on the land, and a deed or mortgage then unrecorded is to be preferred as against the title

[9] Tonopah Banking Corp. v. McKane Min. Co., 31 Nev. 295, 103 Pac. 230.

[10] Bell County v. Felts (Tex. Civ. App.), 120 S. W. 1065.

[11] Tischler v. Robinson, 56 Fla. 699, 48 So. 45.

[12] Schott v. Linscott, 80 Kans. 536, 103 Pac. 997.

[13] Wever v. Parker, 131 Ga. 510, 62 S. E. 813.

[14] Trowbridge v. Cunningham, 63 Kans. 847, 66 Pac. 1015.

[15] Norman v. Eastburn, 230 Mo. 168, 130 S. W. 276.

[16] Bailey v. Block (Tex. Civ. App.), 125 S. W. 955.

[17] Kissinger v. Zieger, 138 Wis. 368, 120 N. W. 249.

[18] Cutting v. Harrington, 104 Maine 96, 71 Atl. 374, 129 Am. St. 373.

[19] Windley v. Swain, 150 N. Car. 356, 63 S. E. 1057, 134 Am. St. 923n.

[20] Wall Lumber Co. v. Lott-Lewis Co., 5 Ga. App. 604, 63 S. E. 637.

[21] National Broadway Bank v. Denny, 133 Ga. 227, 65 S. E. 412.

[22] Levengood's Estate, 38 Pa. Super. Ct. 491.

[23] Bowling v. Bowling (Ky. App.), 118 S. W. 923.

[24] Rosenthal v. Mounts (Tex. Civ. App.), 130 S. W. 192.

[25] Rosenthal v. Mounts (Tex. Civ. App.), 130 S. W. 192.

of the purchaser at the execution sale, at least if it be recorded before the sale.[26]

§ 613. When title vests in purchaser at execution sale.—The title acquired by a sheriff's deed on execution relates back to the date of the judgment lien, for the judgment is the source of the officer's authority, and by such relation the last act is carried back to the first in making out the title, and takes priority as of the date of the first, which is the day of the judgment.[27] But the title acquired under an execution sale will not relate back further than the time the lien was acquired under the judgment upon which it is based unless the record of the proceeding clearly shows that the sale was made under a lien acquired prior to that time.[28]

The title of a purchaser at an execution sale, had under a judgment in attachment, relates back to the levy of the judgment and has priority over intervening incumbrances.[29] An equitable title vests in the purchaser at the moment of sale,[30] but the sale is not consummated until the issuance of a certificate of purchase.[31] The lien acquired by the issuance and levy of execution is perfected by the sale.[32] Most statutes require the sheriff to make a conveyance of the land to the purchaser, and this is usually regarded as necessary to vest the legal title in the purchaser, but it has been held that such conveyance is not essential to the investiture of title.[33]

In jurisdictions where the execution debtor is allowed a designated time from the date of the sale in which to redeem the property, the legal estate does not pass to the purchaser until such time for redemption has passed and a deed from the sheriff has been delivered to the purchaser. Until then, the purchaser has only color of title.[34] In some states sales of realty under execution are

[26] Hargreaves v. Menken, 45 Nebr. 668, 63 N. W. 951.

[27] Hibberd v. Smith, 67 Cal. 547, 4 Pac. 473, 8 Pac. 46, 56 Am. Rep. 726.

[28] Pennsylvania Mtg. Inv. Co. v. Gilbert, 13 Wash. St. 684, 43 Pac. 941, 45 Pac. 43.

[29] Reilley v. Wright, 117 Cal. 77, 48 Pac. 970.

[30] Harris v. Mason, 120 Tenn. 668, 115 S. W. 1146, 125 L. R. A. (N. S.) 1011n.

[31] Kissinger v. Zieger, 138 Wis. 368, 120 N. W. 249.

[32] Mudge v. Livermore (Iowa), 123 N. W. 199.

[33] Rosenthal v. Mounts (Tex. Civ. App.), 130 S. W. 192.

[34] Nesbitt v. Delamar's Nevada Gold Min. Co., 24 Nev. 273, 52 Pac. 609, 53 Pac. 178, 77 Am. St. 807.

required to be reported to the court and confirmed before they become conclusive upon the parties.

§ 614. **The writ of execution.**—The execution writ should sufficiently identify[35] and conform to the judgment,[36] dsecribe the property levied upon,[37] and should be against all the judgment defendants.[38]

Mandatory statutes frequently require the name of the judgment plaintiff to appear in the writ.[39] The writ should be numbered, dated, sealed with the seal of the court, specify to what officer issued, and state the nature of the execution. But the writ is not invalidated because of mere clerical irregularities as to its form and contents.[40] The writ of execution must issue from the court having control of the judgment,[41] and within the time prescribed by statute, in order to keep the lien alive.[42] Where the writ does not conform to the judgment in any material respect, the irregularity should be shown in the abstract in order that counsel may determine its effect on transfer as a muniment of title.

§ 615. **Levy and return of execution.**—A levy constitutes the acts by which a sheriff sets apart and appropriates for the purpose of satisfying the command of a writ of execution a part or the whole of the judgment defendant's property.[43] In the absence of a statutory provision providing that a levy on real estate shall be made a matter of record it is held that it is not necessary that a levy be indorsed upon the writ, but a sufficient levy is shown where the return of the writ contains a copy of the notice of sale which recites a valid levy under the writ.[44] But a formal levy upon real estate is not usually necessary before proceeding to advertise and sell the property.[45]

[35] Dugan v. Harman, 80 Kans. 302, 102 Pac. 465, 133 Am. St. 209.

[36] Patton's Ex'r v. Smith, 130 Ky. 819, 114 S. W. 315, 23 L. R. A. (N. S.) 1124n.

[37] Thornton v. Ferguson, 133 Ga. 825, 67 S. E. 97, 134 Am. St. 226.

[38] Merrifield v. Western Cottage Piano &c. Co., 238 Ill. 526, 87 N. E. 379, 128 Am. St. 148.

[39] Harkey v. Day, 61 Tex. Civ. App. 244, 129 S. W. 1195.

[40] Thornton v. Ferguson, 133 Ga. 825, 67 S. E. 97, 134 Am. St. 226.

[41] Willamette Real Estate Co. v. Hendrix, 28 Ore. 485, 42 Pac. 514, 52 Am. St. 800.

[42] Evans v. Frisbie, 84 Tex. 341, 19 S. W. 510.

[43] Burkett v. Clark, 46 Nebr. 466, 64 N. W. 1113.

[44] Herr v. Broadwell, 5 Colo. App. 467, 39 Pac. 70.

[45] United States Fidelity &c. Co. v. Lentilhon, 64 Misc. 299, 119 N. Y. S. 82.

A sufficient and valid levy of an execution on real property may consist in the officer going upon the land or getting the defendant's consent to levy upon a particular estate, or by notifying the owner that he intends levying upon such estate and by making a proper indorsement upon the writ.[46] It has been held generally that, when the judgment on which execution has issued is a lien upon the land, it is unnecessary to make a formal levy of the writ before proceeding to sell.[47]

The validity of the purchaser's title is not dependent upon a valid levy.[48] But where the officer levies on the real estate, his indorsement upon the writ should describe the land with such a degree of certainty as to enable any person to identify the property taken by virtue of the writ, and to designate in such indorsement the nature of the right and the interest of the judgment defendant in the property.[49]

§ 616. Notice of sale.—The statutes of many states require the officer to give notice in writing to the judgment defendant of the sale under the judgment.[50] Such statute is fully complied with by giving such notice to the defendant's agent or attorney.[51] While notice of an execution sale is usually required by statute, the sale is not rendered invalid because of irregularities in this respect, and the court may correct the notice of sale.[52] But a failure to give any notice whatever, will, under some statutes, render the sale void,[53] while in other jurisdictions, such failure has the effect to render the sale voidable merely.[54] A mistake as to the time or mode of advertising the sale will not affect the title of the purchaser.[55] A sale is not rendered void for failure to give notice where the interest of the judgment defendant in the property levied on has been transferred.[56]

[46] Jones v. Allen, 88 Ky. 381, 10 Ky. L. 962, 11 S. W. 289.

[47] Bagley v. Ward, 37 Cal. 121, 99 Am. Dec. 256; Wood v. Colvin, 5 Hill (N. Y.) 228.

[48] Blood v. Light, 38 Cal. 649, 99 Am. Dec. 441; Den v. Durham, 29 N. Car. 151, 45 Am. Dec. 512.

[49] Bird v. Burgsteiner, 100 Ga. 486, 28 S. E. 219; Chase v. Williams, 71 Maine 190.

[50] Young v. Schofield, 132 Mo. 650, 34 S. W. 497; Mushback v. Ryerson, 11 N. J. L. 346.

[51] Watson v. Sutro, 86 Cal. 500, 24 Pac. 172, 25 Pac. 64; Fox v. Zimmermann, 77 Wis. 414, 46 N. W. 533.

[52] Walker v. Files, 94 Ark. 453, 127 S. W. 739; Kissinger v. Zieger, 138 Wis. 368, 120 N. W. 249.

[53] Thayer v. Roberts, 44 Maine 247; Henderson v. Hays, 41 N. J. L. 387; Borden v. Smith, 20 N. Car. 27.

[54] Jensen v. Woodbury, 16 Iowa 515; Hazen v. Webb, 68 Kans. 308, 74 Pac. 1111; Hall v. Moore, 70 Miss. 75, 11 So. 655.

[55] Stall v. Macalester, 9 Ohio 19.

[56] Randal v. Gould, 225 Pa. 42, 73 Atl. 986.

The statutes usually require such notice to be posted in certain public places during a designated period before the sale, or that the notice be given by publication in a newspaper for a designated number of times; and some statutes require both posting and publication of the notice. Such notice should describe the property to be sold, the time and place of sale, the terms of the sale, etc.

Whatever the form of notice, or the manner of giving it, the abstract should always contain a brief synopsis thereof, so as to enable counsel to determine if the statute has been complied with in this respect. This synopsis should be given in connection with the full synopsis of the sale, and may be noticed in the following manner:

Certified copy of printed notice of sale filed. Contains title and number of cause, describes real estate, fixes date of sale as January 10, 1917, at 10 o'clock A. M., fixes place of sale at east door of courthouse, Indianapolis, Ind., and designates terms to be for cash.

§ 617. **Proof of publication of notice.**—Where the statute requires notice of the sale to be published in a newspaper for a designated period before the sale, proof of such publication is usually made by the officer by attaching a copy of the notice and the affidavit of the publisher to his return. But in most jurisdictions it seems that a failure to make such proof will not invalidate the sale.[57] The rule of law seems to be that where notice is required by statute, and the record of the proceedings in a court of general jurisdiction, while silent upon the question as to whether such notice was given or not, discloses nothing inconsistent with the fact of such notice having been given, in the absence of proof to the contrary, notice will be presumed to have been properly given.[58] A sale without notice, when notice is required, is perhaps void, though after report and confirmation and the execution and delivery of the deed, in the absence of anything in the record negativing the fact of notice, the sale will be upheld under the rule that notice will be presumed.[59] The affidavit making proof of the publication of the notice required by the statute should designate that the notice annexed to the report is a true copy of the notice

[57] Drake v. Hale, 38 Mo. 346.

[58] Horner v. Doe, 1 Ind. 130, 48 Am. Dec. 355.

[59] Saltonstall v. Riley, 28 Ala. 164, 65 Am. Dec. 334; Clark v. Hillis, 134 Ind. 421, 34 N. E. 13; Schaale v. Wasey, 70 Mich. 414, 38 N. W. 317.

printed, the name of the newspaper, the period during which the notice was printed, and the date of the first and last publications. These matters may be shown as follows:

Appended to the foregoing report is,

Affidavit by Earl Diggs, editor and general manager of the Marion Leader.	Subscribed and sworn to before W. D. Lett, a notary public.

Recites, that the notice "of which the annexed printed copy," was published in the regular editions of said paper, a weekly newspaper of general circulation, printed and published in Grant county, Indiana, for the period of three successive weeks, the first of which publications being on the 4th day of May, 1917, and the last on the 18th day of May, 1917.

§ 618. **Effect of death of judgment plaintiff on defendant before execution.**—In case the execution issue after the death of the judgment defendant it may be ineffectual, but if issued during his lifetime a valid sale may be made thereunder.[60] Execution after the death of the defendant must be issued in the manner prescribed by the statute in order to render the sale valid. The common-law rule seems to be that revival of the judgment by scire facias is necessary before execution can be issued after the defendant's death, the statutes of a number of states have provided for the suspension of the right to issue execution for a specified time after the defendant's death, in place of the common-law revival by scire facias.[61] Likewise, in case of the death of the judgment plaintiff before issue of execution, the common-law rule is that revival of the judgment by scire facias is necessary before execution can be issued; but in some jurisdictions the cases, either practically or expressly, hold that revival by scire facias, or in any other manner, is unnecessary.[62]

Where letters testamentary or of administration issued in the estate of a deceased judgment plaintiff or defendant, and such letters are filed or recorded in the court in which the judgment

[60] Barrett v. Furnish, 21 Ore. 17, 26 Pac. 861.

[61] Fowler v. Mickley, 39 Minn. 28, 38 N. W. 634; Alsop v. Cowan, 66 Miss. 451, 6 So. 208; Landes v. Perkins, 12 Mo. 238

[62] Juhan v. Juhan, 104 Ga. 253, 30 S. E. 779; Armstrong v. McLaughlin, 49 Ind. 370.

was rendered, execution may issue and proceedings be had thereunder in the name of the executor or administrator.

§ 619. Exemption of real estate from execution.—We have said that certain classes of persons, such as heads of families, householders, etc., are entitled to claim as exempt from sale on execution certain portions of their property, and where any portion of the land of a judgment debtor is exempt from execution sale he may convey it without regard to any judgment against him, and the purchaser will obtain title free from the judgment;[63] but where an execution debtor's right to have certain property exempt from sale is dependent upon asserting a claim of exemption before sale is made, one who acquires his title before the execution sale of the property must duly assert the claim of exemption if he desires the benefit of it.[64] Unless the exemption is absolute, it may be lost by laches or by failure to claim it, and of course if it be for a limited period only, it will terminate by lapse of time.[65] It is important, therefore, where title is claimed through execution sale, to determine if the property sold was subject to the right of exemption. The property exempt is usually the homestead or residence of the debtor, and he is not usually required to lay claim to his right at the time of the levy, nor at any time before the sale.

§ 620. Effect of execution sale on dower rights.—Where a title is claimed through a judicial or execution sale it is important to know the facts respecting the domestic condition of the original owner. If the inchoate right of dower attached to the property it is an encumbrance until extinguished or released.[66] Where land is sold during the husband's life, at forced sale, to satisfy a judgment against him, the purchaser acquires the same title, as to the wife's right of dower, that he would acquire if he were the husband's grantee by the latter's voluntary conveyance.[67] This is true though the execution sale be subsequently confirmed by the court.[68] Where the whole of a husband's real estate is sold

[63] Citizens' State Bank v. Harris, 149 Ind. 208, 48 N. E. 856.

[64] Moss v. Jenkins, 146 Ind. 589, 45 N. E. 789.

[65] Connor v. McCormick (Iowa), 117 N. W. 976.

[66] Atwood v. Arnold, 23 R. I. 609, 51 Atl. 216.

[67] Roan v. Holmes, 32 Fla. 295, 13 So. 339, 21 L. R. A. 180.

[68] Butler v. Fitzgerald, 43 Nebr. 192, 61 N. W. 640, 27 L. R. A. 252, 47 Am. St. 741.

to satisfy liens prior to the attaching of the wife's dower right, her dower claim is only operative against the surplus proceeds.[69]

Before assignment, a widow's right of dower is a mere chose in action and is not subject to execution sale to pay her debts.[70] This right becomes complete upon her husband's death and is a thing in action applicable to the payment of her debts; but a judgment against her is not a lien on her dower interest until it has been assigned and set off to her.[71]

Where a wife was defaulted and judgment entered against her in an action to foreclose a certain mortgage executed by her husband alone, in which action no mention was made of her inchoate dower right and she was mentioned only as a wife and volunteer, it was held that the foreclosure sale did not preclude her from claiming her dower interest in the land sold.[72] But a wife is not endowed of land sold to satisfy a lien or incumbrance created by deed in which she joined.[73]

It is expressly provided by statute in some states that a judicial sale of property for the satisfaction of the debts of the husband, who is the owner of the fee simple title, terminates the wife's inchoate right of dower.[74] The existence of dower and curtesy rights must be ascertained by inquiries dehors the record.

§ 621. Certificate of purchase at execution sale.—In execution sales where the right to redeem is given the judgment debtor, a deed is not made to the purchaser until the time for such redemption has expired. In such cases the statutes usually provide for the execution and delivery to the purchaser of a certificate of sale by the officer.[75] Such certificate should recite the name of the court rendering the judgment, the parties to the action, the date and amount of the judgment, a description of the premises sold, the date of the sale and the amount bid, the name of the purchaser, and the redemption period.[76] A slight variance

[69] Helm v. Board, 114 Ky. 289, 24 Ky. L. 1037, 70 S. W. 679.

[70] Harper v. Clayton, 84 Md. 346, 35 Atl. 1083, 35 L. R. A. 211, 57 Am. St. 407.

[71] Tenbrook v. Jessup, 60 N. J. Eq. 234, 46 Atl. 516.

[72] Beverly v. Waller, 115 Ky. 596, 24 Ky. L. 2505, 74 S. W. 264, 103 Am. St. 342.

[73] Morgan v. Wickliffe, 115 Ky. 226, 24 Ky. L. 2104, 72 S. W. 1122.

[74] Bowden v. Hadley, 138 Iowa 711, 116 N. W. 689; McKelvey v. McKelvey, 79 Kans. 82, 99 Pac. 238.

[75] Webber v. Kastner, 5 Ariz. 324, 53 Pac. 207; Foorman v. Wallace, 75 Cal. 552, 17 Pac. 680; Whitenack v. Agartt, 56 Ill. App. 72; Hays v. Wilstach, 82 Ind. 13; Drake v. McLean, 47 Mich. 102, 10 N. W. 126.

[76] Fitch v. Pinckard, 5 Ill. 69.

between the recitals in the certificate and the sheriff's return will not invalidate the sale.[77] The certificate of the sheriff is the proper evidence of a sale of real estate on execution, and no other memorandum is required.[78] Where a memorandum is required in execution sales the courts are uniform in holding that the sheriff's return upon the execution meets the requirements in that respect.[79] An execution sale does not, of itself, pass the title to the purchaser, although the sale may be manifested by a memorandum thereof in writing signed by the sheriff. To pass the title, a deed must be executed by the sheriff.[80]

Where the sheriff executes and delivers a certificate to the purchaser, and records a copy thereof in the register of deeds, such record, or the orignal certificate, becomes evidence of the facts therein contained. The record of such certificate may be shown in the abstract in the following manner:

John Williams, Sheriff of Grant County, Indiana, to John Davis.	Certificate of sale on execution. Dated May 1, 1905. Recorded May 2, 1905. Deed Record 75, page 40.

Certifies that by virtue of a writ of execution to him directed from the Circuit Court of Grant County, Indiana, issued on a certain judgment rendered at the November term, 1904, of said court, in favor of Ephraim Creviston, plaintiff, against Harvey Cox, defendant, for the sum of $500 and costs, dated April 5, 1905, he did on May 1, 1905, at 10 o'clock A. M., at the south door of the courthouse in the city of Marion (the time, place and terms of sale having been duly advertised according to law), sell at public auction all right, title and interest of the said defendant in and to the following described real estate, to wit: [here describe premises as same is described in certificate] to John Davis for $525, said sum being the highest and best bid obtainable therefor, and said purchaser will be entitled to a deed for said premises so sold on the 1st day of May, 1906, unless the same shall have been redeemed as provided by law.

[77] Chicago Dock & Canal Co. v. Kinzie, 93 Ill. 415.

[78] Armstrong v. Vroman, 11 Minn. 220 (Gill 142), 88 Am. Dec. 81.

[79] Stearns v. Edson, 63 Vt. 259, 22 Atl. 420, 25 Am. St. 758.

[80] Strain v. Murphy, 49 Mo. 337.

§ 622. **Assignment of officer's certificate.**—The sheriff's certificate of sale on execution may be assigned by the purchaser at the sale, and the deed be made to the assignee.[81] In some states such assignment is expressly authorized by statute.[82] The assignee of a sheriff's certificate of the sale of land on execution is not a bona fide purchaser.[83] It is subject in his hands to all the defenses which may have been interposed against it in the hands of his assignor. But it is held that innocent purchasers are entitled to protection, and acquire good title when they purchase from a purchaser at the sale.[84]

Upon the death of a purchaser at an execution sale, the deed is properly made to his heirs.[85] And where one entitled to receive a sheriff's deed dies, the subsequent execution of it to him, although void, does not affect the title of those claiming under him.[86]

§ 623. **Proof of title under execution sale.**—As a general rule, a purchaser claiming title through an execution sale is bound only to show the judgment of a competent court, an execution warranted by the judgment, and a sale and deed under it.[87] In some cases it is held that he must prove a valid judgment, execution, and levy, independent of recitals in the deed.[88] However, he is not bound to deduce a regular chain of title subsisting in the execution defendant, as it is sufficient if he shows that such defendant had a legal title at the date of the rendition of the judgment.[89] In actions to try the title to real estate derived through an execution sale it is necessary for the purchaser to prove that the judgment defendant had some interest or estate in the land sold on which the judgment could operate.[90]

The abstract should contain a synopsis of all the proceedings

[81] Turner v. First Nat. Bank, 78 Ind. 19.

[82] Turpie v. Lowe, 158 Ind. 314, 62 N. E. 484, 92 Am. St. 310.

[83] Hays v. Peavey, 54 Wash. 78, 102 Pac. 889.

[84] Borders v. Vance, 134 Ga. 85, 67 S. E. 543; Lightfoot v. Horst (Tex. Civ. App.), 122 S. W. 606.

[85] Jones v. Webb, 22 Ky. L. 1100, 59 S. W. 858.

[86] Diamond v. Turner, 11 Wash. St. 189, 39 Pac. 379.

[87] Lahr v. Ulmer, 27 Ind. App. 107, 60 N. E. 1009.

[88] Ayers v. Roper, 111 Ala. 651, 20 So. 460; Cloud v. El Dorado County, 12 Cal. 128, 73 Am. Dec. 526; Wilhite v. Hamrick, 92 Ind. 594; Parlin v. Ware, 39 Maine 363.

[89] Elliott v. Dycke, 78 Ala. 150.

[90] Hendon v. White, 52 Ala. 597; Pekin Mining & Milling Co. v. Kennedy, 81 Cal. 356, 22 Pac. 679; Belford v. Crane, 16 N. J. Eq. 265, 84 Am. Dec. 155; Wall v. Fairley, 77 N. Car. 105.

upon which such title is based, so that counsel may determine therefrom the merits of the title as affected by such proceedings. The court's jurisdiction is a subject that should be carefully inquired into, as a judgment and sale thereunder does not give validity to a title where the court rendering the judgment had no jurisdiction of the parties or the subject-matter.

CHAPTER XXVII

TAXES AND TAX TITLES

SEC.
630. Taxes and taxation in general.
631. Property subject to taxation.
632. The tax lien.
633. Tax titles.
634. Assessment of taxes.
635. Description of land in assessment roll.
636. The tax sale.
637. Collection by proceedings of forfeiture.
638. Who may be purchaser at tax sale.
639. Rights of purchaser at tax sale.
640. Redemption from tax sale.
641. Certificate of purchase at tax sale.
642. The tax deed.
643. Formal parts of the deed.
644. Tax deeds as evidence in support of title.
645. Legislation to strengthen tax titles.
646. Judgment for taxes.
647. Local assessments.

§ 630. Taxes and taxation in general.—A tax has been variously defined as a burden or charge imposed on persons or property, or proportional contribution levied by the sovereign, to raise money for the support of the government and for all public needs and purposes.[1] It is not a debt within the ordinary meaning of that term,[2] but is a charge or burden imposed upon property for the benefit of the public. It is levied upon the authority of the state or municipality, in the exercise of its sovereignty, for governmental purposes, or for some object connected therewith.[3]

A tax levied on land for the support of the government is paramount to all other claims and liens against it. It is a charge upon the land without reference to the matter of ownership.[4] Special assessments for local improvements are not taxes within the meaning of the constitutional and statutory provisions on the general subject of taxation. Hence they do not come within a provision that "laws shall be passed taxing by a uniform rule all real and personal property, according to its true value in money."[5]

The power to tax is an attribute of sovereignty,[6] inherent in the

[1] Louisiana Ry. & Nav. Co. v. Madere, 124 La. 635, 50 So. 609.

[2] United States v. Chamberlin, 156 Fed. 881, 13 Ann. Cas. 720.

[3] Iowa Land Co. v. Douglas Co., 8 S. Dak. 491, 67 N. W. 52.

[4] Jack v. Weiennett, 115 Ill. 105, 3 N. E. 445, 56 Am. Rep. 129.

[5] Raleigh v. Peace, 110 N. Car. 32, 14 S. E. 521, 17 L. R. A. 330.

[6] Federal St. & P. V. Pass. R. Co. v. Pittsburg, 226 Pa. 419, 75 Atl. 662.

legislature,[7] whose powers in such regard are limited only by its own discretion and its responsibility to its constituents,[8] and by constitutional limitations.[9]

Municipal corporations have no inherent power to levy taxes.[10] They have such power only as is expressly given them by statute or charter,[11] or as constitute a proper exercise of their police powers.

The maxim commonly expressed is that "the subjects of every state ought to contribute to the support of the government as nearly as possible in proportion to their respective abilities, that is, in proportion to the revenue which they respectively enjoy under the protection of the state."[12] Briefly stated, this means that taxation should be equal and uniform. But absolute equality is difficult of attainment, and approximate equality is all that can be reasonably expected under the most perfect system in vogue.[13]

§ 631. Property subject to taxation.—As a general rule all property within the jurisdiction of the taxing power of the government is taxable[14] unless specially exempted,[15] or exempted under some rule of comity,[16] independently of any benefit accruing to the owner.[17] But a tax will not be held to be imposed upon property except by language clearly indicating the intent of the legislature to render the same subject to the tax.[18] Property intended to be relieved from the burden of taxation is usually protected by a special exemption based on the purposes for which it is used. Exempting statutes are strictly construed, and the exemption will not be recognized unless clearly conferred.[19] The

[7] Bradley v. Richmond, 110 Va. 521, 66 S. E. 872.

[8] Alderman v. Wells, 85 S. Car. 507, 67 S. E. 781, 27 L. R. A. (N. S.) 864n, 21 Ann. Cas. 193.

[9] State v. Little, 94 Ark. 217, 126 S. W. 713; Smith v. Farr, 46 Colo. 364, 104 Pac. 401; Smith v. Hamilton County Comrs., 173 Ind. 364, 90 N. E. 881.

[10] Booth v. Opel, 244 Ill. 317, 91 N. E. 458.

[11] Pennsylvania Co. v. Pittsburgh, 226 Pa. 322, 75 Atl. 421, 134 Am. St. 1063.

[12] Adam Smith, Wealth of Nations, bk. 4, Ch. 2.

[13] In re Delaware, L. & W. R. Co.'s Tax Assessment, 224 Pa. 240, 73 Atl. 429.

[14] In re Kissel's Estate, 65 Misc. 443, 121 N. Y. S. 1088.

[15] State v. Holcomb, 81 Kans. 879, 106 Pac. 1030, 28 L. R. A. (N. S.) 251n.

[16] McDaniel v. Texarkana Cooperage & Mfg. Co., 94 Ark. 235, 126 S. W. 727.

[17] Atherton v. Essex Junction, 83 Vt. 218, 74 Atl. 1118, 27 L. R. A. (N. S.) 695n, Ann. Cas. 1912a, 339n.

[18] People v. Duffy-McInnery Co., 122 App. Div. 336, 106 N. Y. S. 878.

[19] Young Women's Christian Assn. v. Spencer, 9 Ohio C. C. (N. S.) 351.

property usually exempted from taxation is that used for religious, educational, charitable, benevolent, and cemetery purposes. Exemptions are sometimes allowed to encourage certain industries,[20] to prevent double taxation,[21] and in favor of persons unable to pay.[22]

§ 632. The tax lien.—Tax liens are of purely statutory origin. In the absence of a statute making taxes a lien on real estate there can be no lien, and unless taxes are declared by positive law to be a lien upon the lands against which they are assessed, no such effect can be claimed for them.[23] The statutes usually provide when the lien for taxes will attach to the property. A day is usually designated from and after which a tax shall be a lien, but when no time is specifically designated the attaching of the lien should date from the time when, by the extension of the tax upon the assessment roll, a particular sum has become a charge upon a particular tract of land.[24] Prior to the date fixed by the statute, there exists nothing but a liability of the land to a future lien, though the taxes have been assessed.[25]

Taxes are an incumbrance within the covenant against incumbrances from the time they become a lien upon the land, whether this be from the date of the assessment or from the time fixed by statute, though they have not become due and payable at the time of the conveyance.[26] Assessments for street improvements which have not been laid at the time of a conveyance, though the improvements have already been made, are not within a covenant against incumbrances. Until the amount of a tax is ascertained in the manner prescribed by law, no lien or encumbrance exists by reason thereof.[27] A municipal claim for laying water pipes, not entered of record so as to preserve its lien, is not an incumbrance upon the land in the hands of a subsequent purchaser.[28] But, on the other hand, such assessments are an incumbrance

[20] Shreveport Creosoting Co. v. Shreveport, 119 La. 637, 44 So. 325.

[21] Inhabitants of Trenton v. Standard Fire Ins. Co., 76 N. J. L. 79, 68 Atl. 1111.

[22] New York v. Goss, 124 App. Div. 680, 109 N. Y. S. 151.

[23] Tompkins v. Little Rock & F. S. R. Co., 18 Fed. 344, 5 McCrary 597; Morrow v. Dows, 28 N. J. Eq. 459.

[24] Eaton v. Cheseboroug, 82 Mich. 214, 46 N. W. 365; Webb v. Bidwell, 15 Minn. (Gil. 394) 479.

[25] Bradley v. Dike, 57 N. J. L. 471, 32 Atl. 132.

[26] Campbell v. McClure, 45 Nebr. 608, 63 N. W. 920.

[27] Tull v. Royston, 30 Kans. 617, 2 Pac. 866; Lathers v. Keogh, 109 N. Y. 583, 17 N. E. 131.

[28] Stutt v. Building Assn., 12 Pa. Co. Ct. 344.

from the time the improvements were made according to the decisions in some states.[29] In other states the liability arises from the date of the order for the improvement, or for laying out the street.[30]

Generally the tax lien is a charge merely on each separate parcel for the assessments made thereon,[31] but sometimes the taxes assessed against a landowner are made a lien upon all his real estate indiscriminately, and in some states even the taxes assessed on his personal property is made a lien on his real estate.[32] Some statutes fix a date when the lien attaches, and also designate a subsequent date when the lien attaches as between the grantor and the grantee of the land.

It is important that a search be made for information concerning the levy and assessment of taxes affecting the land. When the date of the search is after the date when taxes are due and payable, and before the time fixed by the statute for the sale of the land for nonpayment of taxes, the abstract should show whether or not the taxes have been paid. A brief note in the appendices will answer for this purpose. But where no such taxes or assessments are found unpaid a statement of this fact is usually embodied in the final certificate of the abstracter.

§ 633. Tax titles.—Tax titles are to some extent uncertain, and usually depend upon numerous contingencies. The rule of caveat emptor applies with great strictness to a purchaser at a tax sale; and if he fails to secure a good title to the property he attempts to purchase, because of the invalidity of the tax sale, he can not recover the amount paid therefor unless some statute expressly provides such remedy.[33] The purchaser at such sale usually buys at a nominal price, and assumes the liability of having his title prove to be worthless. If he gets nothing by his purchase, he has, in the absence of a statutory provision, no recourse upon any one. The statutes of some states, however, entitle the purchaser to be subrogated to the benefit of the lien of the state discharged with the money paid by him, and the party seeking

[29] Hartshorn v. Cleveland, 52 N. J. L. 473, 19 Atl. 974; Lafferty v. Milligan, 165 Pa. St. 534, 30 Atl. 1030.

[30] Carr v. Dooley, 119 Mass. 294.

[31] Meriden v. Maloney, 74 Conn. 90, 49 Atl. 897; Toy v. McHugh, 62 Nebr. 820, 87 N. W. 1059.

[32] Union Trust Co. v. Weber, 96 Ill. 346; Miller v. Anderson, 1 S. Dak. 539, 47 N. W. 957, 11 L. R. A. 317.

[33] Mitchell v. Minnequa Town Co., 41 Colo. 367, 92 Pac. 678; American Inv. Co. v. Beadle, 5 S. Dak. 410, 59 N. W. 212.

to have the sale set aside must reimburse such purchaser to the extent of the taxes legally assessed, with costs of the sale and interest.[34] The effect of such a statute is to modify the rule of caveat emptor applicable to such sales.[35] Still other statutes allow the purchaser at a tax sale which is void for errors and omissions in the proceedings recourse upon the city or county by whose authority the sale was made.[36] So the extent of the purchaser's title in a particular case depends on the statute under which the sale was made. If the statute makes the lien for taxes a first claim on the property, paramount to all other claims and liens whatsoever, the tax lien attaches itself to the property without regard to individual ownership, and, if enforced by a sale of the land in conformity with law, the purchaser will take a valid and unimpeachable title.[37] In some states it is held that the land itself is sold at a tax sale, and not the title or interest of the owner.[38]

"A tax title, from its very nature, has nothing to do with the previous chain of title, and does not in any way connect itself with it. It is a breaking up of all previous titles. The party holding such title, in proving it, goes no further than his tax deed; the former title can be of no service to him, nor can it prejudice him. It was well said by counsel in argument on this point, that a tax sale operated on the property, not the title. In an ordinary case, it matters not how many different interests may be connected with the title, what may be the particular interest of the party in whose name the property may be listed for taxation; it may be a mere equitable right; if the land be regularly sold for taxes, the property accompanied with a legal title, goes to the purchaser, no matter how many estates, legal or equitable, may be connected with it. And in case the person in whose name it was listed, who had but an equitable title to the land at the time of the tax sale, gets a conveyance from the person holding the legal title, he can not avail himself of it. The land is gone, and another title has intervened."[39]

[34] Gage v. Pirtle, 124 Ill. 502, 17 N. E. 34; Barke v. Early, 72 Iowa 273, 33 N. W. 677.

[35] Joliet Stove Works v. Kiep, 230 Ill. 550, 82 N. E. 875, 12 Ann. Cas. 227.

[36] Logansport v. Case, 124 Ind. 254, 24 N. E. 88; Russell v. Hudson, 28 Kans. 99; Hart v. Smith, 44 Wis. 213.

[37] Tyrrel v. Wheeler, 123 N. Y. 76, 25 N. E. 329.

[38] Biscoe v. Coulter, 18 Ark. 423.

[39] Gwynne v. Niswanger, 20 Ohio 556. See also Langley v. Chapin, 134 Mass. 82; Kunes v. McCloskey, 115 Pa. St. 461, 9 Atl. 83.

Where the statute makes the lien for taxes a first claim on the property, superior and paramount to any and all claims and liens whatsoever, and the sale was had in conformity with all the statutory requirements, so as to invest the purchaser with the fee simple title to the land, even the claims of homestead and the inchoate right of dower will be divested.[40] Under this rule an easement granted by the owner to a third person will be extinguished by a sale of the servient estate for nonpayment of taxes.[41] In many of the states, however, the purchaser at a tax sale acquires only such title or estate as was vested in the person in whose name the taxes were assessed,[42] and he holds the land subject to liens having priority over the tax for which it was sold.[43]

Tax titles depend upon a strict compliance with all the provisions of law under which tax sales are made. Such sales have been held invalid for the most insignificant matters, and for this reason they have come to be looked upon with distrust and suspicion. But there is no just ground for such suspicion where the statute has declared such sales to be prima facie valid. If the tax or assessment was authorized by law, was laid or imposed in accordance with the statute, and all the requirements of the law preliminary to the sale and execution of the deed has been complied with, the title of the purchaser is at least the same as that of the person against whom the assessment was made, and if the statute makes the tax a paramount lien to all other claims, as heretofore explained, the purchaser obtains a good title.

§ 634. **Assessment of taxes.**—The statutes prescribe certain things that must be done respecting property to be taxed before any charge will be imposed thereon, and it is upon the proper performance of these preliminary steps that the validity of all future proceedings depend. The term "assessment" embraces all the acts precedent to the exercise of the power of imposing a charge on land for the payment of taxes, and these acts must be performed in the manner prescribed or the tax will be invalid.[44] A list is first prepared by the proper officer, comprising a description of all the persons or property within the particular jurisdic-

[40] McWhirter v. Roberts, 40 Ark. 283; Robbins v. Barron, 32 Mich. 36; Jones v. Devore, 8 Ohio St. 430.

[41] Hill v. Williams, 104 Md. 595, 65 Atl. 413.

[42] McDonald v. Hannah, 51 Fed. 73; Anderson v. Post (Tenn.), 38 S. W. 283.

[43] Cardwell v. Crumley (Tenn.), 35 S. W. 767.

[44] People v. Pearis, 37 Cal. 259; Sanford v. People, 102 Ill. 374.

tion and liable to contribute to the particular tax. This list is then turned over to the tax assessors who proceed to place a valuation on the property, thus forming the basis for an apportionment of the whole tax among the taxable persons within the particular jurisdiction. This list is commonly called a "tax list" or "assessment roll."

The listing and valuation of the property must be made by officers who are designated by law for the purpose, else the assessment will furnish no authority for any further proceedings.[45] But a mere de facto officer may levy a valid assessment.[46] Land must be properly assessed to resident or nonresident owners, and an error in this respect will make the assessment absolutely void.[47] The property listed must be described with such certainty as to distinguish it from every other tract.[48] The owner of the property must be named if known, as an assessment to one not the owner is void.[49] The assessment roll must also conform with all the statutory requirements relative to certification and sealing.[50] It is only when a tax deed is relied upon as a muniment of title that these antecedent proceedings become material and their notation in the abstract a matter of importance. But an assessment is not rendered invalid by harmless irregularities.[51] Regularity in assessment proceedings will be presumed,[52] but such presumption will not be carried to the extent of creating a presumption that the provisions of a permissive statute have been availed of.[53]

In practically all the states curative statutes have been enacted for the purpose of validating or legalizing defective assessments; but where an assessment has already been made, such a statute will not operate retroactively to cure it where there was a want of jurisdiction or authority to make it.[54]

§ 635. Description of land in assessment roll.—We have already said that the assessment roll must contain a sufficient de-

[45] Paldi v. Paldi, 84 Mich. 346, 47 N. W. 510.

[46] Welsh v. Briggs, 204 Mass. 540, 90 N. E. 1146.

[47] Clark v. Kirkland, 64 Misc. 585, 119 N. Y. S. 1117.

[48] King v. Booth, 94 Ark. 306, 126 S. W. 830.

[49] State Land Co. v. Mitchell, 162 Ala. 469, 50 So. 117.

[50] Linton v. Wanke, 118 N. Y. S. 965.

[51] Fleming v. Charnock, 66 W. Va. 50, 66 S. E. 8, 18 Ann. Cas. 711.

[52] California Domestic Water Co. v. Los Angeles County, 10 Cal. App. 185, 101 Pac. 547.

[53] Saranac Land & Timber Co. v. Roberts, 195 N. Y. 303, 88 N. E. 753.

[54] Reis v. Graff, 51 Cal. 86; Hart v. Henderson, 17 Mich. 218; Cromwell v. Mac Lean, 123 N. Y. 474, 25 N. E. 932.

scription of each parcel taxed. By this description the owner is informed of the claim on his property, and in case of nonpayment, an intending purchaser may know just what property will be offered for sale. The method sometimes employed of describing the land by giving its boundaries sometimes results in giving a confused and erroneous description, such as may result in invalidating the sale.[55] But this method of description must be resorted to where the land has not been laid off by government survey, or platted into city or town lots. To aid a description by boundaries the number of acres in the tract is often given, but it is held that a misstatement of the number of acres will not vitiate a description otherwise sufficient.[56] Where the statute requires the number of acres to be given the description will be fatally defective without it.[57]

City or town lots are usually described by giving the number of the lot and of the block, and the name of the subdivision or addition according to the recorded plat, with the name of the city or town. A mistake in the number of a town or city lot will not render the sale void if the description otherwise is such that the lot can be identified; but when the description is alike applicable to either of two lots, evidence aliunde must be produced for the purpose of identification.[58] Where the land is described by congressional survey the statutes usually authorize the use of abbreviations and figures in describing such land in tax assessments, and a description in this manner will be sufficient provided the land can be readily located by it. In some states if the name in which the land is assessed has become associated to the land by some known claim of title or possession, it is a source of indentification and will anwer for a description.[59]

§ 636. **The tax sale.**—The power to assess and levy taxes and to demand payment thereof is an essential and inherent attribute of sovereignty, but the right to make sale of property for the purpose of collecting taxes must be expressly given by statute.[60] The power to provide for the collection of taxes is implied from the power to assess.[61] We have said that a tax is not a debt

[55] Sutton v. Calhoun, 14 La. Ann. 209.

[56] Putnam v. Tyler, 117 Pa. St. 570, 12 Atl. 43.

[57] Weeks v. Waldron, 64 N. H. 149, 5 Atl. 660.

[58] Marsh v. Nelson, 101 Pa. St. 51.

[59] Glass v. Gilbert, 58 Pa. St. 266.

[60] McInery v. Reed, 23 Iowa 410; McPike v. Pen, 51 Mo. 63.

[61] Caldwell Land & Lumber Co. v. Smith, 146 N. Car. 199, 59 S. E. 653.

in the ordinary acceptation of that term, and consequently an action at law will not lie for its recovery, except where such action is authorized by statute.[62] But it has been held that where the statute makes provision for a tax, but is silent as to the method of collection, the implication is strong enough to warrant the remedy by a suit at law for its collection.[63] Where an ample and specific method of enforcing the collection of taxes is provided by statute, such method is exclusive.[64]

Each state prescribes its own method of procedure for the collection of taxes, and a discussion of these various methods would be impracticable. Whatever the method prescribed, the proceedings are summary in character, and a strict compliance with the statute is essential.[65] "Sales of real estate for the nonpayment of taxes must be regarded in a great measure as an ex parte proceeding. The owner is to be deprived of his land thereby; and a series of acts preliminary to the sale are to be performed to authorize it on the part of the assessors and collector, to which his attention may never have been particularly called; and experience and observation render it notorious that the amount paid by purchasers at such sales is uniformly trifling in comparison with the value of the property sold. It has therefore been held, with great propriety, that, to make out a valid title under such sales, great strictness is to be required; and it must appear that the provisions of law preparatory to and authorizing such sales have been punctiliously complied with."[66]

It is incumbent upon a party relying on a tax title to show that each step required under the law to be taken in reference to subjecting the property to taxation and a sale of it for taxes was strictly complied with.[67] The covenant of warranty does not pass to a subsequent purchaser at a tax sale, for the title under such deed is not derivative, but new and independent.[68]

Wherever a tax deed is relied upon as a muniment of title, the

[62] Baldwin v. Hewett, 88 Ky. 673, 11 Ky. L. 199, 11 S. W. 803; Packard v. Tisdale, 50 Maine 376; Detroit v. Jepp, 52 Mich. 458, 18 N. W. 217; Gatling v. Carteret Co., 92 N. Car. 536, 53 Ann. Rep. 432.

[63] Perry v. Selma &c. R. Co., 58 Ala. 546; Slack v. Ray, 26 La. Ann. 674.

[64] Clizer v. Krauss, 57 Wash. 26, 106 Pac. 145.

[65] Oliver v. Robinson, 58 Ala. 46; Millikan v. Patterson, 91 Ind. 515; Large v. Fisher, 49 Mo. 307.

[66] Brown v. Veazie, 25 Maine 359.

[67] Durrett v. Stewart, 88 Ky. 665, 11 S. W. 773; Ladd v. Dickey, 84 Maine 190, 24 Atl. 813.

[68] Bellows v. Litchfield, 81 Iowa 36, 48 N. W. 1062.

abstract must contain a full synopsis of each step in the proceeding leading up to the sale and execution and delivery of the deed. But where no such title is relied upon, the tax sale, if any has occurred, is usually shown as an incumbrance on the title by a brief mention of the fact of the assessment and sale, the date thereof, and the name of the purchaser, together with the record where the proceedings may be found. This is all that is required where the time of redemption has not expired or a deed has not been executed and delivered to the purchaser. It may be shown thus:

William Hannaman, by auditor to tax sale	Feb. 11, 1879. Book 6, page 43.
John C. S. Harrison,	Lot 25 in Robson and Voorhees' Add.

$94.47 for taxes of 1877 and 1878.

§ 637. **Collection by proceedings of forfeiture.**—Forfeiture of land to the state for the non-payment of taxes assessed against it is sometimes provided for, and in order to consummate such forfeiture no judgment or decree or other matter of record is necessary; the statute a proprio vigore effectively divests title out of the defaulting owner, and perfectly vests it in the state.[69] It is intended by this method to divest the owner of all title and to vest in the state a complete and indefeasible title. A subsequent sale of the land by the state is no part of the proceeding, and a sale by the state after the time for redemption has expired vests in the purchaser a good and indefeasible title. It has been doubted, however, whether such taking of property is consistent with the constitutional inhibition against taking private property without due process of law. The method has been repudiated in a number of well considered cases.[70]

The proceedings which operate to forfeit land to the state for non-payment of taxes must be strictly construed in a controversy between a purchaser from the state and the original owner.[71] After forfeiture to the state and before the redemption

[69] Lennig v. White (Va.), 20 S. E. 831.

[70] George v. Cole, 109 La. 816, 33 So. 784; Hill v. Lund, 13 Minn. (Gil. 419) 451; State v. Sponaugle, 45 W. Va. 415, 32 S. E. 283, 48 L. R. A. 727.

[71] Tolman v. Hobbs, 68 Maine 316.

period has expired, a continuation by the state to assess and collect taxes operates as a waiver of the forfeiture.[72]

The forfeiture may be noted in the abstract in the following manner.

John Jones to State of Virginia.	Forfeiture for non-payment of taxes. Sale Oct. 12, 1896. Record 45, page 18.

Lot 45 in Grove's Addition to the city of Richmond, Va., was forfeited to the state of Virginia, Oct. 25, 1896, for the non-payment of State and County taxes for 1894 and 1895, amount $25.00.

§ 638. **Who may be purchaser at tax sale.**—It is a well-established principle that one under a moral or legal obligation to pay taxes can not become a purchaser at a tax sale, either directly or indirectly,[73] and if he attempts to do so his purported purchase will merely amount to a payment of the taxes,[74] leaving the title in precisely the same position it would have occupied had he paid the taxes before the sale.[75] This rule applies to a person who is under obligation to pay a part of the taxes only, unless he has promptly paid his part thereof.[76] The owner of an interest in land can not purchase at a tax sale of the land and acquire a title which he can assert as against his cotenant.[77] But where an owner holds by a title acquired subsequent to the levy of the tax, and has not assumed its payment, or in any way become liable to see it paid, he may become a purchaser at the tax sale and acquire thereby any benefit that the tax title may afford.[78]

A tenant in possession under an agreement with the owner to pay taxes on the land can not obtain a tax deed upon such premises for taxes which accrued during his use and possession, and a

[72] Hodgdon v. Wight, 36 Maine 326.

[73] National Surety Co. v. Walker, 127 Iowa 518, 125 N. W. 492; Matthewson v. Hevel, 82 Kans. 134, 107 Pac. 768; Brooks v. Garner, 20 Okla. 236, 94 Pac. 694, 97 Pac. 995.

[74] McCune v. Goodwillie, 204 Mo. 306, 102 S. W. 997; Gibson v. Sexson, 82 Nebr. 475, 118 N. W. 77.

[75] Dunn v. Snell, 74 Maine 22; Downer v. Smith, 38 Vt. 464.

[76] Lewis v. Ward, 99 Ill. 525.

[77] Morris v. Gregory, 80 Kans. 626, 103 Pac. 137.

[78] Oswald v. Wolf, 129 Ill. 200, 21 N. E. 839.

tax deed so obtained is void and insufficient to start the statute of limitations.[79]

A mortgagor or his grantee can not, by acquiring a tax title upon the land, defeat the lien of the mortgagee.[80] It is generally the duty of a mortgagee in possession and receiving an income from the land to pay the taxes upon it; and therefore he is not allowed to suffer the land to be sold for taxes, and, upon purchasing it in, to set up this title as a bar to the mortgagor's redeeming. He is, on the contrary, regarded as holding this title in trust for the mortgagor's benefit.[81] He may, however, under some circumstances, acquire a tax title, and hold it adversely to the owner of the equity of redemption; but this is only when he is under no obligation himself to pay the taxes on which the sale was made.[82] A first mortgagee may cut off the lien of a second mortgagee by purchasing the property at a tax sale.[83]

It is generally held that one holding a judgment lien against land may become a purchaser at a tax sale of the land, and thereby defeat the lien of another incumbrancer.[84]

Where lands are owned by joint tenants, coparceners, or tenants in common, a co-tenant can not purchase the land at a tax sale and thereby acquire a title paramount to that of his cotenants. He has the same interest he had before the purchase, except that he has a claim upon the others for reimbursement according to their respective shares.[85] An owner of a life estate in land can not acquire an adverse title to the real estate as against the owner of the reversion by purchasing the same at a tax sale, where he was under obligation to pay the taxes.[86]

While the relation of principal and agent exists in relation to real estate owned by the principal, the agent can not become a

[79] St. Clair v. Craig, 77 Kans. 394, 94 Pac. 790, 101 Pac. 3.

[80] Middletown Savings Bank v. Bacharack, 46 Conn. 513; Jordan v. Sayre, 29 Fla. 100, 10 So. 823; Stinson v. Connecticut Mut. L. Ins. Co., 174 Ill. 125, 51 N. E. 193, 66 Am. St. 262; Cooper v. Jackson, 99 Ind. 566; Shrigley v. Black, 66 Kans. 213, 71 Pac. 301; Farmer v. Ward, 75 N. J. Eq. 33, 71 Atl. 401.

[81] Gorham v. Farson, 119 Ill. 425, 10 N. E. 1; Cauley v. Sutton, 150 N. Car. 327, 64 S. E. 3.

[82] Lawrence v. Lawrence, 145 Ky. 61, 140 S. W. 36; Hopkins v. Sanders, 172 Mich. 227, 137 N. W. 709.

[83] Connecticut Mut. L. Ins. Co. v. Bulte, 45 Mich. 113, 7 N. W. 707.

[84] Morrison v. Bank of Commerce, 81 Ind. 335; Contra, Fair v. Brown, 40 Iowa 209.

[85] Bissell v. Foss, 114 U. S. 252, 5 Sup. Ct. 851, 29 L. ed. 126.

[86] Howard Inv. Co. v. Benton Land Co., 5 Kans. App. 716, 46 Pac. 989; Stewart v. Matheny, 66 Miss. 21, 5 So. 387, 14 Am. St. 538; Phelan v. Boylan, 25 Wis. 679.

purchaser of such real estate at a tax sale.[87] But an agent for a non-resident land-owner, who has informed his principal of a pending tax sale and has been discharged, may acquire a valid title under a tax deed.[88]

§ 639. **Rights of purchaser at tax sale.**—We have said that the maxim caveat emptor applies with great strictness to tax sales. This rule has been held to extend not only to purchasers at tax sales, but to transferees of the title so acquired.[89] Before the expiration of the time allowed the owner to redeem the property the purchaser has neither the legal nor equitable title, nor is he entitled to possession of the land.[90] During the redemption period he has a statutory lien on the land for the amount of his purchase money with interest thereon and penalties, which lien becomes foreclosed by operation of law upon the expiration of the redemption period, and the execution and delivery to him of the tax deed vests in him a complete and indefeasible title.[91] Prior to the expiration of the period of redemption, the purchaser's title is inchoate as to persons authorized to redeem, but absolute as to all others.[92]

The purchaser at a tax sale acquires only such title as the delinquent owner had and he holds the land subject to liens having priority in time over the tax for which it was sold.[93] In some jurisdictions, however, the effect of a tax deed is to extinguish and destroy all prior grants, liens, charges, assessments and incumbrances upon the property conveyed, in existence at the time of levying the taxes upon which the tax deed rests, including all prior tax deeds and liens claimed for taxes paid on the property thereby conveyed.[94] But the purchaser at a valid tax sale takes title free from the ownership or incumbrance of rights previously existing which had been carved out of the property

[87] Bowman v. Officer & Pusey, 53 Iowa 640, 6 N. W. 28; Day v. Davey, 132 Mich. 173, 93 N. W. 256; State v. Unknown Heirs of Goldberg, 113 Tenn. 298, 86 S. W. 717; McMahon v. McGraw, 26 Wis. 614.

[88] Bemis v. Plato, 119 Iowa 127, 83 N. W. 83.

[89] Boyd v. Schlesinger, 59 N. Y. 301.

[90] Spaulding v. Elsworth, 39 Fla. 76, 21 So. 812.

[91] Douglass v. Dickson, 31 Kans. 310, 1 Pac. 541.

[92] Elrod v. Owensboro Wagon Co., 128 Ga. 361, 57 S. E. 712; Chandler v. Clark, 151 Mich. 159, 14 Det. Leg. N. 931, 115 N. W. 65.

[93] Cardwell v. Crumley (Tenn.), 35 S. W. 767; Anderson v. Post (Tenn.), 38 S. W. 283.

[94] Douglass v. Lowell, 64 Kans. 533, 67 Pac. 1106.

by an owner, or which had been acquired in it by prescription or otherwise.[95]

The statute of the particular state must be consulted as to the right to possession, rents and profits pending redemption, and also as to the rights of the purchaser as against lienors. As a general rule his rights can not be superior to those of the state and he can acquire no right if the state has no valid charge on the land.[96] The purchaser is usually entitled to a deed upon the expiration of the redemption period, and not before.

§ 640. Redemption from tax sale.—The period during which an owner is allowed to redeem his land from a sale thereof for taxes is fixed by statute, and is not uniform in the different states, ranging from six months in some states, to one, two, and three years in others. This right is governed by the law in force at the time of the sale.[97] In most states the period of redemption begins to run from the date of the sale, but where a deed is directed to be made to the purchaser at the time of the sale or within a limited time thereafter, the redemption period usually begins to run from the date of the filing and recording of the deed.[98] In computing the time when the redemption period expires, the day of the sale must be excluded, and the owner is allowed the whole of the last day in which to redeem.[99]

It is usually obligatory upon the party seeking to redeem that he pay or tender to the proper person, an amount sufficient to reimburse the purchaser.[1]

Only such persons may redeem from a tax sale as come within the terms of the statute, such as the owner[2] and persons having an estate or interest in the land which would be affected by the maturing of the tax title in the purchaser.[3] Thus, a mortgagee, even before condition broken, may protect his lien by redeeming the mortgaged premises after a sale for taxes.[4] Redemption by

[95] Tinsley v. Atlantic Mines Co., 20 Colo. App. 61, 77 Pac. 12; Hunt v. Boston, 183 Mass. 303, 67 N. E. 244; Abbott v. Frost, 185 Mass. 398, 70 N. E. 478.

[96] Burke v. Brown, 148 Mo. 309, 49 S. W. 1023.

[97] Merrill v. Dearing, 32 Minn. 479, 21 N. W. 721.

[98] West v. Duncan, 42 Fed. 430.

[99] Cromelien v. Brink, 29 Pa. St. 522.

[1] Solis v. Williams, 205 Mass. 350, 91 N. E. 148; Blanton v. Nunley, 55 Tex. Civ. App. 427, 119 S. W. 881.

[2] Bentley v. Cavallier, 121 La. 60, 46 So. 101.

[3] Parsons v. Prudential Real Estate Co., 86 Nebr. 271, 125 N. W. 521, 44 L. R. A. (N. S.) 666n; Buchanan v. Tennant, 55 Ore. 116, 105 Pac. 547.

[4] Ellsworth v. Low, 62 Iowa 178, 17 N. W. 450; People v. Edwards, 56 Hun 377, 10 N. Y. S. 335.

an heir to an undivided interest will inure to the benefit of all his co-heirs, but will not affect interests to which he is not an heir.[5]

The person offering to redeem need only show in himself a bona fide title of any kind, which may be lost or prejudiced by a failure to redeem the premises.[6] Upon a deposit being made with the proper officer of the redemption money, a certificate or receipt therefor is usually issued to the person redeeming. This certificate or receipt is then filed and recorded in the proper record, and is thereby made record evidence of redemption. The redemption, if made before the execution of the deed, divests the lien of the tax and leaves the title as free as before the sale.[7]

Care should be exercised to ascertain if a new lien for reimbursement in favor of the redemptioner has arisen by reason of others being jointly interested with him.[8] The abstracter's certificate being presumed a sufficient showing of the condition of the title at the date thereof, a special mention of redemption from a tax sale is not ordinarily deemed important. But the better practice would be to note the fact of redemption in all cases where it appears of record, and where there has been a tax sale, disclosed by a prior examination or during the period covered by the examination being made, and the period of redemption has not expired, the fact of no redemption should be noted.

§ 641. **Certificate of purchase at tax sale.**—Upon payment of the amount of his bid a purchaser at a tax sale is entitled to receive from the proper officer a certificate of purchase. This is sometimes in the form of a receipt for the amount of money paid, but its form is often prescribed by statute. It is generally required to state the year of the assessment,[9] sufficiently describe the property sold,[10] state the amount for which the sale was made, and fix the date of the expiration of the period of redemption.[11] A certificate which does not at least substantially conform to the statutory requirements is void.[12] "The certificate of purchase does not convey a legal title, but it is evidence of an equitable

[5] Russell v. Bell, 160 Ala. 480, 49 So. 314.

[6] Plumb v. Robinson, 13 Ohio St. 298.

[7] Lake v. Gray, 35 Iowa 44.

[8] Watkins v. Eaton, 30 Maine 529, 50 Am. Dec. 637.

[9] Preston v. Hirsch, 5 Cal. App. 485, 90 Pac. 965.

[10] Bank of Lemoore v. Fulgham, 151 Cal. 234, 90 Pac. 936.

[11] Bank of Lemoore v. Fulgham, 151 Cal. 234, 90 Pac. 936.

[12] Barker v. Muehler, 55 Wash. 411, 104 Pac. 637.

title to the land, and enables the purchaser to call in the legal title. And it savors so strongly of the realty that in our opinion it descends to the heir, and is not assets in the hands of the executor. The act provides that such certificates shall be assignable in law, and vest in the assignee, or his legal representative, all the right and title of the original purchaser."[13]

Under some statutes the certificate serves the same purpose as a tax deed.[14] Such certificate is usually assignable by the purchaser to any person capable of holding it, if the assignment be made in the form prescribed by statute. Some statutes require the assignment to be executed by a county officer. The certificate of purchase is seldom recorded, although many statutes make provision for such recording. But where such a certificate is found on the record it must be noted as a lien on the land, but if a tax deed has been executed and delivered to the holder of the certificate, only a brief mention of the certificate need be made.

A synopsis of a certificate of purchase should contain the essential facts recited therein. An example of such synopsis is submitted.

Auditor of Marion County, Ind.
to
Harry Hamlyn.

Certificate of sale.
Certificate No. 7250.
Register 13, page 117.

Said auditor certifies that he did, on the 4th day of March, 1910, sell at public auction, after due notice as required by law, to said Harry Hamlyn, the following described real estate situated in the city of Indianapolis, Marion County, Ind., to wit: [here describe real estate] at and for the price of $25.00, being the amount due for taxes, interest, charges and penalties on said land for the years 1908 and 1909, and that said Harry Hamlyn (or his assign) will be entitled to a deed of the same in two years from date, unless redeemed before that time. Signed by auditor of county.

§ 642. The tax deed.—As a general rule, the purchaser of real estate at a tax sale is not entitled to a deed until the period allowed for redemption has expired, and the statutes frequently impose certain formalities as conditions precedent to his obtain-

[13] Rice v. White, 8 Ohio 216.

[14] Clifford v. Hyde County, 24 S. Dak. 237, 123 N. W. 872.

ing the deed. Thus in some states he is required to produce the certificate of purchase;[15] in other states he is required to pay such legal fees as have accrued since the issue of the certificate;[16] and in still others he is required to produce a surveyor's report.[17] In some states he must make an affidavit showing service of notice on the owner to redeem.[18] Notice to the owner of the expiration of the period of redemption, usually including notice of the purchaser's intention to apply for a deed, must conform to statutory requirements strictly construed,[19] and must state the amount required to redeem[20] and properly describe the property.[21] Failure to give the required notice of the expiration of the period of redemption is a fatal defect in the purchaser's claim of title.[22] Upon compliance with all the preliminary steps required of the purchaser, and there being no redemption, he is entitled to a deed, and this deed if regularly made vests the title in the purchaser.[23]

§ 643. **Formal parts of the deed.**—Statutes usually prescribe the form and contents of a tax deed, and there must be at least a substantial compliance with the statutory form.[24] It must be properly executed,[25] and duly recorded within the time provided by the statute.[26] It is essential that the deed sufficiently set forth all the requisite recitals,[27] sufficiently designate the landowner, [28] state facts necessary to authorize the sale and conveyance,[29] show facts from which may be ascertained the amount of the delinquent taxes,[30] show facts from which may be ascer-

[15] Reed v. Merriam, 15 Nebr. 323, 18 N. W. 137.

[16] White v. Strahl, 17 Wis. 146.

[17] Orr v. Wiley, 19 W. Va. 150.

[18] Smith v. Prall, 113 Ill. 308, 24 N. E. 521.

[19] Lindsey v. Booge, 144 Iowa 168, 122 N. W. 819.

[20] Shine v. Olson, 110 Minn. 44, 124 N. W. 452, 19 Ann. Cas. 962.

[21] Wallace v. Weld, 145 Iowa 478, 124 N. W. 789.

[22] King v. Samuel, 7 Cal. App. 55, 93 Pac. 391.

[23] Byington v. Stone, 51 Iowa 317, 1 N. W. 647; Board of Regents v. Linscott, 30 Kans. 240, 1 Pac. 81; Langley v. Chapin, 134 Mass. 82.

[24] Seaverns v. Costello, 8 Ariz. 308, 71 Pac. 930; Simmons v. McCarthy, 118 Cal. 622, 50 Pac. 761; Sayre v. Sage, 47 Colo. 559, 108 Pac. 160; Rector & Wilhelmy Co. v. Maloney, 15 S. Dak. 271, 88 N. W. 575; Lain v. Cook, 15 Wis. 446.

[25] Norman v. Beekman, 58 Fla. 325, 50 So. 876; Huber v. Brown, 57 Wash. 654, 107 Pac. 850.

[26] Slocum v. McLaren, 109 Minn. 49, 122 N. W. 871.

[27] Charland v. Trustees of Home for Aged Women, 204 Mass. 563, 91 N. E. 146, 134 Am. St. 696; Shelton v. Franklin, 224 Mo. 343, 123 S. W. 1084.

[28] Proctor v. Nance, 220 Mo. 104, 119 S. W. 409, 132 Am. St. 555n.

[29] Houghton v. Kern Val. Bank, 157 Cal. 289, 107 Pac. 113.

[30] Finn v. Jones, 80 Kans. 431, 102 Pac. 479.

tained the amount of the consideration paid,[31] and show that the sale was held at the proper time.[32]

The deed should describe the land sold with such certainty that it may be readily identified.[33] The description must identify the land perhaps with greater certainty than an ordinary deed or the return of a levy on an execution. The deed must bear the proper date,[34] be duly acknowledged,[35] attested by the seal of the proper officer,[36] and filed in the proper office.[37]

In some states a tax deed does not confer any title until it is recorded; and in other states until it is confirmed by the state.[38] In brief, whatever recitals the statute requires the deed to contain must be inserted.[39] However, harmless error in a tax deed will not render it void.[40] The deed should be made to the purchaser at the sale, or to his assignee; and the deed in terms must show that it is so made.[41]

Where no form is prescribed by statute, the deed should contain at least the same requisites as ordinary deeds, and such additional matters as will show it to have been made in execution of the statutory power.[42] Where the officer has made a tax deed so irregular and imperfect that no title is passed by it to the purchaser, a second or other deed may be executed to correct such defective deed, if there has been a substantial compliance with all the steps necessary to a valid sale. The purchaser may compel, by mandamus, the execution of a correct deed,[43] but he can not resort to a court of equity to have the deed corrected.[44]

[31] Gibson v. Garst, 81 Kans. 741, 107 Pac. 40.

[32] Seals v. Perkins, 96 Miss. 704, 51 So. 806, 52 So. 584.

[33] Herod v. Carter, 81 Kans. 236, 106 Pac. 32; Lara v. Peterson, 56 Wash. 70, 105 Pac. 160.

[34] Glos v. Cass, 230 Ill. 641, 82 N. E. 827.

[35] Mathews v. Blake, 16 Wyo. 116, 92 Pac. 242, 27 L. R. A. (N. S.) 339n.

[36] Jackson v. McCarron, 77 Kans. 776, 95 Pac. 402.

[37] Brannon v. Pringle, 94 Miss. 215, 46 So. 161, 47 So. 674.

[38] Neal v. Wideman, 59 Ark. 5, 26 S. W. 16.

[39] Burden v. Taylor, 124 Mo. 12, 27 S. W. 349.

[40] Milburn v. Beaty, 81 Kans. 696, 106 Pac. 1065; Ensley v. Coolbaugh, 160 Mich. 299, 17 Det. Leg. N. 33, 125 N. W. 279; Peters v. Lohr, 24 S. Dak. 605, 124 N. W. 853.

[41] Krueger v. Knab, 22 Wis. 429.

[42] Pitkin v. Reibel, 104 Mo. 505, 16 S. W. 244.

[43] McCready v. Sexton, 29 Iowa 356, 4 Am. Rep. 214.

[44] Keepfer v. Force, 86 Ind. 81.

The abstract should contain a synopsis of all the essential recitals of the tax deed. The following example is submitted:

Charles F. Grant, Auditor of Marion County, Ind. to Arthur G. Fosdyke.	Tax Deed. Dated Feb. 18, 1899. Recorded Feb. 23, 1899. Land Record 34, page 394

Recites, that at a public sale of real estate for the non-payment of taxes, made in the county aforesaid on Jan. 5th, 1897, the following described real estate, to wit: [here describe real estate sold] was sold to said Arthur G. Fosdyke, for the sum of $75.00, that being the full amount of said taxes, interest and charges, and that a certificate of purchase therefor was duly issued to said purchaser, entitling him to a deed to said real estate (Certificate 35737, Register 13, page 117). Therefore, said county auditor, in consideration of the premises and by virtue of the statute, grants and conveys to said Arthur G. Fosdyke the real estate hereinbefore described, subject to any redemption provided by law. Signed by a said auditor, and attested by the official seal of the county. Acknowledged, Feb. 18, 1899.

§ 644. **Tax deeds as evidence in support of title.**—By some statutes a tax deed is made conclusive evidence of the regularity of all prior proceedings.[45] In some states it is held that a statute making a tax deed conclusive evidence of the regularity of the tax proceedings is held unconstitutional.[46] But as a general rule, the validity of a tax deed depends upon a strict compliance with all the requirements of the statute respecting the proceedings leading up to the deed. Even when the statute attempts to make the recitals of a deed prima facie evidence of the facts recited, yet a failure to comply with some of the essential steps in the proceedings will overthrow the prima facie character of the deed.[47] Thus if the assessment was illegal, the prima facie case made by the tax deed, conceding it to be sufficient in form, will be

[45] White v. Flynn, 23 Ind. 46; McCready v. Sexton, 29 Iowa 356, 4 Am. Rep. 214; Abbott v. Lindenbower, 42 Mo. 162; Magruder v. Esmay, 35 Ohio St. 221.

[46] Bradford v. Durham, 54 Ore. 1, 101 Pac. 897, 135 Am. St. 807.

[47] Bidleman v. Brooks, 28 Cal. 72; Ray v. Murdock, 36 Miss. 692; Johnson v. Elwood, 53 N. Y. 431.

overthrown.[48] Even if it is provided by statute that, as between the purchaser at the tax sale and the former owner of the property it shall be conclusively presumed that all the steps necessary to pass a good title have been duly and regularly taken, yet the former owner may show by pleading and proof that there is an infirmity in the assessment or sale.

Where the statute makes a tax deed prima facie evidence of the regularity of all the proceedings leading up to and including the execution of the deed, it is necessary for a person attacking the tax title to prove, either that the land described in the deed was not subject to taxation at the date of the assessment of the tax for which it was sold, or that the taxes for the nonpayment of which the land was sold were paid to the proper officer within the time limited by law therefor, or that the same had not been assessed for the taxes for the nonpayment of which it was sold, or that the same had been redeemed pursuant to law, or that a certificate in proper form had been given by the proper officer, within the time limited by law for paying taxes or for redeeming from sales made for the nonpayment thereof, stating no taxes were due at the time such sale was made, or that the lands were not subject to taxation.[49] In order to constitute prima facie evidence of title under such a statute the deed should recite enough of the proceedings to show authority for the sale.[50]

Unless the statute provides that the deed shall be evidence of the facts recited, the person claiming under the deed must prove that the requirements of the statute as to the tax proceedings have been complied with.[51] He has the burden of proving the truth of the recitals in his deed.[52] At common law, neither the tax deed nor its recitals are competent evidence of the existence, legality, or validity of the tax proceedings; but such proceedings must be proved as a preliminary step to the production of the deed as evidence of the title.[53]

§ 645. Legislation to strengthen tax titles.—The legislatures of the various states have frequently passed curative stat-

[48] Bidleman v. Brooks, 28 Cal. 72.

[49] Burns' Rev. Stat., Ind., 1914, § 10392.

[50] Woodward v. Sloan, 27 Ohio St. 592.

[51] Worthing v. Webster, 45 Maine 270, 71 Am. Dec. 543.

[52] Pierce v. Low, 51 Cal. 580.

[53] Emeric v. Alvarado, 90 Cal. 444, 27 Pac. 356; Bowen v. Swander, 121 Ind. 164, 22 N. E. 725; Rhodes v. Gunn, 35 Ohio St. 387.

utes for the purpose of validating or curing irregular and defective tax proceedings. Such acts have generally been held constitutional,[54] but have been objected to on the ground that they impair vested rights.[55] Such acts are regarded as valid so far as they attempt to validate the proceedings in respect to a particular step therein with which the legislature could have dispensed in the first place, but no further.[56] If the defect involves the authority of the taxing officers to act, or if it involves the omission of a step which the legislature could not have dispensed with, or if it consists of an irregularity which was beyond the power of the legislature to make immaterial, the statute will not cure it.[57]

Legislatures have also undertaken to strengthen titles of purchasers at tax sales by passing acts providing that the tax deed shall be prima facie evidence of the regularity of the proceedings leading up to and including the execution of the deed, and it has sometimes been made even conclusive evidence in this respect. The effect of these acts as affording evidence in support of tax titles was discussed in the preceding section.

Statutes usually impose a limitation on the right of the former owner to bring an action to test the validity of a tax sale. As a rule, the time within which such action must be brought is much shorter than that prescribed by the common law for the bringing of actions to try title to real estate. These statutes have the effect to strengthen that class of titles which depend upon tax sales. A literal application of some of these acts have the effect to make a tax title impervious to attack after the limitation has run, regardless of defects and irregularities in the proceedings under which title is claimed, and irrespective of possession or other circumstances usually deemed necessary in such cases. But these statutes have generally been held insufficient to validate sales which are void for want of jurisdiction on the part of the officials to make the sale.[58] The time from which such limitation begins to run varies in the different states. Thus it may begin to run from the notice of the sale,[59] or possession by the pur-

[54] Kearney v. Taylor, 15 How. (U. S.) 494, 14 L. ed. 787; Tifft v. Buffalo, 82 N. Y. 204; State v. Myers, 52 Wis. 628, 9 N. W. 777.

[55] Grim v. Weissenburg School Dist., 57 Pa. St. 433, 98 Am. Dec. 237.

[56] People v. Ingham Co., 20 Mich. 95.

[57] Exchange Bank Tax Cases, 21 Fed. 99; Johnston v. Sutton, 45 Fed. 296.

[58] In re Union College, 129 N. Y. 308, 29 N. E. 460.

[59] Hall v. Miller, 150 Mich. 300, 113 N. W. 1104.

chaser,[60] or the accrual of the attacking party's right of possession,[61] or the expiration of the time for redemption.[62]

§ 646. **Judgment for taxes.**—A tax, not being a debt in the ordinary sense of that word, can not, unless expressly so provided by statute, be enforced by the forms of action ordinarily applicable for the recovery of a debt.[63] In many states the sale of real estate for the non-payment of taxes, must be founded upon the judgment or order of a court of record.[64] The statutory provisions and conditions must be closely followed to authorize a sale under such judgment.[65]

In some states an action in personam against the delinquent may be maintained to recover the amount of taxes for which he is in default. Upon obtaining a judgment against him execution may issue and a levy be made on his real estate the same as in ordinary cases of judgment for money. In some states an action in assumpsit for delinquent taxes may be brought, and an execution upon the judgment obtained may be levied as well upon land as upon personal property. The judgment relates back to the assessments, and is a lien superior to all others. Errors, irregularities, or omissions in the assessment of land, do not go to the jurisdiction of a court to render judgment for taxes and are no ground for a collateral attack on the judgment.[66] But it is held that a tax judgment obtained under statutory provisions for the collection of taxes by judicial proceedings is not an ordinary money judgment, and does not expire by the statute of limitations.[67] When a judgment is recovered for back taxes, the lien of the taxes will not be merged in the judgment.[68]

§ 647. **Local assessments.**—A distinction is made between local assessments and taxes levied for general revenue purposes. An assessment for a local improvement is not a tax within the meaning of the constitutional provision requiring uniformity of

[60] Long v. Boast, 153 Ala. 428, 44 So. 955.
[61] Gannon v. Moore, 83 Ark. 196, 104 S. W. 139.
[62] Beatty v. O'Harrow, 49 Tex. Civ. App. 404, 109 S. W. 414.
[63] United States v. Chamberlain, 156 Fed. 881, 13 Ann. Cas. 720.
[64] Webster v. Chicago, 62 Ill. 302; Carlin v. Cavender, 56 Mo. 286.
[65] York v. Goodwin, 67 Maine 260.
[66] McNamara v. Fink, 71 Minn. 66, 73 N. W. 649.
[67] Hanson v. Franklin, 19 N. Dak. 259, 123 N. W. 386.
[68] Greenwood v. La Salle, 137 Ill. 225, 26 N. E. 1089; Beard v. Allen, 141 Ind. 243, 39 N. E. 665, 40 N. E. 654; Boyd v. Ellis, 107 Mo. 394, 18 S. W. 29.

taxation.[69] Local assessments are charges laid upon individual property because the property upon which the burden is imposed receives a special benefit which is different from the general one which the owner enjoys in common with other citizens.[70] The authority to levy assessments upon property for local improvements may be delegated to local governmental instrumentalities. The authority, however, is not inherent in any public corporation, but must be directly conferred by statute.[71] Where the statute from which the authority is derived prescribes the mode in which it shall be exercised, that mode must be strictly pursued.[72] There may be in existence at the same time two complete and distinct systems of making and enforcing local assessments.[73] The legislature may provide for the collection of local assessments by a summary method,[74] or it may provide for their collection by an ordinary suit in equity or in an appropriate action at law.[75] Whatever steps the statute requires must be taken or no title will pass upon the sale on the assessment.[76] Some statutes authorize a proceeding by application to a court, where an assessment is delinquent, for a judgment and sale of the property. This has been held to be a proceeding in rem.[77] But the most common method of enforcing local assessments is by a suit in equity in the nature of a foreclosure suit. Whatever may be the method employed, a strict compliance with the provisions of the statute is necessary to vest title in the purchaser.

Search must be made by the abstracter for unpaid assessments against the property, and should he find any remaining unsatisfied at the time of the examination, a brief statement of all the essential particulars of the assessments should be included. This statement properly belongs in the appendix in connection with

[69] Denver v. Knowles, 17 Colo. 204, 30 Pac. 1041, 17 L. R. A. 135; Rolph v. Fargo, 7 N. Dak. 640, 76 N. W. 242, 42 L. R. A. 646.

[70] Lamar Water Co. v. Lamar, 128 Mo. 188, 26 S. W. 1025, 31 S. W. 756, 32 L. R. A. 157.

[71] Sargent v. Tuttle, 67 Conn. 162, 34 Atl. 1028, 32 L. R. A. 822; Rochester v. Rochester R. Co., 182 N. Y. 99, 74 N. E. 953, 7 L. R. A. 773.

[72] Tulare Irrigation Dist. v. Shepard, 185 U. S. 1, 22 Sup. Ct. 531, 46 L. ed. 773.

[73] Robinson v. Rippey, 111 Ind. 112, 12 N. E. 141.

[74] Barber Asphalt Pav. Co. v. Hezel, 155 Mo. 391, 56 S. W. 449, 48 L. R. A. 285.

[75] Dowell v. Talbot Pav. Co., 138 Ind. 675, 38 N. E. 389.

[76] Goring v. McTaggart, 92 Ind. 200.

[77] St. John v. East St. Louis, 50 Ill. 92.

statements regarding other unpaid taxes and tax sales, should any exist.

Special assessments may be shown as follows:

LOCAL ASSESSMENTS

Assessment for local sewer in Linwood Ave. Approved Sept. 9, 1912, payable under Barret Law, $34.95 on lot 54 in Charles M. Cross, Trustee's Clifford Ave. Addition to the city of Indianapolis, Ind.

CHAPTER XXVIII

ACTIONS AND PROCEEDINGS AFFECTING TITLE TO REAL ESTATE

SEC.
650. Jurisdiction in general.
651. Legal or equitable jurisdiction.
652. Jurisdiction in rem and jurisdiction in personam.
653. Probate jurisdiction.
654. Lands in another county or in several counties.
655. Lands in another state.
656. Jurisdiction of particular actions.
657. Record of equitable proceedings as notice.
658. Process.
659. Style and contents of process.
660. Service of the process.
661. Service by publication.
662. Return and proof of service.
663. Effect of appearance without process.
664. Reports of referees and masters in chancery.
665. Verdicts.
666. Abstracting equitable proceedings.
667. Injunctions.
668. Ejectment.
669. Action to quiet title.
670. Partition.
671. Action for specific performance.
672. Redemption by bill in equity.
673. Rescission and cancellation.
674. Foreclosure in equity.
675. Assignment of dower.
676. Divorce proceedings.
677. Condemnation proceedings.
678. Construction of wills.

§ 650. Jurisdiction in general.—It has often been said that jurisdiction is the power to hear and determine a case, and this is the generally accepted definition of the word.[1] The phrase "the power to hear and determine," does not mean, when rightly interpreted, the authority to judge what settled law declares can not be decided in any one of the general class of cases to which the case before the court belongs. Where the general authority ends jurisdiction ceases, but as long as the general authority exists, jurisdiction continues. If, therefore, the court having authority over a general class of cases should err in its judgment in a particular case, the judgment is not void, for jurisdiction is not lost. Where, however, the judgment is entirely outside of the kind or species of judgments proper in the general class of cases, it is effective against all within the class of judgments that may be rendered in the general class of cases, it is effective against all collateral assaults.[2]

[1] Smith v. Adams, 130 U. S. 167, 9 Sup. Ct. 566, 32 L. ed. 895; Tucker v. Sellers, 130 Ind. 514, 30 N. E. 531.

[2] Ex parte Yarborough, 110 U. S. 651, 4 Sup. Ct. 152, 28 L. ed. 274; Ex parte Gordan, 92 Cal. 478, 28 Pac. 489, 27 Am. St. 154; People v. Liscomb, 3 Hun 760, 6 Thomp. & C. 258 (rev'd., 60 N. Y. 559, 19 Am. Rep. 211).

The right to hear and determine judicial controversies resides solely in judicial tribunals. Where no tribunal can by any legal possibility have an existence there can be no jurisdiction. Thus a court having exclusive jurisdiction in criminal cases is as no court in suits to foreclose mortgages. Where there is authority over a general class of cases but none over a particular member of the class, then, a timely objection may be fatal to the exercise of jurisdiction in the particular instance.

It is undoubtedly true that authority over the person is essential to the existence of plenary jurisdiction, but it is to be borne in mind that jurisdiction to render decrees or judgments affecting property may exist, although, in the strict sense, there is no complete jurisdiction of the person.

In a broad sense the jurisdiction of the courts is derived from the law of the land.[3] Consent of the parties can not confer jurisdiction of the general subject-matter.[4] Neither can a court give itself jurisdiction of the subject-matter by reciting in its record that it has jurisdiction. And where the record is silent as to jurisdictional facts, no inference or intendment against the proceedings is authorized.[5]

In courts of general or superior jurisdiction, the right to jurisdiction is a presumption of law in favor of such courts; but in courts of limited or inferior jurisdiction, no such presumption exists, and all the facts necessary to give such courts jurisdiction in any particular matter must appear upon the face of the proceedings, or no valid judgment can be rendered.[6]

In the examination of the record of an action or proceeding affecting a particular title, care should be exercised in determining whether the court had authority under the law to entertain the suit, or whether the court had authority to entertain the suit against the defendant as the owner of the land. In other words, jurisdiction of the subject-matter and of the parties must be in-

[3] Martin v. Hunter's Lessee, 1 Wheat. (U. S.) 304, 4 L. ed. 97; Missouri River Tel. Co. v. First National Bank, 74 Ill. 217.

[4] Smith v. Myers, 109 Ind. 1, 9 N. E. 692, 58 Am. Rep. 375; Hawkins v. Hughes, 87 N. Car. 115; Weeden v. Richmond, 9 R. I. 128, 98 Am. Dec. 373.

[5] Dequindre v. Williams, 31 Ind. 444.

[6] Ex parte Watkins, 3 Pet. (U. S.) 193, 7 L. ed. 650; Jackson v. State, 104 Ind. 516, 3 N. E. 863; Cooper v. Sunderland, 3 Iowa 114, 66 Am. Dec. 52.

quired into, and the abstract must contain every statement of the record pertaining to such jurisdiction.

§ 651. Legal or equitable jurisdiction.—The jurisdiction of the courts of chancery was anciently regarded as "the extraordinary jurisdiction," and that of the courts of law as the ordinary jurisdiction. It is still true that courts of law are those of ordinary jurisdiction and that where a right is created and no provision made for its enforcement, jurisdiction will fall to the courts of law unless the case is one legitimately belonging to the courts of equity jurisdiction. But the jurisdiction of courts of equity is now so well defined by precedent and practice that where a right is created requiring for its enforcement the machinery of a court of equity it will be held that the case is one of equity cognizance, but where there is no equitable feature impressed upon the case by the statute by which it was created it will fall to the court of ordinary jurisdiction.[7]

As is true of law jurisdiction, the jurisdiction of equity is determined by a decision of the question whether the particular case in which the court is asked to pronounce a decree is a member of a general class over which the courts of equity have authority. Whether relief shall be granted or denied in a particular instance is not the test of jurisdiction. Thus, if a bill is filed asking the foreclosure of a mortgage the equitable jurisdiction is invoked and is not affected by any consideration relating solely to the merits of the particular controversy. Where equity assumes jurisdiction, although wrongfully, the decree is not void.[8] Where the jurisdiction is in equity a decree is as effective as is a judgment of a law tribunal in a matter of which it has jurisdiction.[9] It is a general rule that courts of equity will not entertain jurisdiction where the party has a complete and adequate remedy at law.[10] Where the main features of a case are equitable, they control the incidents.[11] Equity will not permit litigation by piecemeal, but will determine the whole controversy, so as to prevent

[7] Cummings v. National Bank, 101 U. S. 153, 25 L. ed. 903; Ellis v. Davis, 109 U. S. 485, 3 Sup. Ct. 327, 27 L. ed. 1006.

[8] Kilbourn v. Sunderland, 130 U. S. 505, 9 Sup. Ct. 594, 32 L. ed. 1005; Mellen v. Moline Iron Works, 131 U. S. 352, 9 Sup. Ct. 781, 33 L. ed. 178.

[9] Faught v. Faught, 98 Ind. 470.

[10] Ashhurst v. McKinzie, 92 Ala. 484, 9 So. 262; Porter v. Frenchman's Bay &c. Co., 84 Maine 195, 24 Atl. 814; Kelley v. Kelley, 80 Wis. 486, 50 N. W. 334.

[11] Brighton v. White, 128 Ind. 320, 27 N. E. 620.

future litigation.[12] But the rule that courts of equity having jurisdiction for one purpose will proceed to settle all matters germane to the disputed question can not be invoked in cases where the equitable jurisdiction of the court can not be exercised until it judicially determines a question of which it has no equitable jurisdiction.[13] By virtue of statutes in many states, a defendant in an action on a contract is allowed to interpose a special plea setting up any matter which would entitle him to relief in equity against the obligation thereof.[14] Equity will not assume jurisdiction where there is an adequate remedy at law, and this rule prevails even in those states where the statute declares that the distinction between law and equity is abolished.[15]

§ 652. Jurisdiction in rem and jurisdiction in personam.—A judicial proceeding against property or against a thing is a proceeding in rem, but there are proceedings in rem which are not in the true sense proceedings against the res.[16] A prominent characteristic of a proceeding in rem is that it is effective against all the world. This is true of all classes of proceedings in rem, as well of those called quasi proceedings in rem as of those which are strictly in rem. A proceeding in attachment is generally regarded as a quasi proceeding in rem. It is not strictly a proceeding in rem, for the rights of the person are often involved. Probate proceedings are also quasi in rem. The estate is regarded as the res, and the proceedings are, therefore, in the nature of proceedings in rem.[17] Where a sale is ordered of real property by a court of competent jurisdiction in the exercise of its probate authority the proceedings are regarded by some of the courts as in rem,[18] but by other courts a different view is taken.[19] Cases in which the relief sought is the enforcement of a lien against real estate are usually considered as quasi proceedings in rem. The fact that there must be some notice to the person makes the proceeding not strictly in rem.[20] Where the jurisdiction is purely

[12] Watson v. Sutro, 86 Cal. 500, 21 Pac. 172, 25 Pac. 64.

[13] Tecumseh Iron Co. v. Camp, 93 Ala. 572, 9 So. 343.

[14] Dunn v. White, 1 Ala. 645.

[15] Buzard v. Houston, 119 U. S. 347, 7 Sup. Ct. 249, 30 L. ed. 451; Hower v. Weiss, Malting &c. Co., 55 Fed. 356.

[16] Cross v. Armstrong, 44 Ohio St. 613, 10 N. E. 160.

[17] Gaines v. Fuentes, 92 U. S. 10, 23 L. ed. 524, 1 Abb. N. C. 25n; Brown v. Brown, 86 Tenn. 277, 6 S. W. 869, 7 S. W. 640.

[18] Hood v. Hood, 110 Mass. 463.

[19] Good v. Norley, 28 Iowa 188.

[20] Arndt v. Griggs, 134 U. S. 316, 10 Sup. Ct. 557, 33 L. ed. 918.

in rem the proceedings are directly against the thing, and hence it is not necessary that there should be any personal defendant present.[21] Where the proceedings are against the property, that is, are proceedings in rem in the narrow and strict sense of the term, possession actual or constructive is essential to the existence of jurisdiction.[22]

A fundamental requisite to jurisdiction of the person is that of notice. No judgment can be valid as against a person unless he has notice according to law. A decree of a court of equity directing specific performance of a contract concerning land directly affects the person, as does a decree for the cancelation of a deed, or a decree directing the rescission of a contract. Where the person is acted upon by a judgment or decree the proceeding is in personam, although real estate may be involved. If a personal judgment is sought there must be notice other than by publication.[23]

In theory the decree of a court of equity acts only upon the conscience of the party, but practically they do act upon the property. Thus, in the great class of cases where decrees enforcing the specific performance of contracts concerning land are granted, the decree necessarily and vitally affects the question of title, and yet it is firmly settled that a suit to enforce such a contract is a proceeding in personam and not in rem, and may be maintained where there is jurisdiction of the person, although the land involved may be situated in another state.[24]

§ 653. **Probate jurisdiction.**—The constitution of many of the states establishes or provides for the establishment of courts of probate, yet they derive all their powers from the statutes regulating them.[25] They can exercise such jurisdiction only as is directly conferred upon them by the statute, [26] or necessary to carry out some power so conferred.[27] So unless a warrant for the exercise of jurisdiction in any particular case can be found

[21] Belcher v. Chambers, 53 Cal. 635; Billings v. Kothe, 49 Iowa 34.

[22] Markle v. Akron, 14 Ohio 586.

[23] St. Clair v. Cox, 106 U. S. 350, 1 Sup. Ct. 354, 27 L. ed. 222.

[24] Watkins v. Holman, 16 Pet. (U. S.) 25, 10 L. ed. 873; Monnett v. Turpie, 132 Ind. 482, 133 Ind. 424, 32 N. E. 328.

[25] Tucker v. Harris, 13 Ga. 1, 58 Am. Dec. 488; Pennisson v. Pennisson, 22 La. Ann. 131; Pelham v. Murray, 64 Tex. 477.

[26] Shafer v. Shafer, 85 Md. 554, 37 Atl. 167; Bramell v. Cole, 136 Mo. 201, 37 S. W. 924, 58 Am. St. 619.

[27] In re Verplanck, 91 N. Y. 439.

in the statute, given either expressly or by implication, the whole proceeding is void.[28]

Many states have created courts whose jurisdiction is confined exclusively to probate matters; while in other states probate jurisdiction is conferred upon courts of plenary powers, or upon circuit courts, all of which, however, are known as courts of probate jurisdiction when exercising authority over probate matters. The jurisdiction of circuit courts in probate matters are separate and distinct from its general jurisdiction in civil cases and must be exercised under different forms and modes, and this jurisdiction is in all cases strictly statutory.[29] Such courts, in the exercise of their probate jurisdiction and powers with which they are invested by statute in respect to the estates of decedents, have the right or power, when the necessity of the case demands, to determine either legal or equitable questions, when they are properly presented, or arise in the course of probate jurisdiction, and to award all necessary relief, whether legal or equitable.[30] The statutes usually require a record of the proceedings in probate courts to be kept, and this record is evidence of the acts of such courts.[31]

The question of jurisdiction most frequently arises in connection with the sale of real estate by order of the probate court, and in those states where such courts are held to be inferior tribunals of special and limited jurisdiction every power must be strictly executed, and every prescribed formula observed. No presumptions are allowed, in favor of such courts. The record must show every fact which was necessary to authorize the order or decree, or it is void when questioned either directly or collaterally.[32]

§ 654. Lands in another county or in several counties.— The general rule is that actions affecting the title to land, to recover possession thereof and to recover for injuries thereto must be brought in the county where the land is situated. These actions are local and the venue is to be laid in the county where the land is situated.[33] The general doctrine is carried very far by

[28] Smith v. Howard, 86 Maine 203, 29 Atl. 1008, 41 Am. St. 537; Riggs v. Cragg, 89 N. Y. 479, 11 Abb. N. C. 401.

[29] Noble v. McGinnis, 55 Ind. 528.

[30] Galvin v. Britton, 151 Ind. 1, 49 N. E. 1064; Hyland v. Baxter, 98 N. Y. 610.

[31] State v. Chrisman, 2 Ind. 126.

[32] Haynes v. Meeks, 20 Cal. 288; Vance v. Maroney, 4 Colo. 47; Seymour v. Seymour, 22 Conn. 272.

[33] Thorn v. Maurer, 85 Mich. 569, 48 N. W. 640; Kipp v. Cook, 46 Minn. 535, 49 N. W. 257; Bent v. Maxwell, &c. R. Co., 3 N. Mex. (Gild.) 227,

many of the cases, for it is held that if a local action is brought in the wrong county all the proceedings are void, no matter what the defendant may do.[34] While power to adjudicate upon a subject-matter which can have no existence save at a fixed place pertains to the courts established for that place,[35] other courts may have jurisdiction for the purpose of adjudicating personal rights of parties present in court which are in respect to, but do not directly affect, such subject-matter. Thus a court having jurisdiction of parties to a trust estate in land outside the county may order the trustee to execute a deed thereof pursuant to a judgment settling rights of parties therein, and such deed will pass a valid title.[36] Also a county court has jurisdiction to decree partition of several tracts of land partly within and partly without the county, where each are owned in common by the same parties.[37] It is held that where a court of one county has jurisdiction of the parties and the original controversy, it may decree a sale of the land in another county as incidental to the relief originally sought.[38]

Actions for foreclosure of mortgages are generally required by statute to be brought in the county where the mortgaged premises or some part thereof are situated. Such a statute gives to a mortgagee whose mortgage covers several disconnected tracts of land in different counties the right to foreclose as to all of them by a single suit, in any county where one tract is situated.[39] Where, however, separate mortgages are given upon land in separate counties and each secures a part of the debt, there must be separate foreclosures in the separate counties.[40] It is doubtful whether the parties may confer jurisdiction by consent in any other county than that in which the statute says the action must be instituted.[41] The titles to the land can not be investigated.[42]

3 Pac. 721; Thomson v. Locke, 66 Tex. 383, 1 S. W. 112.

[34] Spalding v. Kelly, 66 Mich. 693, 33 N. W. 803; In re Hayes' Appeal, 123 Pa. St. 110, 16 Atl. 600.

[35] Puget Sound Nat. Bank v. Fisher, 52 Wash. 246, 100 Pac. 724.

[36] Steele v. Bryant, 132 Ky. 569, 116 S. W. 755.

[37] Middlecoff v. Cronise, 155 Cal. 185, 100 Pac. 232, 17 Ann. Cas. 1159.

[38] Doty v. Deposit Bldg. & L. Assn., 103 Ky. 710, 20 Ky. L. 625, 46 S. W. 219, 43 L. R. A. 551, 554.

[39] Stevens v. Ferry, 48 Fed. 7; Empire State Surety Co. v. Ballou, 66 Wash. 76, 118 Pac. 923.

[40] Citizen's Nat. Bank. v. Abbott, 72 Wash. 73, 129 Pac. 1085.

[41] Silcox v. Jones, 80 S. Car. 484, 61 S. E. 948. But see Snyder v. Pike, 30 Utah 102, 83 Pac. 692.

[42] Palmer v. Mead, 7 Conn. 149.

§ 655. **Lands in another state.**—It is a fundamental rule that no state court can have jurisdiction beyond the limits of the state of its creation.[43] Thus the courts of one state can not render judgment for possession of lands in another state, or for damages arising from injuries to such lands.[44] Nor can the legislature of one state, by mere enactment, without the co-operation of an adjoining state, extend its territorial jurisdiction at the expense of the latter state and thereby invest its courts with extra-territorial jurisdiction over lands of the other state.[45]

A judgment or decree of a court of one state has no effect to pass title to, or to affect, land in another state, nor can a sale or conveyance under it by a trustee or commissioner do so,[46] but where a court has jurisdiction of the parties, it may decree a conveyance of real estate by those parties, although the land be situated in another state.[47]

A court of one state has no jurisdiction to decree a foreclosure of a lien on lands situated in another state.[48] But when a court of equity has acquired jurisdiction over the person of a party in a proper case, it may, by virtue of its power to coerce obedience to its decrees, enforce the performance of contracts relating to land situated in another state.[49] Such court, however, has no power to divest title to real estate situated in another state.[50]

While it is true that the courts of one state can not, by any decree, directly affect any interest in lands situated in another state, it is also true that the courts of one state may render a valid judgment, directing the parties properly before the court to do or perform certain acts in reference to the title to certain lands in another state, and such judgment, when properly pleaded, may be the basis of a cause of action or defense in a proceeding in the state where the land is situated, and when so pleaded is conclusive.[51]

[43] Booth v. Clark, 17 How. (U. S.) 322, 15 L. ed. 164; Lovejoy v. Albee, 33 Maine 414, 54 Am. Dec. 630.

[44] Dubreuil v. Pennsylvania R. Co., 130 Ind. 137, 29 N. E. 909; Allin v. Connecticut River Lumber Co., 150 Mass. 560, 23 N. E. 581, 6 L. R. A. 416.

[45] Rober v. Michelsen, 82 Nebr. 48, 116 N. W. 949.

[46] Wilson v. Braden, 48 W. Va. 196, 36 S. E. 367.

[47] Muller v. Dows, 94 U. S. 444, 24 L. ed. 207; Noble v. Grandin, 125 Mich. 383, 84 N. W. 465.

[48] Richard v. Boyd, 124 Mich. 396, 83 N. W. 106.

[49] King v. Pillow, 90 Tenn. 287, 16 S. W. 469.

[50] Winn v. Strickland, 34 Fla. 610, 16 So. 606.

[51] Burnley v. Stevenson, 24 Ohio St. 474, 15 Am. Rep. 621.

In cases of fraud, of trust, and of contract the jurisdiction of a court of chancery is sustainable wherever the person is found, although lands not within the jurisdiction of the court may be affected by the decree.[52] A court of equity having obtained jurisdiction of the parties, as affecting real estate in another state, may authorize jurisdiction to appoint a trustee,[53] or to restore a lost deed.[54] The courts of a state have jurisdiction of an action founded on an instrument by which the defendant in the action, purchasing land in another state, agreed to allow the plaintiff a certain portion of the net profits upon a sale of the land.[55]

§ 656. Jurisdiction of particular actions.—The particular actions affecting real estate which must be brought in the county where the land or some portion thereof is situated are, actions to quiet title;[56] actions to enforce liens;[57] actions for foreclosure of mortgages;[58] actions for trespass for an injury to land;[59] actions for the enforcement of a vendee's lien;[60] actions for the specific performance of contracts of sale;[61] actions for destruction of growing crops;[62] an action to declare a mortgage executed by a trustee on land a prior lien;[63] action to declare one a trustee of lands;[64] action to cancel a mortgage and to expunge the record thereof;[65] and an action to enforce a bond given for the purchase price of real estate.[66] These actions are local, and disclose a tendency of the decisions to enlarge the rule that prevailed at common law and place in the class of local actions all actions that in any wise concern the possession of land, the estate therein or injuries thereto.

The following actions are transitory and need not be brought

[52] King v. Pillow, 90 Tenn. 287, 16 S. W. 469.

[53] Smith v. Davis, 90 Cal. 25, 27 Pac. 26, 25 Am. St. 92.

[54] Pillow v. King, 55 Ark. 633, 18 S. W. 764.

[55] McDonald v. Dexter, 234 Ill. 517, 85 N. E. 209.

[56] Urton v. Woolsey, 87 Cal. 38, 25 Pac. 154.

[57] Cobbey v. Wright, 29 Nebr. 274, 45 N. W. 460.

[58] Staacke v. Bell, 125 Cal. 309, 57 Pac. 1012; Urmston v. Evans, 138 Ind. 285, 37 N. E. 792.

[59] Grace v. Cox, 16 Ind. App. 150, 44 N. E. 813.

[60] Bullitt v. Eastern Ky. Land Co., 99 Ky. 324, 18 Ky. L. 230, 36 S. W. 16.

[61] State v. Superior Court, 13 Wash. St. 187, 43 Pac. 19.

[62] Keaton v. Snider, 14 Ind. App. 66, 42 N. E. 372.

[63] Staacke v. Bell, 125 Cal. 309, 57 Pac. 1012.

[64] Booth v. Bradford, 114 Iowa 562, 87 N. W. 685.

[65] Kommer v. Harrington, 83 Minn. 114, 85 N. W. 939.

[66] Connor v. Dillard, 129 N. Car. 50, 39 S. E. 641.

where the land lies, but the jurisdiction is in the county of the defendant's residence; action to cancel a mortgage on the ground of fraud;[67] action to compel specific performance of an agreement to convey land, if the defendant's obligation is in contract, merely, without any element of trust;[68] action for the vacation of a judgment constituting a lien on land;[69] and an action to set aside an administrator's sale.[70]

Actions of the character mentioned above are termed transitory actions. Whether an action is local or transitory depends to a very great extent upon the statutes of the different states.

§ 657. Record of equitable proceedings as notice.—Where the title to any particular real estate has been the subject of litigation, or has been affected by the judgment or decree of a court, a subsequent purchaser thereof takes subject to every defect or irregularity which affirmatively appears from the record of the proceedings. This is certainly true where such purchaser had notice of the defect or irregularity, or where by the exercise of reasonable diligence, he might have obtained notice from a search of the records and documents accessible to him.[71] If he was a purchaser of the property at a judicial sale he is presumed to have notice of a want of jurisdiction appearing from the record of the proceedings under which he purchased.[72] He is bound to see that all the persons who were necessary to convey the title were before the court, and that the sale was made in accordance with the decree.[73] Although a court of equity has sold real estate, yet the purchaser is bound to ascertain that all the judgment creditors having legal liens has come in under the decree, for any one who did not might enforce his judgment against the purchaser although he paid the whole of the purchase-money into court. A purchaser must acquaint himself with all the facts disclosed by the court's record in any case affecting the title to the premises. But the purchaser is not bound to look beyond the judgment or decree, and the legal effect it may have on the title which is the subject of inquiry.[74]

[67] Shouse v. Taylor, 115 Ky. 22, 24 Ky. L. 1842, 72 S. W. 324.
[68] Close v. Wheaton, 65 Kans. 830, 70 Pac. 891.
[69] State v. District Court, 85 Minn. 283, 88 N. W. 755.
[70] Smith v. Barr, 76 Minn. 513, 79 N. W. 507.
[71] Smith v. Winn, 38 S. Car. 188, 17 S. E. 717, 751.
[72] Campbell v. McCahan, 41 Ill. 45.
[73] Daniel v. Leitch, 13 Grat. (Va.) 195.
[74] Dugan v. Follett, 100 Ill. 581.

§ 658. **Process.**—The ordinary method of bringing an action or suit is to file a bill, petition or complaint with the clerk of the proper court and to cause a summons to be issued thereon. It is a maxim of jurisprudence as well as a constitutional provision that every one is entitled to his day in court, and that no one shall be condemned unheard. Hence, the necessity for process notifying and summoning the defendant to appear in court to answer the complaint against him. This process issues upon the filing of the bill, petition or complaint, and the action is not deemed commenced until it is issued and delivered to the proper officer for service.[75] Under this rule, the mere filing of the bill or complaint is not sufficient; there must be both the filing of the pleading and the issuing of the process,[76] and process issued and served, prior to the filing of the pleading renders the proceeding a nullity.[77] The process is the means used to acquire jurisdiction of the defendants,[78] and unless the defendants waive service and voluntarily appear, such jurisdiction can only be acquired by an observance of the modes of procedure prescribed by law.[79]

The original writ of the common law and the subpoena of chancery have in modern practice been suspended by a writ of summons, although the term "subpoena" is still applied to the writ issued by a court of chancery. Under the system which prevails in almost all the states the writ which brings a defendant into court is a summons requiring him to appear to the complaint, petition, declaration or bill of the plaintiff. The term "process" is often applied to all writs, original, mesne and final, but some courts hold that the term does not embrace a summons or the writ which brings the defendant into court.[80] The true doctrine is that where there is no notice and no waiver by express agreement or by conduct there is not due process of law, and where there is not due process of law there can be no valid judgment.[81]

[75] Bracken v. McAlvey, 83 Iowa 421, 49 N. W. 1022; Kenney v. Lee, 10 Tex. 155.

[76] Sanford v. Dick, 17 Conn. 213; Schroeder v. Merchants &c. Ins. Co., 104 Ill. 71; Niblack v. Goodman, 67 Ind. 174; Howell v. Shepard, 48 Mich. 472, 12 N. W. 661.

[77] Hodgen v. Guttery, 58 Ill. 431.

[78] Wilson v. St. Louis &c. R. Co., 108 Mo. 588, 18 S. W. 286, 32 Am. St. 624.

[79] Williams v. Monroe, 125 Mo. 574, 28 S. W. 853.

[80] Kennard v. Louisiana, 92 U. S. 480, 23 L. ed. 478; Comet Con. Min. Co. v. Frost, 15 Colo. 310, 25 Pac. 506; Gowdy v. Sanders, 88 Ky. 346, 10 Ky. L. 912, 11 S. W. 82; Fitzpatrick v. New Orleans, 27 La. Ann. 457; Sprague v. Birchard, 1 Wis. 457, 60 Am. Dec. 393.

[81] Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565.

§ 659. **Style and contents of process.**—It is provided, either by constitution or statute, in many of the states, that all process shall run in the name of "The State" or "The People." But a defect or irregularity in this respect will not, according to the better reason and the weight of authority, make the proceedings absolutely void.[82] Some courts, however, have held that the failure of process to run in the name of the people, as required by the constitution, will prevent jurisdiction from attaching and render the proceedings void.[83]

The summons should inform the defendant in what court or office he is required to appear.[84] But a misnomer of the court is not a material defect where there is but one court that could have been intended and the defendant could not have been misled thereby.[85]

The summons should state the name of the plaintiff, and the character in which he sues. It should also name the defendant and state the character in which he is sued. But if the name of the defendant is unknown, that fact should be stated in the summons and he may be otherwise identified therein. It is proper that information of the nature and extent of the plaintiff's claim should be given in the summons, or by indorsement thereon. The defendant is entitled to know at what time he is required to appear, and the date at which the summons is returnable should, therefore be stated therein.[86] If the writ is made returnable beyond the first term of court after it is issued it will be absolutely void,[87] and this has also been held to be the rule where the writ is made returnable to an impossible term of court.[88]

The summons should be signed by the clerk, sealed with the seal of the court and delivered to the proper officer.[89] Under a statute requiring the name of the plaintiff or his attorney to be subscribed to the summons, any signature which they may adopt,

[82] Kahn v. Kuhn, 44 Ark. 404; Brewster v. Ludekins, 19 Cal. 162; Carson v. Sheldon, 51 Mo. 436; Mabbett v. Vick, 53 Wis. 158, 10 N. W. 84.

[83] Wallahan v. Ingersoll, 117 Ill. 123, 7 N. E. 519; Yeager v. Groves, 78 Ky. 278.

[84] Kitsmiller v. Kitchen, 24 Iowa 163.

[85] New Eng. Manf. Co. v. Starin, 60 Conn. 369, 22 Atl. 953.

[86] Phinney v. Donahue, 67 Iowa 192, 25 N. W. 126.

[87] Hochlander v. Hocklander, 73 Ill. 618; Briggs v. Sneghan, 45 Ind. 14; McAlpine v. Smith, 68 Maine 423.

[88] Hoxie v. Payne, 41 Conn. 539.

[89] Dwight v. Merritt, 4 Fed. 614, 18 Blatchf. 305, 59 How. Pr. 320.

whether written, printed or lithographed, is sufficient.[90] The formal requisites of the summons should be set out in the abstract, especially where there was no appearance to the action.

§ 660. Service of the process.—A summons, being directed to a certain officer, usually the sheriff, should be served by such officer or his deputy, unless the statute makes provision for service by some one else.[91] It is frequently provided by statute, however, that a third person may serve the summons and make proof of the service by affidavit.[92] In the absence of any express statutory provision as to the manner and mode of service, personal service is generally essential.[93] Strictly, personal service is service by reading and delivering the original or a copy of the summons, or by merely delivering such copy, to the defendant by the proper officer or person authorized to serve the writ, and showing the original if demanded.[94] It is frequently provided that a summons may also be served by leaving a copy at the last and usual abode, or place of residence of the defendant. This is usually called substituted service,[95] although it is sometimes called personal service as distinguished from service by publication.[96]

Service on a corporation should be made upon the agent or officer thereof designated by the statute, and the return should show his official position in such a manner as to make it clear that the service was upon the officer or agent designated by the statute, and that he was served in his official or representative character.[97]

Where partners are sued, service should be had upon all the members of the firm, but some statutes authorize a judgment to be entered against a partnership upon service on any one or more of the partners, enforcible against the partnership property and the individual property of the partners who are properly served.[98]

Except where otherwise provided, personal service should be made upon infants in the same manner as upon adults.[99]

[90] Herrick v. Morrill, 37 Minn. 250, 33 N. W. 849, 5 Am. St. 841.

[91] Rudd v. Thompson, 22 Ark. 363; Callaway v. Harrold, 61 Ga. 111; Kyle v. Kyle, 55 Ind. 387; Grantier v. Rosecrance, 27 Wis. 488.

[92] Coffee v. Gates, 28 Ark. 43; Proctor v. Walker, 12 Ind. 660.

[93] Brydolf v. Wolf, 32 Iowa 509; Read v. French, 28 N. Y. 285.

[94] Wilson v. Trenton, 53 N. J. L. 178, 20 Atl. 738 (rev'd, 53 N. J. L. 645, 23 Atl. 278, 16 L. R. A. 200,) and note.

[95] Chittenden v. Hobbs, 9 Iowa 417.

[96] Dunkle v. Elston, 71 Ind. 585.

[97] Jones v. Hartford Ins. Co., 88 N. Car. 499.

[98] Sugg v. Thornton, 132 U. S. 524, 10 Sup. Ct. 163, 33 L. ed. 447.

[99] Abdil v. Abdil, 26 Ind. 287; Larkins v. Bullard, 88 N. Car. 35.

§ 661. **Service by publication.**—It is provided by statute in most states that in certain classes of cases notice of the pendency of an action may be given by publication in a newspaper. Service of process in this mode is called constructive service. It is generally authorized where the defendant has property within the jurisdiction of the court, as in cases of attachment, and suits to foreclose mortgages, or to determine and quiet title to land within the state, and the defendant is a nonresident or has absconded, making it impossible to get personal service upon him.[1] But a strictly personal judgment can not be rendered upon such service.[2]

As service by publication is a statutory mode of service, the provisions and requirements of the statute must be strictly complied with.[3] It is generally provided that an affidavit should first be filed as an essential requisite to a valid notice by publication, stating the facts required by statute to authorize service by publication.[4] Thus it has been held that it should show the existence and nature of the cause of action,[5] that the defendant is a nonresident,[6] and, under some statutes, that, although the plaintiff had used due diligence in attempting to find him, he could not be found within the state,[7] that he has property within the state,[8] and all other jurisdictional facts required by statute.

A valid order is necessary to support service by publication as against a direct attack.[9] It must comply with the statutory requirements in all material respects.[10] The order and notice should be harmonious, and it is customary to recite in the order the jurisdictional matters on which it is founded.[11] The notice

[1] People v. Huber, 20 Cal. 81; Lovejoy v. Lunt, 48 Maine 377; Bobb v. Woodward, 42 Mo. 482. See Sexton v. Rhames, 13 Wis. 99.

[2] Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 655; Cloyd v. Trotter, 118 Ill. 391, 9 N. E. 507.

[3] Hartley v. Boynton, 17 Fed. 873, 5 McCrary 453; Beckett v. Cuenin, 15 Colo. 281, 25 Pac. 167, 22 Am. St. 399, and note; Likens v. McCormick, 39 Wis. 313.

[4] Beckett v. Cuenin, 15 Colo. 281, 25 Pac. 167, 22 Am. St. 399; Bardsley v. Hines, 33 Iowa 157. See Schell v. Leland, 45 Mo. 289.

[5] Forbes v. Hyde, 31 Cal. 342; Fontaine v. Houston, 58 Ind. 316; Claypoole v. Houston, 12 Kans. 324.

[6] Bixby v. Smith, 49 How. Pr. (N. Y.) 50.

[7] McDonald v. Cooper, 32 Fed. 745, 13 Sawy. 86; McCracken v. Flanagan, 127 N. Y. 493, 28 N. E. 385, 24 Am. St. 481.

[8] Spiers v. Halstead, 71 N. Car. 209.

[9] Frisk v. Reigelman, 75 Wis. 499, 43 N. W. 1117, 44 N. W. 766, 17 Am. St. 198.

[10] Fetes v. Volmer, 55 Hun 604, 8 N. Y. S. 294, 28 N. Y. St. 317, 5 Silvernail 408.

[11] Newnam v. Cincinnati, 18 Ohio 323.

should properly name the defendant, and if the wrong party is named it will be insufficient, even, it seems, as against a collateral attack.[12] The notice is generally required to be published in some local newspaper of general circulation. Where the particular newspaper is designated in the order, or the kind of newspaper is specified in the statute, the publication must be made in the kind of paper specified and in the particular paper designated in the order.[13] The notice should be published for the statutory period, but the fact that publication is made for a longer period than that required by statute will not invalidate the notice.[14]

Where the jurisdiction of the person of a defendant was obtained by publication, every step essential to authorize such service must appear in the abstract, as the validity of all subsequent proceedings in the case is based upon the due performance of every requirement respecting such service. This mode of service requires the most careful scrutiny on the part of counsel, and the abstracter should be careful to give him every possible means of information.

§ 662. **Return and proof of service.**—There is a sharp conflict among the authorities as to how far the return of an officer is conclusive; but the weight of authority seems to be to the effect as between third persons and in favor of the officer, where he is a party, it is simply prima facie evidence of the service,[15] while as between the parties to the action and their privies it is generally regarded as conclusive and can not be collaterally impeached.[16] The return is generally required to be in writing, but where it has been lost proof of the service may be made by parol evidence,[17] and it has also been held that where it is defective it may be aided, in order to prevent a failure of justice, by other proof of the service.[18] The return should be signed by the officer making it, and if by deputy, he should sign it in the name of his principal by

[12] Troyer v. Wood, 96 Mo. 478, 10 S. W. 42, 9 Am. St. 367; Freeman v. Hawkins, 77 Tex. 498, 14 S. W. 364, 19 Am. St. 769.

[13] Townsend v. Tallant, 33 Cal. 45, 91 Am. Dec. 617; Otis v. Epperson, 88 Mo. 131.

[14] Taylor v. Coots, 32 Nebr. 30, 48 N. W. 964, 29 Am. St. 426.

[15] Hensley v. Rose, 76 Ala. 373; Nichols v. Patten, 18 Maine 231, 36 Am. Dec. 713; Chadbourne v. Sumner, 16 N. H. 129, 41 Am. Dec. 720.

[16] Studebaker v. Johnson, 41 Kans. 326, 21 Pac. 271, 13 Am. St. 287, and note; Thomas v. Ireland, 88 Ky. 581, 11 S. W. 653, 11 Ky. L. 103, 21 Am. St. 356.

[17] Bridges v. Arnold, 37 Iowa 221.

[18] Martin v. Gray, 142 U. S. 236, 12 Sup. Ct. 186, 35 L. ed. 997.

himself as deputy.[19] It should state the facts showing the person served and the time and manner of service, together with any other matters required by statute.[20] Where a private individual is authorized to make the service, his return should be verified by affidavit.[21] It is also provided by statute in some states that a written acknowledgment of the defendant on the back of the summons shall be sufficient proof of the service.[22]

The publication of notice is generally proved by the affidavit of the editor or publisher of the paper, or by his foreman or clerk, with a copy of the printed notice annexed. It has been held, however, that although there is no affidavit in the record, the recital in the judgment or decree showing due service of process is at least prima facie, if not conclusive, evidence of such service;[23] but where the return or proof shows that there was no service it has been held that the judgment is void, notwithstanding a recital of service in the record.[24] The affidavit of publication should show that all the requirements of the statute have been complied with. Every step pertaining to the return and proof of service, whether personal or by publication, should be set out in the abstract, and carefully scrutinized by counsel.

§ 663. **Effect of appearance without process.**—A general appearance by the defendant or his attorney waives all defects and irregularities in notice, process, or service, and gives jurisdiction over the person of the defendant.[25] Such appearance is equivalent to personal service.[26] But it does not give the court jurisdiction over the subject-matter, where it can have no such jurisdiction under the law;[27] and it has also been held that jurisdiction of minors can only be acquired in the manner prescribed by law, and that an appearance for them will not, therefore, give jurisdiction

[19] Reinhart v. Lugo, 86 Cal. 395, 24 Pac. 1089, 21 Am. St. 52; Bolard v. Mason, 66 Pa. St. 138.

[20] Richmond v. Brookings, 48 Fed. 241.

[21] Coffee v. Gates, 28 Ark. 43; In re Robinson, 6 Mich. 137.

[22] Hendrix v. Cawthorn, 71 Ga. 742; McCormack v. First Nat. Bank, 53 Ind. 466; Cheney v. Harding, 21 Nebr. 65, 31 N. W. 255.

[23] Hardy v. Beaty, 84 Tex. 562, 19 S. W. 778, 31 Am. St. 80.

[24] Barber v. Morris, 37 Minn. 194, 33 N. W. 559, 5 Am. St. 836.

[25] Union Pac. R. Co., v. DeBusk, 12 Colo. 294, 20 Pac. 752, 3 L. R. A. 350, 13 Am. St. 221; Hall v. Craig, 125 Ind. 523, 25 N. E. 538; Jones v. Jones, 108 N. Y. 415, 15 N. E. 707, 2 Am. St. 447.

[26] Christal v. Kelly, 88 N. Y. 285; Dikeman v. Struck, 76 Wis. 332, 45 N. W. 118.

[27] Smith v. Myers, 109 Ind. 1, 9 N. E. 692, 58 Am. Rep. 375; Schuylkill v. Boyer, 125 Pa. St. 226, 17 Atl. 339.

over them and operate as a waiver of process or defective service.[28]

One who voluntarily appears after being made a party by order of court or upon affidavit requiring him to interplead can not assail the ruling of the court upon the ground that he was not brought in by service of process.[29] A misnomer in the summons is waived by a general appearance,[30] and any irregualrity in the service is cured in the same way.[31]

A special appearance for a particular purpose does not waive jurisdiction over the person, unless it is of such a nature as to admit the jurisdiction.[32] And where it is expressly made for the purpose of taking advantage of particular defects or irregularities, it does not, of course, waive such defects and irregularities.[33]

Where there has been no service of process, or where the service is fatally defective, the appearance, if any, should be noted in the abstract in such a way as that it will show whether the appearance is such as will amount to a waiver of process.

§ 664. Reports of referees and masters in chancery.—A court is sometimes authorized to appoint a master or referee to ascertain the rights of the parties to the proceedings and to aid the court in his judicial duties. They are not judges in the true sense of the term, although they exercise duties of a judicial nature. Proceedings before such officers are ancillary, and not final, since the final decision must be pronounced by the court. They convey information to the court either upon matters of fact or of law, but even this they can not do in matters which require the direct investigation and decision of the duly appointed or elected judge. A master or referee, to whom matters are referred is controlled by the order of the court in the particular case,[34] and where the order requires a report of the evidence, it is the duty of the master to report it; but where the order does not require a report of the evidence, it is, as a general rule, sufficient to report the facts. Where there is a general order referring a matter to

[28] Bonnell v. Holt, 89 Ill. 71.

[29] Henderson v. Carbondale &c. Co., 140 U. S. 25, 11 Sup. Ct. 691, 35 L. ed. 332.

[30] New Eng. Mfg. Co. v. Starin, 60 Conn. 369, 22 Atl. 953.

[31] White v. Morris, 107 N. Car. 92, 12 S. E. 80.

[32] Harkness v. Hyde, 98 U. S. 476, 25 L. ed. 237; Dailey v. Kennedy, 64 Mich. 208, 31 N. W. 125, 7 West. Rep. 467.

[33] Campbell v. Swasey, 12 Ind. 70; Blake v. Jones, 7 Mass. 28.

[34] McNaught v. McAllister, 93 Ind. 114; Simmons v. Jacobs, 52 Maine 147.

a master, the facts should be reported so that the court may give the ultimate decision upon them.[35] The substantive facts should be stated, and not simply the master's deductions from them, inasmuch as the judgment of the court must rest upon the facts, and not upon the mere conclusions of the master.[36] The master's duty, in the absence of specific directions in the order, is to ascertain and state the controlling matters of fact and of law, for the information of the court.[37] The report of the master is regarded in many respects as the verdict of a jury, and rules applicable to verdicts are applied to reports of masters.[38]

In suits for the specific performance of contracts for the sale of real estate, whether by vendor or purchaser, questions relating to the ability of the vendor to give such title as the contract calls for are often referred to a master with directions to make inquiry and report to the court his findings with reference thereto. In such cases the master's report should state in terms whether the title can or can not be made out, and, it seems, in what way it can be perfected. If the referee's report shows that a marketable title is not offered, or if there be a reasonable doubt as to the soundness of the title, the court will not compel the purchaser to complete the purchase, even if the better opinion be that the title is good.[39]

In proceedings where a referee or master has reported on a question involving the title to the real estate, the abstract should contain a synopsis of the officer's report.

§ 665. Verdicts.—A verdict is commonly understood to mean the decision of an issue by a jury, but the term has also been held to include the finding, upon the facts, of a judge or referee appointed to determine the issues in a cause.[40] In most jurisdictions a suit in equity is heard by the court without a jury, but where an equitable action involves distinct legal issues, the latter may be submitted to a jury.[41] Even where the issues in a case are purely equitable, they may, in the discretion of the court, be sub-

[35] Skinner v. Conant; 2 Vt. 453, 21 Am. Dec. 554.

[36] Parker v. Nickerson, 137 Mass. 487; Frazier v. Swain, 36 N. J. Eq. 156.

[37] Furrer v. Ferris, 145 U. S. 132, 12 Sup. Ct. 821, 36 L. ed. 649.

[38] Izard v. Bodine, 9 N. J. Eq. 309.

[39] Ely v. Mathews, 58 Misc. 365, 110 N. Y. S. 1102.

[40] Lone Tree Ditch Co. v. Rapid City Electric &c. Co., 16 S. Dak. 451, 93 N. W. 650.

[41] Conway v. Owensboro Sav. Bank & Trust Co., 165 Fed. 822.

mitted to a jury for an advisory verdict.[42] The findings of a jury in an equity case being advisory only, the court may adopt them or may ignore them and make separate findings.[43]

When the verdict or findings of a jury in an equitable action has been acted upon by the court, it becomes an important matter, and is required to be noted in the abstract. Likewise the verdict of a jury in an action at law involving the title to the real estate in question should never be omitted from the examination.

§ 666. **Abstracting equitable proceedings.**—Where the real estate under examination has been the subject-matter of a proceeding in equity, a synopsis of such proceeding should be given in the abstract. This should contain all the material points presented; such as: (1) The title and name of the court; (2) the names of all parties, plaintiff and defendant; (3) the process by which the defendants were brought into court, the date, seal of the court thereon, who are named therein as defendants, to what officer the writ is directed, and his return thereon, showing who were served, when served, and how served; (4) the nature of the claim made; (5) whether the defendant answered or suffered default, and if any answered the date and a brief statement of the nature of the answer; (6) if any of the defendants are under legal disability, the appointment of a guardian ad litem, the acceptance of the appointment, and the answer of such guardian; (7) reference to a master, referee or jury and a report of the findings; (8) the decree, the date thereof, the term of the court, the number and page where recorded, and a statement of the material parts thereof. Where any such proceeding is pending at the date of an examination a subsequent examination should show all steps taken after the date of the previous examination. The following synopsis of a suit for specific performance will illustrate the points suggested:

Charles B. Davis	Marion Circuit Court, Marion County, Ind.
v.	Cause No. 2763.
Johnathan D. Hagar, William Hagar, and Caroline Hagar.	Order Book 8, page 455. Petition filed Feb. 9, 1841.

Alleging that in the summer of 1831 plaintiff purchased from

[42] Heron v. Weston, 44 Colo. 379, 100 Pac. 1130; Lawrence v. Lawrence, 82 S. Car. 150, 63 S. E. 690.

[43] Bethany Hospital Co. v. Philippi, 82 Kans. 64, 107 Pac. 530, 30 L. R. A. (N. S.) 194n.

Christian Hagar, since deceased, the following described real estate in Marion county, state of Indiana, to wit: The east half of the northwest quarter of section 19 in township 16 north of range 4 east, containing 80 acres for the sum of $300, payable in three annual instalments of $100 each, and took from said Christian Hagar his title bond conditioned for the conveyance of said real estate to plaintiff. That said Christian Hagar departed this life intestate on the —— day of —— 18—, leaving as his only heirs at law the above named defendants. That plaintiff made all the payments in the time and manner provided in said bond, but said Christian Hagar died without having executed to plaintiff his deed for said land. That since the death of said Christian Hagar, plaintiff has demanded of said defendants that they execute and deliver to plaintiff a deed to said land in accordance with the terms of said bond, but defendants have failed and refused to do so. Wherefore plaintiff prays for an order or decree of conveyance, and the appointment of a commissioner to execute and deliver a deed conveying said land to plaintiff. Summons issued to John Jones, sheriff of Marion county, Indiana, on the —— day of ——, 18—. Return shows served by reading to each of said defendants on the —— day of ——, 18—. Appearance by each of said defendants. Answer in general denial filed on the —— day of ——, 18—. Decree entered Nov. 15, 1844. Shows finding of court to be that matters and things alleged in plaintiff's complaint are true, and that the full amount of purchase-price of said land is paid. That plaintiff is entitled to a deed for same. That said Christian Hagar died intestate on the —— day of——, 18—, without having conveyed said land to plaintiff. That defendants are the heirs and only heirs of said Christian Hagar, deceased. That John H. Bradley is appointed commissioner to make, execute and deliver to plaintiff a deed conveying the legal title to said land, and to report his proceedings to the court.

The above synopsis should immediately precede the commissioner's deed in the abstract.

§ 667. Injunctions.—An injunction is a judicial order or process issuing out of a court of equity, whereby the defendant is commanded to abstain from doing, or is commanded to perform, a certain act. It may be, therefore, either preventive or remedial in its operation, but the most ordinary form is that

which operates to prevent the performance of an act.[44] A suit for injunction is always equitable, but when the court, in the exercise of its chancery powers, undertakes to administer such relief, it has jurisdiction to award compensatory damages when there has been a trespass and in other proper cases.[45]

Mandatory injunctions are frequently issued upon complaints for specific performance, as where a defendant is required to execute a deed, or to perform some similar act.[46]

The legal remedies for the adjudication of titles to real property are so adequate as to forbid the use of the writ of injunction where the sole question involved is one of disputed title. The writ is denied where the right is doubtful.[47] Accordingly, an injunction will not issue to evict a party from the actual possession of land where the right to the possession is disputed.[48] So, an injunction is not warranted to restrain an ordinary trespass where the title of the plaintiff is in dispute and has not been established by a legal adjudication.[49] The title is generally regarded as in dispute where the defendant in his answer denies the right or title of the complainant.[50] The authorities generally require the establishment of the title of the complainant at law before granting the writ of injunction, unless the facts on which the title is founded are admitted or otherwise clearly established.[51]

A restrictive covenant in a conveyance of real property may be enforced by injunction. The writ will issue in cases of a threatened violation of the restriction and a mandatory injunction may be issued to undo the forbidden act after it has been done.[52] The restrictive covenants that are subject to enforcement by injunction most commonly are restrictions as to the purposes for which the premises are used, the character of buildings to be erected, and the place of the erection of buildings with reference to lot or street lines. Injunctions may also issue to restrain the foreclosure

[44] Porter v. Armour, 241 Ill. 145, 89 N. E. 356; Norwood v. Leeves (Tex. Civ. App.) 115 S. W. 53.

[45] McClellan v. Taylor, 54 S. Car. 430, 32 S. E. 527.

[46] Biddle v. Ramsey, 52 Mo. 153.

[47] Preston v. Smith, 26 Fed. 884; Wharton v. Hannon, 115 Ala. 518, 22 So. 287; Burnside v. United Sawmill Co., 92 Ark. 118, 122 S. W. 98; Roy v. Moore, 85 Conn. 159, 82 Atl. 233.

[48] Vaughn v. Yawn, 103 Ga. 557, 29 S. E. 759.

[49] Carney v. Hadley, 32 Fla. 344, 14 So. 4, 22 L. R. A. 233, 37 Am. St. 101.

[50] Murphey v. Harker, 115 Ga. 77, 41 S. E. 585.

[51] In re Rankin's Appeal, 1 Monag. (Pa.) 308, 16 Atl. 82, 2 L. R. A. 429.

[52] Riverbank Imp. Co. v. Bancroft, 209 Mass. 217, 95 N. E. 216, 34 L. R. A. (N. S.) 730n, 1912B, 450n.

of a mechanic's lien, to restrain a breach of covenant in a lease, to prevent the removal of fixtures, to restrain a sale under a mortgage fraudulently executed, to restrain the violation of a party-wall agreement, and to remove an obstruction to an easement. It will be seen that the remedy of injunction is applicable to transitory matters, and are incidental only to the title. For this reason it is not material that they should be shown in the abstract.

§ 668. Ejectment.—At common law, the action of ejectment could only be used to recover the possession of real property. By the structure of such an action, and the pleadings therein, the title of the freehold was never directly put in issue.[53] It was a mere possessory action between fictitious parties. The judgment therein did not determine the estate or interest of the parties in the property, nor did it conclusively determine the right to possession. But in most states, the common-law action has been stripped of its fiction and made a simple remedy for the recovery of the possession of real property, and the trial of title thereto.[54] It is now generally considered a possessory remedy, and can be resorted to only when a right of entry exists.[55] Where united with trespass the action constitutes one distinctly to try title.[56]

The action can be resorted to only where the thing or interest is tangible, so that possession can be delivered. Thus, it will not lie to recover an easement or thing incorporeal.[57] To authorize the maintenance of an action of ejectment it must appear that the defendant is in actual possession of the land in dispute at the commencement of the action.[58] But in California it is held that the constructive possession of the defendant is sufficient to authorize a recovery.[59] To entitle the plaintiff to recover he must have a title, valid and subsisting, at the commencement of the action.[60] He must recover upon the strength of his own title and

[53] Brooke v. Gregg, 89 Md. 234, 43 Atl. 38.

[54] Hoover v. King, 43 Ore. 281, 72 Pac. 880, 65 L. R. A. 790, 99 Am. St. 754.

[55] United States Pipe Line Co. v. Delaware, &c. R. Co., 62 N. J. L. 254, 41 Atl. 759, 42 L. R. A. 572, Leprell v. Kleinschmidt, 49 Hun 605, 1 N. Y. S. 821, 17 N. Y. St. 231.

[56] Lavin v. Dodge, 30 R. I. 8, 73 Atl. 376.

[57] Lyman v. Suburban R. Co., 190 Ill. 320, 60 N. E. 515, 52 L. R. A. 645; Fritsche v. Fritsche, 77 Wis. 270, 45 N. W. 1089.

[58] Haden v. Goodwin, 217 Mo. 662, 117 S. W. 1129.

[59] Moore v. Moore, 99 Cal. XVIII, 34 Pac. 90.

[60] Card v. Dean, 84 Nebr. 4, 120 N. W. 440; Harris v. Mason, 120 Tenn. 1146, 115 S. W. 1146; Wilburn v. Land, 138 Wis. 36, 119 N. W. 803.

not on the weakness of that of the defendant.[61] Subject to certain exceptions, the kind of title necessary to support the action is a good and valid legal title or interest in the premises.[62] But it has been held that an equitable title in the plaintiff will enable him to maintain the action.[63] It has been held, however, that an equitable title based on estoppel will not support an action of ejectment.[64] The plaintiff must show title and a right of possession at the time of the commencement of his action.[65] A plaintiff in ejectment may recover the premises in dispute upon the strength of his prior possession alone, as against one who subsequently acquires possession of the land by mere entry, and without any lawful right whatever.[66] Thus where one occupies land under an invalid tax deed he has such possesion as will enable him to maintain ejectment against a mere trespasser.[67] Where both plaintiff and defendant assert title from a common grantor it is not usually necessary for the plaintiff to go back to the common source in order to prove title, but he need only show a better title through the common source than the defendant has.[68]

Where an action of ejectment has been commenced against a defendant in possession, one who acquires possession from the defendant pendente lite will be bound by the judgment that may be recovered to the same extent as the defendant.[69]

A judgment for the plaintiff in ejectment should be limited to the issues raised, and must describe the specific property in controversy, provide for recovery of possession by the plaintiff, and be based on a sufficient verdict if the trial is by a jury. The judgment is executed by the issuance of a writ of possession directing the seizure of the property and the placing of the successful party in possession.

[61] McCauley v. Mahon, 174 Ill. 384, 51 N. E. 829; Comstock v. Kerwin, 57 Nebr. 1, 77 N. W. 387; Jarvis v. Lynch, 157 N. Y. 445, 52 N. E. 657; Worth v. Simmons, 121 N. Car. 357, 28 S. E. 528.

[62] Simmons v. Richardson, 107 Ala. 697, 18 So. 245; Cahill v. Cahill, 75 Conn. 522, 54 Atl. 201, 732, 60 L. R. A. 206; Taylor v. Russell, 65 W. Va. 632, 64 S. E. 923.

[63] Ohio River Junction R. Co. v. Pennsylvania Co., 222 Pa. 573, 72 Atl. 271.

[64] Harrison v. Alexander, 135 Ala. 307, 33 So. 543.

[65] Demps v. Hogan, 57 Fla. 60, 48 So. 998; Welborn v. Kimmerling, 46 Ind. App. 98, 89 N. E. 517, 91 N. E. 982; Harris v. Mason, 120 Tenn. 668, 115 S. W. 1146, 25 L. R. A. (N. S.) 1011n; Harley v. Harley, 140 Wis. 282, 122 N. W. 761.

[66] Bagley v. Kennedy, 85 Ga. 703, 11 S. E. 1091.

[67] Robinson v. Gautt, 1 Nebr. (Unoff.) 51, 95 N. W. 506.

[68] Graton v. Holliday Koltz Land & Lumber Co., 189 Mo. 322, 87 S. W. 37.

[69] Howard v. Kennedy, 4 Ala. 592, 39 Am. Dec. 307.

In abstracting proceedings in ejectment a full synopsis thereof must appear, including all the pleadings, the verdict, if any, and the judgment.

§ 669. Action to quiet title.—Equity has inherent jurisdictions of suits to quiet title to real estate and to remove clouds therefrom.[70] Statutory actions for this purpose are generally regarded as equitable in character,[71] and provisions authorizing them as merely enlarging the powers of courts of equity,[72] and as creating concurrent and not exclusive remedies.[73] There is a conflict of authority as to whether the statutory action is one in personam or in rem. Most courts hold that it is not an action to determine title as against all the world as in proceedings in rem, but is one in personam only.[74] It is sometimes considered an action for the recovery of real property which is the subject-matter thereof.[75]

A suit, the sole object of which is to remove a cloud on a title, as distinguished from one seeking a decree quieting title, is an action in personam, and therefore maintainable only in the district where the defendant can be personally served with process.[76] Statutory remedies must be strictly pursued, though they are frequently cumulative.[77] Apart from any statutory provision to the contrary the plaintiff must ordinarily have both possession and the legal title, [78] and conversely the defendant must be out of possession.[79] But the possession of the plaintiff may be constructive, or by a tenant or licensee.[80]

The usual rule applies that the decree must be within the issues raised by the pleadings,[81] and be construed with reference to the

[70] Acord v. Western Pocahontas Corporation, 156 Fed. 989.

[71] Carlson v. Curren, 48 Wash. 249, 93 Pac. 315.

[72] Siedschlag v. Griffin, 132 Wis. 106, 112 N. W. 18.

[73] Hudson v. Wright, 204 Mo. 412, 103 S. W. 8.

[74] Dixon v. Hunter, 204 Mo. 382, 102 S. W. 970; Lally v. New York Cent. &c. R. Co., 123 App. Div. 35, 107 N. Y. S. 868.

[75] Townsend v. Driver, 5 Cal. App. 581, 90 Pac. 1071.

[76] Philadelphia Co. v. Dickinson, 33 App. D. C. 338.

[77] Griffin v. Franklin, 224 Mo. 667, 123 S. W. 1092.

[78] Fies v. Rosser, 162 Ala. 504, 50 So. 287, 136 Am. St. 57; Bowling v. Breathitt Coal &c. Co., 134 Ky. 249, 120 S. W. 317; Solis v. Williams, 205 Mass. 350, 91 N. E. 148.

[79] Bieber v. Porter, 242 Ill. 616, 90 N. E. 183; Moody v. Macomber, 158 Mich. 209, 16 Det. Leg. N. 577, 122 N. W. 517.

[80] Stewart v. May, 111 Md. 162, 73 Atl. 460, 18 Ann. Cas. 856.

[81] Rydalch v. Anderson, 37 Utah 99, 107 Pac. 25.

relief prayed for.[82] In statutory proceedings, the form and scope of the decree are frequently prescribed.[83] The decree in a suit to quiet title is binding only upon the parties thereto and their privies.[84]

The action to quiet title is a very common and effective procedure employed in the removal of a cloud from the title, and it becomes the duty of counsel to insist upon the action being taken when he finds anything which is calculated to cast a doubt or suspicion on the title.

§ 670. **Partition.**—Partition is the division which is made between several persons of lands, tenements, or hereditaments. The term is more technically applied to the division of real estate made between coparceners, tenants in common or joint tenants. In jurisprudence the term is usually used in speaking of a right, or of proceedings to enforce the right, which either of the joint owners of joint property has to demand a division and that his share be set off to him in severalty.[85] At common law there could be no partition of the common subject of property between joint tenants, except as the result of voluntary agreement of all the parties. Joint tenancy was one of the arrangements of the feudal law, and like other feudal institutions, was contrived to last forever. About the beginning of the sixteenth century partition was declared by statute to be a compulsory remedy at the election of any one of the parties, by writ of partition. The writ is now abolished in England and a bill in equity for partition substituted. In this country, the jurisdiction of courts of equity has always been recognized, but in many of the states there are statutory provisions giving concurrent jurisdiction to common-law courts, or to the courts having probate jurisdiction, particularly in cases of partition of a decedent's real estate.

Partition, either by division of the property or by its sale and a division of the proceeds, is a matter of absolute right, against which no consideration of hardship, inconvenience, or loss, on the part of other cotenants, can prevail.[86]

[82] Del Notaro v. Douglas, 55 Wash. 493, 104 Pac. 774.

[83] Potrero Neuvo Land Co. v. All Persons Claiming, 155 Cal. 371, 101 Pac. 12.

[84] Doyle v. Hays Land & Inv. Co., 80 Kans. 209, 102 Pac. 496, 133 Am. St. 199.

[85] Abbott's Law Dictionary, tit. Partition.

[86] Hartmann v. Hartmann, 59 Ill. 103; Lake v. Jarrett, 12 Ind. 395; Wood v. Little, 35 Maine 107.

Title and possession or right of possession must concur in the plaintiff, before he can maintain the action of partition.[87] Partition may be enforced by, or against, persons under legal disability.[88] It has been uniformly held that remaindermen can not compel partition, that is, they can not maintain such partition as plaintiffs, but they may be made defendants, and will be bound by the decree.[89]

The petition for partition should show the nature and extent of the interest of the petitioner in the premises, as well as that of the defendants, and that they hold as joint tenants or tenants in common. The title to the real estate may be put in issue, tried, and determined, and the judgment rendered is binding upon all the parties to the issue. To give validity and effect to a decree in partition, all persons interested in the property, either as owners or lienholders, at the commencement of the suit, should be made parties. All persons dealing with the property, pendente lite, are affected with notice of the orders and proceedings had therein and are bound thereby.[90] The petition must show that the plaintiff, at the time of bringing the suit, is seized of some definite undivided share of the land of which he seeks partition.[91] Ordinarily, the title to land is not put in issue in a suit for partition. Neither the object of the suit nor the effect of the decree is to establish or quiet title, but simply to make division of the land; and it is by interlocutory orders that the rights and interests of the parties are regularly adjusted and defined. The business of the court in such a suit, is not to draw into discussion various and conflicting rights and equities of encumbrancers. The property is divided cum onere, each taking the share allotted to him subject to such liens as exist upon it.[92] The decree should be sufficiently specific as to show on its face what land is intended to be partitioned, and should be drawn so as to give a good title, but it should not be broader than the scope of the litigation.[93]

[87] Tower v. Tower, 141 Ind. 223 40 N. E. 747; Whitten v. Whitten, 36 N. H. 332; Sullivan v. Sullivan, 66 N. Y. 37; Nichols v. Nichols, 28 Vt. 228, 67 Am. Dec. 699.

[88] Indianapolis v. Kingsbury, 101 Ind. 200, 51 Am. Rep. 749; Cocks v. Simmons, 57 Miss. 183; Mitchell v. Jones, 50 Mo. 438; Goudy v. Shank, 8 Ohio 415.

[89] Tower v. Tower, 141 Ind. 223 40 N. E. 747; Sullivan v. Sullivan, 66 N. Y. 37; Savage v. Savage, 19 Ore. 112, 23 Pac. 890, 20 Am. St. 795.

[90] Schissel v. Dickson, 129 Ind. 139, 28 N. E. 540.

[91] Brown v. Brown, 133 Ind. 476, 32 N. E. 1128, 33 N. E. 615.

[92] Sebring v. Mersereau, 9 Cow. (N. Y.) 344.

[93] Stokes v. Stokes, 240 Ill. 330, 88 N. E. 829.

Provision is usually made by statute for the appointment of a commissioner or commissioners to make a division and allotment of the land, or to sell same and divide the proceeds where the land is not susceptible of division. The commissioners are required to make report to the court of their acts and doings in the premises, which report must be approved by the court.

Where title to the land being abstracted has been the subject of a proceeding in partition a full synopsis of such proceeding should appear in the abstract. The following is given as an example of such synopsis:

Edward Hall
v.
Louisa Hall and James Hall.

Circuit Court of Marion County, Indiana.
Case No. 5280.
Action in partition.
Petition filed Sept. 12, 1900.

Plaintiff alleges that he and the defendants are each the owners of an undivided one-third interest in and to the northeast quarter of section 4, township 15 north of range 4 east, in Marion county, state of Indiana. Prays that said real estate be partitioned among parties according to their rights and interests in severalty, if same can be done without prejudice to the rights of parties, or if same can not be so partitioned, that the land may be sold according to law, and the proceeds of such sale be divided among the parties according to their respective interests. Process issued, dated Sept. 12, 1900, to both defendants, returnable Oct. 1, 1900. Summons returned Oct. 1, 1900, showing service by reading same to both defendants on the 12th day of Sept., 1900.

Answer of both defendants filed Oct. 12, 1900. Cause submitted and evidence heard Dec. 1, 1900. Decree entered Dec. 1, 1900, showing [here set out all material parts of decree].

If the decree is interlocutory only, the order appointing commissioners, their report and its confirmation, and final decree should follow.

§ 671. **Action for specific performance.**—The common law furnishes no remedies for the enforcement of executory contracts, except to give damages for their breach. Specific performance is a term applied to a remedy in equity whereby a court, in its sound discretion, will compel a party making a breach of

his contract obligations to perform the same in the terms agreed upon. This remedy is of a purely equitable nature, being a substitute for the legal remedy of compensation in damages when the latter is inadequate or impracticable, and lies within sound judicial discretion on consideration of all the circumstances surrounding the case.[94] In the great class of cases where decrees enforcing the specific performance of contracts concerning land are granted, the decree necessarily and vitally affects the question of title, and yet it is firmly settled that a suit to enforce such a contract is a proceeding in personam and not in rem, and may be maintained where there is jurisdiction of the person, although the land involved in the controversy may be situated in another state.[95] However, in a limited and qualified sense a decree for specific performance may also operate in rem in cases where the property to be conveyed under the contract is within the court's jurisdiction, but the defendant is absent therefrom.[96]

It has also been held that a court of equity can decree specific performance of a contract to sell land situated in another state if it has jurisdiction of all the parties.[97] But such decree is effectual only upon the person, not upon the land. The decree does not change the title to the land. It remains the same as before the decree was granted until the person in whom the title resides either voluntarily or perforce obeys the decree and divests himself of the title by a conveyance valid under the lex loci.[98] So, also, specific performance of a contract to convey land in one state may be decreed against an inhabitant of another state who has been personally served with process.[99] A decree for specific performance of a contract, being an action in personam and not in rem, to have effect beyond the jurisdiction of the court, must be founded either upon personal service of process or upon a voluntary appearance.[1]

Defective process is waived if the parties appear and proceed in the cause without objecting thereto.[2] But where the appearance

[94] Brown v. Boston & M. R. Co., 106 Maine 248, 76 Atl. 692.

[95] Monnett v. Turpie, 132 Ind. 482, 133 Ind. 424, 32 N. E. 328; McQuerry v. Gilliland, 89 Ky. 434, 11 Ky. L. 656, 12 S. W. 1037, 7 L. R. A. 454; Davis v. Headley, 22 N. J. Eq. 115.

[96] Wait v. Kern River Min. &c. Co., 157 Cal. 16, 106 Pac. 98.

[97] Poole v. Koons, 252 Ill. 49, 96 N. E. 556; Barringer v. Ryder, 119 Iowa 121, 93 N. W. 56.

[98] Proctor v. Proctor, 215 Ill. 275, 74 N. E. 145, 69 L. R. A. 673, 106 Am. St. 168.

[99] Dooley v. Watson, 1 Gray (Mass.) 414.

[1] Worthington v. Lee, 61 Md. 530.

[2] Thebant v. Canova, 11 Fla. 143.

is special, and for the purpose of objecting to the process, the irregularities are not necessarily waived.[3]

Equity has jurisdiction of a suit to compel specific performance on the part of the purchaser of real estate, though the vendor has a remedy at law by an action for the purchase-money.[4] If the property contracted for was never owned by the vendor, or was not in existence at the time of the contract, or where the vendor has no title, a decree for specific performance will be denied.[5] On the other hand equity will not compel a purchaser to specifically perform his contract of purchase of real estate where title to the same is defective or doubtful.[6]

The remedy of specific performance is open alike to both vendor and vendee in a contract for the sale of real estate.[7] The suit may also be maintained by the assignee of the vendee.[8]

A contract for the sale of real estate which is not definite, certain and clear will not be specifically enforced in equity.[9] When a decree is based on a certain contract, and requires its specific enforcement, it must require the performance of the contract by plaintiff as well as the defendant.[10] So, the contract merges with the decree which should leave the defendant no alternative but to perform.[11] Performance may also be decreed in the alternative.[12]

A contract for the testamentary disposition of the estate of a decedent may be specifically enforced against the heirs, devisees or personal representatives of the deceased promisor,[13] and such persons will be treated as trustees, whose duty under the decree is to convey the property in accordance with the terms of the contract.[14] In some jurisdictions a decree may be entered for specific performance which will operate as a conveyance.[15]

[3] Merrill v. Houghton, 51 N. H. 61.
[4] Morgan v. Eaton, 59 Fla. 562, 52 So. 305, 138 Am. St. 167.
[5] Enslen v. Allen, 160 Ala. 529, 49 So. 430.
[6] Triplett v. Williams, 149 N. Car. 394, 63 S. E. 79, 24 L. R. A. (N. S.) 514n.
[7] Boehly v. Mansing, 52 Misc. 382, 102 N. Y. S. 171.
[8] Cheney v. Bilby, 74 Fed. 52, 20 C. C. A. 291.
[9] Ehrenstrom v. Phillips, 9 Del. Ch. 74, 77 Atl. 80, 81.
[10] Thompson v. Burns, 15 Idaho 572, 99 Pac. 111.
[11] Broemsen v. Agnic, 70 W. Va. 106, 73 S. E. 253.
[12] Prichard v. Mulhall, 140 Iowa 1, 118 N. W. 43.
[13] Manning v. Pippen, 86 Ala. 357, 5 So. 572, 11 Am. St. 46.
[14] Owens v. McNally, 113 Cal. 444, 45 Pac. 710, 33 L. R. A. 369.
[15] Otto v. Young, 227 Mo. 193, 127 S. W. 9; Ready v. Schmith, 52 Ore. 196, 95 Pac. 817.

Where specific performance has been decreed, and the decree complied with, a full synopsis of all the proceedings, including the final decree, should be included in the abstract. But where the decree denies specific performance it would seem to be only necessary to set out the contract, if it is recorded, and make a brief mention of the action. A synopsis of the proceedings should always supplement the deed made in pursuance of the decree of specific performance whether such deed be made by the defendant, a commissioner, or an administrator or executor.

§ 672. Redemption by bill in equity.—The only remedy of a mortgagor for enforcing his right to redeem after a breach of the condition is by a bill in equity or by an action under the statute in the nature of a bill in equity. So long as the mortgage is in fact not discharged, and is apparently a subsisting security, the mortgagor can not obtain possession by ejectment,[16] but he must resort to a suit in equity to redeem. The action will lie only where the conveyance was intended as a security.[17]

The action may be instituted for the sole purpose of having a deed declared to be a mortgage, but the plaintiff must also offer to redeem the property and place himself within the jurisdiction of the court to settle the whole controversy.[18] Reconveyance will be decreed only upon payment of the debt in full.[19] In order to maintain the bill there must be an existing debt or obligation which the grantee can enforce by way of foreclosure proceedings.[20]

Any one who has a right to redeem is a proper party plaintiff. Upon the death of one having an interest in fee in the land, his heirs or devisees are the proper parties.[21] As a general rule, all persons who have an interest in the mortgage, or in the equity of redemption, which interest is apparent of record or known to the plaintiff, should be made parties to the suit.[22] All persons who appear to be legally or equitably interested in the mortgage security must be made defendants and served with process.[23]

[16] Woods v. Woods, 66 Maine 206; Stitt v. Rat Portage Lumber Co., 96 Minn. 27, 104 N. W. 561.

[17] Russell v. Tucker, 136 Ga. 136, 70 S. E. 1018; Potts v. Reynolds, 131 La. 421, 59 So. 837.

[18] Gerhardt v. Tucker, 187 Mo. 46, 85 S. W. 552; Mack v. Hill, 28 Mont. 99, 72 Pac. 307.

[19] Cumming v. McDade, 118 Ga. 612, 45 S. E. 479.

[20] Martinet v. Duff, 178 Ill. App. 199.

[21] Sutherland v. Rose, 47 Barb. (N. Y.) 144.

[22] Hicklin v. Marco, 56 Fed. 549.

[23] Rowell v. Jewett, 69 Maine 293.

If any of such persons be dead, their heirs or devisees, in whom the legal estate has become vested, must be made defendants; and their personal representatives should also be made parties, because they are entitled to recover the money paid.[24] When a junior mortgagee seeks to redeem he must make the mortgagor or other representative of the realty a party, and the prior mortgagees as well.[25]

The form of the decree ordinarily is, that the plaintiff may redeem upon paying the amount found due on the mortgage within a specified time, together with costs; and that upon his doing so the defendant shall discharge the mortgage and deliver up the mortgaged premises; and that upon default of such payment the complaint be dismissed with costs.[26] The decree should fix the time within which the redemption is to take place. This time rests in the sound discretion of the court in view of all the circumstances.[27] Such decree has an effect on the title, and for this reason the entire proceedings should be noted in the abstract.

§ 673. **Rescission and cancellation.**—Rescission and cancellation, in the sense in which the terms are here used, may be regarded as one and the same remedy; the decree for rescission generally directs the cancellation of the instrument which embodies the evidence of the contract in question, or the obligation arising therefrom, thereby rendering the decree of the court effectual and complete.[28] So, where rescission as well as cancellation is sought, the latter remedy is a mere auxiliary to effectuate the rescission.[29] The purpose of this remedy is to procure the cancellation of a contract or conveyance. Thus a contract for the sale of real estate may be rescinded in this way on the ground of fraud or mistake.[30] Although such contract may be wholly void, it is still a cloud on the vendor's title until removed, and an action will lie to rescind. Also where there is a failure of title on the part of the vendor, or he has not such title as

[24] Dexter v. Arnold, Fed. Cas. No. 3857, 1 Sumn. 109.

[25] Wimpfheimer v. Prudential Ins. Co., 56 N. J. Eq. 585, 39 Atl. 916.

[26] Machold v. Farnan, 20 Idaho 80, 117 Pac. 408; Chicago & C. Rolling Mill Co. v. Scully, 141 Ill. 408, 30 N. E. 1062.

[27] Decker v. Patton, 120 Ill. 464, 11 N. E. 897.

[28] Scruggs v. Driver's Exrs., 31 Ala. 274; Kirby v. Harrison, 2 Ohio St. 326, 59 Am. Dec. 677.

[29] Johnson v. United R. Co., 227 Mo. 423, 127 S. W. 63.

[30] Brown v. Norman, 65 Miss. 369, 4 So. 293, 7 Am. St. 663.

the law will require him to accept, the vendee may have rescission of the contract.[31]

The vendor or grantor of real estate seeking cancellation of a contract of sale must restore the cash payment if any has been made.[32] So, also, the vendee of land who has taken possession thereof, under contract or conveyance, must surrender possession and must reconvey, or at least be ready to do so, if he has received conveyance.[33]

All persons interested in the subject-matter and who will be affected by the decree are necessary parties to the suit.[34] The heirs and devisees of a deceased grantor are usually necessary parties plaintiff to a suit to set aside a conveyance made by the deceased.[35] Also in a suit to cancel a mortgage the mortgagor is a necessary party.[36]

Where a court of equity has obtained jurisdiction to cancel an instrument or rescind a contract it will usually give complete relief in the premises. Thus where a deed is rescinded the court will usually direct a reconveyance from the party claiming under it;[37] or direct that an entry of the fact of rescission be made upon the proper record where the instrument is recorded.[38]

Where the land in question has been affected by a suit in rescission and cancellation, the abstract should contain a full synopsis of the proceeding including the decree; but where relief has been denied in such suit, a mere mention of the action will suffice.

§ 674. **Foreclosure in equity.**—An examination of the statutes of the several states in relation to the foreclosure of mortgages can hardly fail to surprise one at the great diversity of systems in use, and at the difference in detail between those which are based upon the same general principles. In general it may be said that a bill in equity for the foreclosure and sale of the property is the prevailing method, and the one most frequently met with in the examination of a title. Although other remedies are used for the foreclosure of mortgages under dif-

[31] Boyce v. Grundy, 3 Pet. (U. S.) 210, 7 L. ed. 655.

[32] Miller v. Louisville &c. R. Co., 83 Ala. 274, 4 So. 842, 3 Am. St. 722.

[33] Westhafer v. Patterson, 120 Ind. 459, 22 N. E. 414, 16 Am. St. 330.

[34] Cummins v. Boyle, 1 J. J. Marsh (Ky.) 480.

[35] Webb v. Janney, 9 App. D. C. 41.

[36] Oakes v. Yonah Land & Min. Co. 89 Fed. 243.

[37] Dey v. Dunham, 2 Johns. Ch. (N. Y.) 182.

[38] Fenton v. Way, 44 Iowa 438; Jones v. Porter, 59 Miss. 628.

ferent systems of law and practice adopted in different states, yet generally courts of equity are not deprived of jurisdiction by the existence of other remedies. When provisions in detail are made by statute on the subject of foreclosure, they are generally founded upon principles and rules of practice already established by courts of equity under the general jurisdiction they have always exercised of the subject; and the powers of these courts are only enlarged and defined by the statute. But even where systems of foreclosure not derived directly from chancery courts have been adopted, courts of equity, where they have not been superseded by codes of practice, which do away with all distinctions between actions at law and suits in equity, still have concurrent jurisdiction of the subject, and are resorted to, if not generally, then in particular instances, for the reason that they afford a more complete and certain remedy.[39]

The foreclosure of a mortgage does not involve the title to land in the sense that suits involving title to land may be brought only in certain named courts.[40] Jurisdiction is not defeated by the fact that a state or territory which has acquired a part of the mortgaged premises refuses to be made a party to the suit.[41] A foreclosure suit in its usual form is partly an action in rem, for the seizure and sale of the property, and partly an action in personam, for the ascertainment of the debt of the mortgage debtor, and obtaining a personal judgment against him.[42]

When no personal judgment is sought the suit is essentially a proceeding in rem, and service by publication, when this is allowed by statute, is sufficient to give jurisdiction.[43]

Actions for the foreclosure of mortgages are generally required by statute to be brought in the county where the mortgaged premises or some part thereof are situated. It is doubtful whether the parties may confer jurisdiction by consent in any other county than that in which the statute says the action must be instituted.[44]

[39] Merchants' Nat. Bank v. Greene, 150 Mass. 317, 23 N. E. 103; Germania Life Ins. Co. v. Potter, 124 App. Div. 814, 109 N. Y. S. 435; In re McCudy's Appeal, 65 Pa. St. 290.

[40] Reynolds v. Atlanta Nat. Bldg. &c. Assn., 104 Ga. 703, 30 S. E. 942.

[41] Kawananakoa v. Polyblank, 205 U. S. 349, 27 Sup. Ct. 526, 51 L. ed. 834.

[42] Batjer v. Roberts (Tex. Civ. App.), 148 S. W. 841; State v. Superior Court of King County, 63 Wash. 312, 115 Pac. 307, Ann. Cas. 1913D, 1119.

[43] Martin v. Pond, 30 Fed. 15.

[44] Silcox v. Jones, 80 S. Car. 484, 61 S. E. 948. But see Snyder v. Pike, 30 Utah 102, 83 Pac. 692.

It is not proper in a foreclosure suit to try a claim of title paramount to that of the mortgagor. The only proper object of the suit is to bar the mortgagor and those claiming under him.[45] There are cases, however, which hold that when the plaintiff in a foreclosure action makes any person defendant, alleging "that he claims to have some interest or lien upon the mortgaged premises, or some part thereof, which lien, if any, has accrued subsequently to the time of said mortgage," such defendant may by his answer set up a paramount claim to the mortgaged premises, or to some part thereof, and that such right may be tried and adjudged in the foreclosure action.[46]

Aside from the usual foreclosure in equity resulting in a sale of the property to satisfy the mortgage debt, we have, in a few states, what is termed a "strict foreclosure," by which the absolute ownership of the property is given to the mortgagee under the decree. The effect of this form of foreclosure is simply to cut off the equity of redemption. The mortgagee's title after foreclosure is that conveyed by the mortgage discharged from the condition of defeasance. It is the same as if the original mortgage had been an absolute deed, giving no right of redemption at law or in equity.[47] This form of foreclosure is proper in the case of a mortgage given for the entire purchase-money, when the value of the premises is not more than the mortgage debt, and the mortgagor does not appear in the suit.[48] It is proper where a mortgagee or purchaser is in possession under a legal title from the mortgagor, for the purpose of cutting off subsequent liens or incumbrances.[49] It is proper, too, where the mortgage is in the form of an absolute deed without any written defeasance.[50] In these cases the decree of strict foreclosure perfects and confirms the title. It bars the interest of persons who have a mere lien upon the land.[51] A judgment of strict foreclosure may properly be rendered upon a land contract for failure of the vendee to make the payments stipulated for.[52]

[45] Grosscup v. German Sav. &c. Soc., 162 Fed. 947.

[46] Lego v. Medley, 79 Wis. 211, 48 N. W. 375, 24 Am. St. 706.

[47] Champion v. Hinkle, 45 N. J. Eq. 162, 16 Atl. 701.

[48] Jefferson v. Coleman, 110 Ind. 515, 11 N. E. 465; Moulton v. Cornish, 138 N. Y. 133, 33 N. E. 842, 20 L. R. A. 370.

[49] Jackson v. Weaver, 138 Ind. 539, 38 N. E. 166.

[50] Hone v. Fisher, 2 Barb. Ch. (N. Y.) 559.

[51] Warner v. Freud, 138 Cal. 651, 72 Pac. 345.

[52] Taylor v. Collins, 51 Wis. 123, 8 N. W. 22.

It has frequently been said that the only proper or necessary parties to a foreclosure suit are the mortgagor and the mortgagee, and those who have acquired rights or interests under them subsequent to the mortgage.[53]

Where title is claimed through a foreclosure proceeding the abstract must contain a synopsis of every step taken from the institution of the suit until final decree, and where a sale of the property was made under the decree, the certificate of such sale, the report thereof and final confirmation. These matters should precede the officer's deed. Care should be exercised by counsel to see that all parties whose interests are affected by the procedure were properly before the court, and that they were duly barred or their rights protected. It is generally essential that all persons materially interested in the subject-matter of the suit shall be made parties to it, either as plaintiffs or defendants.[54]

§ 675. Assignment of dower.—Statutes generally prescribe the method of assigning dower to the widow; but at common law, and in the absence of statutory provisions to the contrary, it is not necessary to resort to legal proceedings for this purpose. In such case the heir, devisee, or alienee of the husband may make the assignment, and the parties thereto are bound as effectually as in any other transaction.[55] But any course of procedure laid down by the statute must of course be observed. Without discussing the various modes of procedure at common law and under the statutes, we proceed to indicate some of the salient principles governing the assignment of dower by summary proceedings in equity and in the courts controlling the administration of decedents' estates. The assignment may be properly made in the probate court, unless, in some states, the chancery court has assumed jurisdiction.[56] The jurisdiction of equity in cases of dower was for a long time doubted. It was at first held that a court of equity would interfere in behalf of a dowress when the remedy provided at common law was for

[53] Tug River Coal & Salt Co. v. Brigel, 86 Fed. 818, 30 C. C. A. 415; Bennett v. United States Land &c. Co., 16 Ariz. 138, 141 Pac. 717; Gamble v. Martin (Tex. Civ. App.), 151 S. W. 327.

[54] O'Brien v. Moffitt, 133 Ind. 660, 33 N. E. 616, 36 Am. St. 566.

[55] Lenfers v. Henke, 73 Ill. 405, 24 Am. Rep. 263; Austin v. Austin, 50 Maine 74, 79 Am. Dec. 597; Clark v. Muzzey, 43 N. H. 59.

[56] Hamby v. Hamby, 165 Ala. 171, 51 So. 732, 138 Am. St. 123.

any reason inappropriate or inadequate. It was finally decided, however, that courts of equity had concurrent jurisdiction with courts of law in the matter of dower.[57] The proceeding in equity is as effective as an action at law, and in some respects much more so, as the assignment of dower in equitable estates and interests can thereby be enforced. In some states probate courts have full power to determine the widow's rights to dower, while in others they possess no such power, but may assign dower where the right thereto is not disputed. In case dower is not assigned by the person or persons whose duty it is to assign it, or if the probate court in states where such jurisdiction is given, the widow may, usually, after demand made, bring suit to compel an assignment.[58]

The action must be brought in the county where the land is situated.[59]

Some statutes require the action to be brought within a certain number of years after the husband's death. But in the absence of such statutes the cases are not agreed on whether the general statute of limitations will apply.

The judgment or decree is either for dower alone, or for dower with damages for its detention. The court usually issues a writ or order directing the sheriff or commissioners to set out the widow's dower, and without this or some statutory authorization, she can not take possession.[60] The action of the official is usually subject to the approval of the court. In abstracting proceedings for the assignment of dower, all the material parts thereof must be shown. This may appear in the synopsis of the probate proceedings, or given as a separate entry. Sometimes an allowance is made in lieu of dower to become a lien on the property, and a statement of this fact becomes an important part of the synopsis.

§ 676. Divorce proceedings.—A suit for divorce is regarded as a civil action, and in the absence of a statute to the contrary, is conducted according to the rules of practice prevailing in ordinary suits in equity.[61] In many states it is deemed

[57] Herbert v. Wren, 7 Cranch (U. S.) 370, 3 L. ed. 374; Bishop v. Woodward, 103 Ga. 281, 29 S. E. 968.

[58] Brooks v. Woods, 40 Ala. 538.

[59] Lamar v. Scott, 3 Strob. (S. Car.) 562.

[60] Hildreth v. Thompson, 16 Mass. 191.

[61] Hobart v. Hobart, 45 Iowa 501.

a proceeding in rem so far as it affects the status of the parties, and the service of summons by publication on a non-resident defendant.[62] As the decree operates to fix the status of the parties, it is obvious that at least one of the parties must be a resident of the state in which the divorce is granted. Where one of the parties is a bona fide resident of the state the courts of that state have jurisdiction to determine, upon constructive notice, the status of the parties.[63] There is, it is evident, a difference of an essential character between the status of persons and rights which are purely of a personal or property nature, so that there is reason for holding that a judgment for alimony can not be rendered upon constructive notice.[64]

A decree of divorce is a bar to any action between the parties thereto to enforce any property rights growing out of the marital relation.[65] Title to real estate can not be litigated in divorce proceedings except as incident to a decree of divorce.[66] The parties may by contract fix their property rights and such contract, when approved by the court, may be carried into its decree and thus bind the parties thereto.[67] But in some states the court may disapprove a stipulation of the parties for a division of the property and may order a more just and equitable division.[68] Generally the court granting the divorce has exclusive jurisdiction over the adjustment of property rights growing out of the divorce, and in the exercise of such power may set aside,[69] or compel conveyances,[70] or grant injunctions against disposing of property during the pendency of the suit;[71] but if a divorce is denied, the court is not usually vested with power to adjust property rights.[72]

It is held in some cases that the court has authority to award the title to specific property of the husband as permanent alimony

[62] In re Newman's Estate, 75 Cal. 213, 16 Pac. 887, 7 Am. St. 146.

[63] Cheely v. Clayton, 110 U. S. 701, 4 Sup. Ct. 328, 28 L. ed. 298.

[64] Lytle v. Lytle, 48 Ind. 200; Prosser v. Warner, 47 Vt. 667, 19 Am. Rep. 132.

[65] Thompson v. Thompson, 132 Ind. 288, 31 N. E. 529; Roe v. Roe, 52 Kans. 724, 35 Pac. 808, 39 Am. St. 367; Barnett v. Barnett, 9 N. Mex. 205, 50 Pac. 337.

[66] Uhl v. Uhl, 52 Cal. 250; Peck v. Peck, 66 Mich. 586, 33 N. W. 893; Wetmore v. Wetmore, 40 Ore. 332, 67 Pac. 98.

[67] Hassaurek v. Hassaurek, 68 Ohio St. 554, 67 N. E. 1066.

[68] Kohl v. Kohl, 143 Wis. 214, 125 N. W. 921.

[69] Singleton v. Close, 130 Ga. 716, 61 S. E. 722.

[70] Miller v. Miller, 234 Ill. 16, 84 N. E. 681.

[71] McClelland v. Gasquet, 122 La. 241, 47 So. 540.

[72] Burns v. Burns (Tex. Civ. App.), 126 S. W. 333.

for the wife.[73] And it is held that lands situated in a county other than that in which the suit is brought may be awarded the wife as alimony, even where the proceedings are based only on constructive notice, if the petition and notice contain averments which bring the subject-matter within the control of the court.[74] But ordinarily an allotment of specific property by way of alimony will not be made.[75]

A husband and wife become tenants in common of community property upon decree of divorce where no order is made concerning such property.[76] But there separate property remains separate.[77] Also an absolute decree of divorce changes a tenancy by the entirety to a tenancy in common.[78] In some instances statutes regulate the interest which one spouse shall have in the real estate of the other upon obtaining a divorce.[79]

Where property is held jointly by the husband and wife as a homestead it is proper in an action for divorce to decree the conveyance of such property as alimony.[80] Or the court may make a judgment against the husband for the support of the wife a lien on lands held by him as a homestead and direct a sale thereof.[81] But the homestead remains in the husband if the decree is silent on the subject.[82]

Also a court may award as alimony lands, the title to which is held by a third person but which in fact belongs to the husband, where such third person is made a party to the suit for divorce.[83]

In a suit to annul a void marriage between two parties, the court can not award alimony as such, but may make an equitable division of property jointly accumulated by the parties while they lived together.[84]

[73] Powell v. Campbell, 20 Nev. 232, 20 Pac. 156, 2 L. R. A. 615, 19 Am. St. 350.

[74] Wesner v. O'Brien, 56 Kans. 724, 44 Pac. 1090, 32 L. R. A. 289, 54 Am. St. 604.

[75] Doe v. Doe, 52 Hun 405, 5 N. Y. S. 514, 24 N. Y. St. 364.

[76] Southwestern Mfg. Co. v. Swan (Tex. Civ. App.), 43 S. W. 813.

[77] James v. James, 51 Wash. 60, 97 Pac. 1113, 98 Pac. 1115.

[78] Mardt v. Scharmach, 65 Misc. 124, 119 N. Y. S. 449.

[79] Taylor v. Taylor, 54 Ore. 560, 103 Pac. 524.

[80] Reeves v. Reeves, 117 Mich. 526, 76 N. W. 4.

[81] Wadsworth v. Wadsworth, 81 Cal. 187, 22 Pac. 648, 15 Am. St. 38; Harding v. Harding, 16 S. Dak. 406, 92 N. W. 1080, 102 Am. St. 694.

[82] Goldsborough v. Hewitt, 23 Okla. 66, 99 Pac. 907, 138 Am. St. 795.

[83] VanVleet v. DeWitt, 200 Ill. 153, 65 N. E. 677.

[84] Werner v. Werner, 59 Kans. 399, 53 Pac. 127, 41 L. R. A. 349, 68 Am. St. 372.

Where a wife accepts the provisions made for her by the decree of divorce in lieu of dower, she is held to abandon all claim under an antenuptial agreement whereby she is to receive a certain sum in lieu of dower.[85]

It would seem that in jurisdictions where a decree for alimony is given the qualities of an ordinary judgment, the real estate of the husband becomes subject to a lien for the payment of such alimony.[86] But where the alimony is temporary during the pendency of the suit, it is held not a judgment upon which execution can issue, and is not a lien.[87] In some cases it is held that notwithstanding the statute making judgments liens on the real estate of the debtor within the county, an allowance of permanent alimony payable in instalments does not create a lien on any property of the husband, unless the record affirmatively discloses that the court intended it to have that effect.[88] The weight of authority to support the proposition that courts have power to declare a lien upon the real estate of the husband to secure the payment of permanent alimony awarded.[89]

Where the question as to whether a wife lost her right of dower in a proceeding for divorce, or where alimony to the wife has been awarded in such proceeding, the abstract should contain a synopsis of such proceeding. Otherwise it is not customary to make any mention of a divorce proceeding. An example of a synopsis of a divorce proceeding is submitted:

Sarah Jones
v.
John Jones.

Circuit Court of Marion County, Indiana.
Cause No. 7280
Action for divorce and alimony.
Filed May 1, 1902.
Order Book 75, page 200.

Decree of divorce granted plaintiff. Judgment for alimony

[85] Long v. Barton, 236 Ill. 551, 86 N. E. 127, 19 L. R. A. (N. S.) 384.

[86] Wetmore v. Wetmore, 149 N. Y. 520, 44 N. E. 169, 33 L. R. A. 708, 52 Am. St. 752; Conrad v. Everich, 50 Ohio St. 476, 35 N. E. 58, 40 Am. St. 679; Goff v. Goff, 60 W. Va. 9, 53 S. E. 769.

[87] In re Grove's Appeal, 68 Pa. St. 143.

[88] Scott v. Scott, 80 Kans. 489, 103 Pac. 1005, 25 L. R. A. (N. S.) 132n, 133 Am. St. 217, 18 Ann. Cas. 564.

[89] Gaston v. Gaston, 114 Cal. 542, 46 Pac. 609, 55 Am. St. 86; Hanscom v. Hanscom, 6 Colo. App. 97, 39 Pac. 885.

in the sum of $1,000.00 awarded plaintiff, and that same is a lien on the real estate of the defendant. Costs against defendant.

§ 677. **Condemnation proceedings.**—In another part of this work we said the right of eminent domain belongs to the sovereign, and consists in the right to take private property for public use, without the consent of the owner. It embraces all cases where, by the authority of the state and for the public good, the property of the individual is taken, without his consent, for the purpose of being devoted to some particular use, either by the state in its soverign capacity, or by a corporation, public or private, or by a citizen to whom such right has been granted by the state.[90] Every estate in land is liable to be determined by the exercise of the right of eminent domain. But property exempted by the constitution or statute, or property already devoted to a public use can not be so taken.[91]

Since eminent domain involves the forcible taking of private property against the owner's consent, all conditions precedent must be strictly complied with. Among the more common of such conditions are the filing of maps and profiles of the enterprise,[92] procurement of the consent of a designated per cent. of the abutters to the occupation of a street,[93] attempts to agree upon the amount of damages,[94] or to purchase the land from the owner thereof.[95]

The procedure in cases of seizure of private property under the right of eminent domain is so largely controlled and regulated by statute that we can not go into details. We mention only the general principles of a fundamental nature which apply to such proceedings almost universally. The proceeding must be, in its nature, judicial, but it is not a proceeding in the ordinary course of the common law entitling the parties to a trial by jury. As to whether it is a "civil action" or "special proceeding," within the meaning of those terms, as used in the codes of the

[90] Consumers' Gas Trust Co. v. Harless, 131 Ind. 446, 29 N. E. 1062, 15 L. R. A. 505; Warren v. St. Paul &c. R. Co., 18 Minn. 384.

[91] Shepard Drainage Dist., v. Eimerman, 140 Wis. 327, 122 N. W. 775.

[92] New York Cent. &c. R. Co. v. Untermyer, 133 App. Div. 146, 117 N. Y. S. 443.

[93] Lehman v. Chambersburg &c. R. Co., 224 Pa. 276, 73 Atl. 440.

[94] Beechwood Park Land Co. v. Summit, 78 N. J. L. 182, 73 Atl. 57.

[95] Jersey City v. Bayonne (N. J. L.) 76 Atl. 1010.

different states is a question upon which there is some diversity of opinion, but the weight of authority is that it is, in many respects, a special proceeding and not a civil action.[96]

The settled rule is that the provisions of the statute prescribing the mode of proceeding must be pursued.[97] Compensation must be determined and fixed by a judicial tribunal, for the question of compensation, under our system, is a judicial question. It is essential to the validity of the decision of a tribunal that it should have jurisdiction of the general subject. The authorities with very little conflict affirm that notice to the property owner is essential in appropriation proceedings.[98] The mode prescribed for serving the notice must be substantially pursued. Also the provisions of the statute relative to the appointment of commissioners or the summoning of a jury must be strictly pursued. All persons who have an estate, interest or right in the land sought to be appropriated should be made parties to the proceedings.[99] The fact that all preliminary requirements of the statute have been met should be stated in the petition, except where the statute provides what the petition shall contain.[1] Statutes sometimes provide a tribunal for assessing benefits and damages, although the appointment of the members of the tribunal may be conferred upon the courts. This tribunal is sometimes called a jury, but is more commonly designated as commissioners. They should in all cases be sworn as required by the statutes, otherwise their proceedings will be invalid.[2]

In many of the states the report of the commissioners must be confirmed by the court appointing them. The report may be accepted or rejected by the court, as justice may require.[3] But the court must confirm or reject the report as a whole.[4] He may, however, amend or modify the report in minor particulars, and confirm it as amended, or recommit it for correction and amend-

[96] Hartley v. Keokuk &c. R., 85 Iowa 455, 52 N. W. 352; Erie R. Co. v. Steward, 59 App. Div. 187, 69 N. Y. S. 57.

[97] Alexandria &c. F. R. Co. v. Alexandria &c. R. Co., 75 Va. 780, 40 Am. Rep. 743, and note.

[98] People v. O'Brien, 111 N. Y. 1, 18 N. E. 692, 2 L. R. A. 255, 7 Am. St. 684, and note.

[99] Grand Rapids &c. R. Co. v. Alley, 34 Mich. 18.

[1] Colorado Cent. R. Co. v. Allen, 13 Colo. 229, 22 Pac. 605.

[2] Bohlman v. Green Bay &c. R. Co., 40 Wis. 157.

[3] Hingham & Q. Bridge & Tpk. Corp. v. Norfolk, 6 Allen (Mass.) 353.

[4] Winchester v. Hinsdale, 12 Conn. 88.

ment.[5] The report, award or verdict should be reasonably certain and explicit in its statements of what was done and decided.[6] Where the statute limits the time in which a report must be made, it must be made within the time, or it will be ineffective.[7]

The condemnation of land usually passes to the condemning party only the right to the specific use for which the land is condemned, and this is an easement and not a fee. The owner of the fee has a right to take possession on abandonment or failure to use the premises by the condemning party.[8] But condemnation may be had of the fee in the land.[9] The report of the commissioners should show the estate or interest taken, as nothing is taken by implication or intendment.[10]

Where the title to the particular land being abstracted was obtained through condemnation proceedings, a full synopsis of such proceedings should appear, but where a particular part of the land in question, such as a right of way for a railroad, a brief reference to the essential steps of the proceeding will suffice. Proceedings to condemn land for the opening or widening of a road or street resulting in a change in the shape or dimensions of land, and in proceedings where benefits and damages have been assessed, require a showing of the essential steps taken.

An example of a synopsis is as follows:

Union Traction Company of Indiana v. Elmer Howard.	In the Circuit Court of Marion County, Indiana. Cause No. 12560. Petition to condemn land for right of way. Petition filed February 12, 1905, for the condemnation of a strip of land 100 feet in width off of the west side of the N. W. ¼ of the N. E. ¼

of Section 19, Township 16 North, Range 4 east, Marion County,

[5] Louisiana Western R. Co. v. Crossman, 111 La. 611, 35 So. 784.

[6] Reitenbaugh v. Chester Valley R. Co., 21 Pa. St. 100.

[7] Anderson v. Pemberton, 89 Mo. 61, 1 S. W. 216.

[8] Muhle v. New York T. &c. R. Co., 86 Tex. 459, 29 S. W. 607.

[9] Seton v. New York, 130 App. Div. 148, 114 N. Y. S. 565.

[10] C. G. Larned Mercantile. Real Estate & Live Stock Co. v. Omaha &c. R. Co., 56 Kans. 174, 42 Pac. 712.

Indiana, for the purpose of an interurban railway right of way. Appearance entered by defendant February 20, 1905.

Cause heard May 1, 1905 (Order Book 75, page 200). Verdict rendered showing finding for plaintiff that it take from the defendant the following described real estate to wit: [Here describe real estate taken and other items of the finding.]

Ordered, by the court, that plaintiff have judgment of condemnation, and that upon the payment by it to the clerk of said court, of said sum, that plaintiff take possession of said land and hold the same for the purposes provided by law.

§ 678. **Construction of wills.**—It frequently becomes necessary to adjudicate the rights and interests of devisees and legatees under the provisions of a will; and such adjudication involves the ascertainment of the testator's intention, in order to fix the rights of beneficiaries in accordance therewith,[11] and whether a disposition is valid or void,[12] or adeemed.[13] Perhaps the most difficult questions on which title to real estate depends are those which involve the true construction of wills where they form or are relied on as a muniment of title. The probate court having jurisdiction of a testator's estate usually has power in the first instance to construe the will, whenever such construction is involved in the settlement and distribution of the estate. The court's order or decree is conclusive as to the rights of heirs, legatees and devisees.[14]

A court of equity may construe wills in proper cases,[15] but its power in this regard grows out of its general jurisdiction over trusts,[16] hence it can not entertain a suit the sole object of which is to settle the legal title between heirs or devisees,[17] nor will it make premature adjudications,[18] or recognize persons who are without interest.[19] A general decree construing a will can not be made in a collateral proceeding in which all the beneficiaries

[11] Glover v. Reid, 80 Mich. 228, 45 N. W. 91; Brown v. Stark, 47 Mo. App. 370.

[12] Johnson v. Longmire, 39 Ala. 143.

[13] May v. May, 28 Ala. 441.

[14] Goad v. Montgomery, 119 Cal. 552, 51 Pac. 681, 63 Am. St. 145.

[15] Davidson v. Davidson Real Estate & Inv. Co., 226 Mo. 1, 125 S. W. 1143, 136 Am. St. 615.

[16] Fletcher v. Root, 240 Ill. 429, 88 N. E. 987.

[17] Bieber v. Porter, 242 Ill. 616, 90 N. E. 183.

[18] Gillen v. Hadley (N. J. Err. & App.) 73 Atl. 849.

[19] Garrard v. Kendall (Ky. App.), 121 S. W. 997.

are not represented.[20] The executor or the devisees and legatees or any of them, may maintain a suit to secure a construction of a will, and the decree of the court is conclusive upon all who are parties to the action.[21] Also a widow may maintain a suit to have her rights under a will judicially determined, and the judgment is conclusive.[22]

Where a will is relied upon as a muniment of title to the real estate in question, a decree of court construing the will is as important as the will itself, and should be shown in the abstract.

[20] Hay v. Hay (Tex. Civ. App.), 120 S. W. 1044.

[21] Sherwood v. Sherwood, 45 Wis. 357, 30 Am. Rep. 757.

[22] Faught v. Faught, 98 Ind. 470; Youmans v. Youmans, 26 N. J. Eq. 149.

CHAPTER XXIX

ADVERSE TITLE

SEC.
685. General considerations.
686. Instruments affecting title adversely.
687. Adverse possession in general.
688. Color of title.
689. Actual possession.
690. Constructive possession.
691. Tacking possessions.
692. How far possession is notice.
693. Estates or property subject to adverse possession.
694. Who may acquire title by adverse possession.
695. Adverse title against reversioners and remaindermen.
696. Title by adverse possession between cotenants and joint owners.
697. Persons under legal disability.
698. Adverse title against state or municipality.
699. Effect of adverse possession.
700. Evidence in support of title by adverse possession.

§ 685. **General considerations.**—It is not unusual to find on the public records evidence of conflicting claims or titles to the same land held by two or more persons. Where such is the case, the title is absolutely defective, and, as between vendor and purchaser, is unmarketable.[1] An inquiry into the matter of occupancy may result in finding the premises in possession of a stranger who claims adversely to the record claimant. Such occupant may base his claim to ownership on some transaction or event not disclosed by the record; such, for instance, as an unrecorded deed, an undisclosed, heirship, or an adverse user for the statutory period of limitation. The occupation of lands by a party as owner, under circumstances which usually characterize proprietary occupations, is evidence, or is accepted as evidence, that the title of such occupant has been created by contracts legally made and has come to him, if he is not the original grantee, by such other contracts as the law allows, or in such other manner as the law appoints for the transmission of estates in land from one person to another, when such proprietary occupation has continued for the period of time fixed by law for that purpose. It is apparent that there is much beyond the abstract and the records that may encumber or defeat the title, and

[1] Reydell v. Reydell, 10 Misc. 273, 31 N. Y. S. 1, 63 N. Y. 437.

while it is not the duty of counsel to look up equities not apparent or fairly to be inferred from the abstract, nor to consider the matter of unrecorded evidence, nevertheless, he should at least direct his client's attention to those matters not shown by the record which may affect the title. Wherever it is discovered that there is an adverse claimant, a careful inquiry must be made as to the source and strength of his claim. This is perhaps the most perplexing and laborious part of counsel's task in passing upon a title.

§ 686. **Instruments affecting title adversely.**—Aside from defects appearing on the face of instruments through which title is claimed, and from matters appearing neither on the face of the instrument, nor in the records, there may be defects from matters appearing in the record of instruments through which title is claimed, and in the records of other instruments affecting the title. Thus an adverse conveyance may result from the officer's transcribing an instrument in such a manner as to affect the land in question, when a correct transcribing of the instrument would have no such result. Such mistakes occur more often in matters of description than of any other part of the instrument. Mistakes appearing on the face of recorded instruments, which affect the title to land not intended to be affected, must be shown in the abstract in order that the proper requisition for its correction may be made. A deed correcting a mistake in a former deed is not an unusual occurrence, and when both are recorded, both should be set out, or, as is the practice of some abstracters, an explanatory note should follow the adverse deed. Where there is a gap or break in the chain, whether it be partial, as where one of several joint owners fails to convey, or entire, as where no privity of title is shown to exist between present and past owners, the asserted claim becomes adverse to the original title and inquiry in pais must be made to ascertain if a valid title by adverse possession exists.

§ 687. **Adverse possession in general.**—An adverse title may arise from possession merely, and need not depend on a deed or other instrument of record. A purchaser who examines the records is protected by them only so far as they are capable of protecting him, but he necessarily assumes the risk of having the actual state of the title correspond with that which appears

of record.[2] As the abstract does not show the fact of possession, he must make inquiry outside the record if he would protect himself, for he takes subject to the right the law gives the occupant indicated by such possession.[3] By statute in some states it is necessary that the adverse occupant should hold under color of title, and other statutes require that he must pay the taxes during the running of the statute of limitations. Still other statutes require that the entry and occupation by the claimant must have been in good faith.[4] The possession of the disseisor, in order to support his claim to title by adverse possession, must be hostile to the true owner, and not merely subordinate to him.[5]

Where one enters upon the land of another without right or claim of right, he is a trespasser, and his possession, no matter for what duration, can never ripen into a title.[6] Some claim of right, not necessarily distinct or valid, is necessary in all cases, and whether such claim has been adverse to the true owner is always a question of fact.[7] Title by adverse possession can not be acquired where entry was made through mere permission or license from the owner;[8] but possession obtained with the consent of the owner, and subsequently asserted adversely to such owner to his knowledge, becomes adverse.[9]

A possession, to be adverse, must also be continued for the whole period required to bar an action for recovery under the statute of limitations.[10] The period of time required to give rise to a title by adverse possession varies in the different states, and the local statute should be consulted in each case. In most states the statute does not run against persons under legal disability. In a number of states a possession based upon some written instrument or judgment is protected against the entry or suit of

[2] Reck v. Clapp, 98 Pa. St. 581.

[3] Hottenstein v. Lerch, 104 Pa. St. 454; Loughridge v. Bowland, 52 Miss. 546; Betts v. Letcher, 1 S. Dak. 182, 46 N. W. 193.

[4] May v. Dobbins, 166 Ind. 331, 77 N. E. 353; Lindt v. Uihlein, 116 Iowa 48, 89 N. W. 214.

[5] Toney v. Knapp, 142 Mich. 652, 106 N. W. 552; Miller v. Warren, 94 App. Div. 192, 87 N. Y. S. 1011; Ayers v. Reidel, 84 Wis. 276, 54 N. W. 588.

[6] Kingston v. Guck, 155 Mich. 264, 118 N. W. 967.

[7] Highstone v. Burdette, 54 Mich. 329, 20 N. W. 64.

[8] St. Joseph v. Seel, 122 Mich. 70, 80 N. W. 987; Coleman v. Pickett, 82 Hun 287, 31 N. Y. S. 480, 64 N. Y. 78.

[9] Vandiveer v. Stickney, 75 Ala. 225.

[10] Overing v. Russell, 32 Barb. (N. Y.) 263.

the dispossessed owner after a much shorter period than that which bars the right against a possession not founded on an instrument or judgment.[11]

[11] Latta v. Clifford, 47 Fed. 614; Stoltz v. Doering, 112 Ill. 234. Time necessary to confer title by adverse possession in the different states; Alabama, ten years; Alaska, ten years; Arizona, three years, where possession is peaceable, adverse, and under color of title; five years where possession is peaceable, adverse, and where possessor pays taxes; ten years where there is merely an adverse holding; Arkansas, seven years adverse possession; California, five years adverse possession; Colorado, seven years actual residence under a connected title deducible of record, seven years possession under color of title to vacant and unoccupied lands, taken in good faith, and paying of taxes; Connecticut, fifteen years adverse possession; Florida, seven years adverse possession; Georgia, twenty years adverse possession, and seven years adverse possession under color of title; Idaho, five years adverse possession; Illinois, twenty years adverse possession, and seven years adverse possession coupled with color of title and payment of taxes; Indiana, twenty years adverse possession; Iowa, ten years adverse possession; Kansas, fifteen years adverse possession; Kentucky, fifteen years adverse possession; Louisiana, ten years continuous and uninterrupted possession in good faith, and thirty years of such possession without regard to good faith; Maine, twenty years exclusive, peaceable, continuous, and adverse possession; Maryland, twenty years uninterrupted adverse possession; Massachusetts, twenty years adverse possession; Michigan, five years adverse possession under color of title, and fifteen years adverse possession without regard to color of title; Minnesota, fifteen years adverse possession; Missouri, ten years adverse possession; Montana, ten years adverse possession; Nebraska, ten years adverse possession; Nevada, five years adverse possession of property other than mining claims, two years adverse possession of mining claims; New Hampshire, twenty years adverse possession; New Jersey, sixty years actual possession, uninterruptedly continued, and twenty years in favor of mortgagee after default; New Mexico, ten years adverse possession under color of title; New York, twenty years adverse possession; North Carolina, seven years adverse possession with color of title, and twenty years of such possession without color of title; North Dakota, ten years adverse possession and payment of taxes; Ohio, twenty-one years adverse possession; Oklahoma, fifteen years adverse possession; Oregon, ten years adverse possession; Pennsylvania, twenty-one years adverse possession, and forty years possession of land in Philadelphia; Rhode Island, twenty years adverse posession under claim of ownership in fee; South Carolina, seven years adverse possession under color of title, and ten years possession without color of title; South Dakota, ten years adverse possession together with payment of taxes; Tennessee, seven years adverse possession with color of title, and twenty years adverse possession without color of title; Texas, five years adverse possession coupled with color of title and payment of taxes; Utah, seven years continuous adverse possession coupled with payment of taxes; Vermont, fifteen years adverse possession; Virginia, fifteen years adverse possession of lands lying east of the Alleghany mountains, and ten years adverse possession of lands lying west of the Alleghany mountains; Washington, ten years adverse possession, and seven years adverse possession under a connected title deducible of record from the state or United States; West Virginia, ten years adverse possession; Wisconsin, ten years adverse possession under color of title, and twenty years adverse

The possession, to be adverse, must be something more than temporary occupancy, as occasional acts of dominion over the land, although extended over the statutory period, will not constitute continuous possession.[12] When the possession is interrupted, the running of the statute is stopped, and a subsequent return to possession will not avail. The running of the statute will only begin from the date of the return.[13]

Adverse possession may be shown in various ways. Among these may be mentioned residence on the land,[14] the erection of buildings and other structures,[15] or the actual inclosure of the land with a fence.[16] None of these acts, however, are absolutely necessary, and in some cases they may be impossible, from the character of the property.[17]

§ 688. **Color of title.**—The expression, "color of title," when used in connection with the law of adverse possession, means that which has the appearance or semblance of title.[18] Color of title may be given by deed, by will, by descent cast, by an execution sale, by a tax deed, by a decree of court, or by any instrument which serves to define the extent of the disseisor's claim.[19] Many decisions hold that color of title may also be created by acts and circumstances which of themselves show the character and extent of the disseisor's entry and claim.[20]

It is not necessary that the title of the disseisor be valid to constitute an adverse possession. His title may be bad, or his original entry may have been by permission of the true owner. It is only necessary that he should have color of title, and that this color of title should purport to give him a freehold estate adverse to that of the original owner. He must have title, or color of title, as distinguished from a mere claim of title.[21] Color of title is not required, however, in order to obtain title to land

possession without color of title; Wyoming, ten years adverse possession.

[12] Elyton Land Co. v. Denny, 108 Ala. 553, 18 So. 561.

[13] Boltz v. Colsch, 134 Iowa 480, 109 N. W. 1106.

[14] Bennett v. Kovarick, 23 Misc. 73, 51 N. Y. S. 752.

[15] Hubbard v. Kiddo, 87 Ill. 578; Congdon v. Morgan, 14 S. Car. 587.

[16] Illinois Cent. R. Co. v. Houghton, 126 Ill. 233, 18 N. E. 301, 1 L. R. A. 213, 9 Am. St. 581.

[17] Murphy v. Doyle, 37 Minn. 113, 33 N. W. 220.

[18] Wright v. Mattison, 18 How. (U. S.) 50, 15 L. ed. 280; Finley v. Hogan, 60 Ark. 499, 30 S. W. 1045.

[19] Cook v. Norton, 43 Ill. 391; Thompson v. Burhans, 79 N. Y. 93.

[20] Kirby v. Kirby, 236 Ill. 255, 86 N. E. 259; Hollingshead v. Nauman, 45 Pa. St. 140.

[21] Dawley v. Brown, 79 N. Y. 390.

by adverse possession, unless there are special statutory provisions to the contrary; but when one enters upon land, under color of title, his possession is not limited to the land actually occupied by him, but by construction is extended to the entire tract included in the instrument under which he claims.[22] On the other hand, if one enters without color of title, his entry can give the disseisee no notice of adverse occupancy except as to the land actually occupied.[23]

§ 689. **Actual possession.**—In order that title to land may be gained by adverse possession, the possession of the disseisor must be actual, and in order to determine the fact of actual possession in a particular case all the circumstances must be taken into consideration.[24] The disseisor must exercise such acts of dominion over the property as will apprise the owner of the fact that a claim of ownership is being asserted.[25] In all cases the acts of dominion on the part of the disseisor must be done with the intention to disseise the owner;[26] but a mere intention to disseise unaccompanied by positive acts will not produce that effect.[27] The acts of dominion must be acts indicative of ownership.[28] An entry made by mistake, although there was color of title, does not amount to a disseisin.[29] Statutes sometimes control the question of actual possession by requiring an actual residence on the land,[30] or by requiring the land to be inclosed or cultivated.[31]

§ 690. **Constructive possession.**—We have said that an adverse occupant who holds land without any color of title, he can obtain title by adverse possession only to so much of the land as he actually occupied. But by the doctrine of constructive possession under color of title he may acquire title to more land than he actually occupied. He obtains title to the entire area

[22] Anderson v. Burnham, 52 Kans. 454, 34 Pac. 1056.
[23] Barber v. Robinson, 78 Minn. 193, 80 N. W. 968.
[24] Houghton v. Wilhelmy, 157 Mass. 521, 32 N. E. 861.
[25] Anderson v. Burnham, 52 Kans. 454, 34 Pac. 1056; Whitaker v. Erie Shooting Club, 102 Mich. 454, 60 N. W. 983.
[26] Ewing v. Burnet, 11 Pet. (U. S.) 41, 9 L. ed. 624.
[27] Lynde v. Williams, 68 Mo. 360.
[28] Algonquin Coal Co. v. Northern &c. Iron Co., 162 Pa. St. 114, 29 Atl. 402.
[29] Skinner v. Crawford, 54 Iowa 119, 6 N. W. 144.
[30] Stumf v. Osterhage, 94 Ill. 115.
[31] McFarlane v. Kerr, 10 Bosw. (N. Y.) 249.

defined or described by the instrument giving color of title.[32] By entry under color of title, the adverse claimant is presumed to be in possession of the whole of his claim.[33] In order, however, to acquire adverse title by constructive possession, the owner of the land must have notice of the claim of title, either by actual knowledge or through notice implied by law.[34] Any land which is actually held by the owner can not be acquired by another who bases his claim on constructive possession.[35]

§ 691. **Tacking possessions.**—Possession must be continuous for the entire statutory period, but such continuous possession need not be by one and the same person. One person may start the adverse possession to land, and another in privity with him may continue it for the statutory period.[36] Several successive periods of possession by different persons may be tacked or added to each other, provided the successive occupants are in privity of contract, estate, or blood,[37] and the combined period of such adverse holdings will be deemed as one continuous possession for the statutory period.[38] Privity that will permit the tacking of possessions exists between testator and devisee,[39] between ancestor and heir,[40] between landlord and tenant,[41] between vendor and vendee,[42] and between a purchaser at a judicial sale and the occupant of the land.[43] It is essential in all cases, however, that there be no gap between the holdings which are to be tacked,[44] although, as between landlord and tenant, a brief vacancy resulting from a change of occupancy does not prevent tacking in favor of the landlord.[45]

§ 692. **How far possession is notice.**—Possession by one who is not the owner of record should induce one proposing to

[32] Hornblower v. Banton, 103 Maine 375, 69 Atl. 568, 125 Am. St. 300n; Clark v. Campau, 92 Mich. 573, 52 N. W. 1026.

[33] Kittell v. Steger, 121 Tenn. 400, 117 S. W. 500.

[34] Ellicott v. Pearl, 10 Pet. (U. S.) 412, 9 L. ed. 475; Little v. Downing, 37 N. H. 355.

[35] St. Louis, A. & T. H. R. Co. v. Nugent, 152 Ill. 119, 39 N. E. 263.

[36] Erck v. Church, 87 Tenn. 575, 11 S. W. 794, 4 L. R. A. 641.

[37] Illinois Cent. R. Co. v. Hatter, 207 Ill. 88, 69 N. E. 751; Allis v. Field, 89 Wis. 327, 62 N. W. 85.

[38] McNeely v. Langan, 22 Ohio St. 32.

[39] Sherin v. Brackett, 36 Minn. 152, 30 N. W. 551.

[40] Montague v. Marunda, 71 Nebr. 805, 99 N. W. 653.

[41] Schneider v. Botsch, 90 Ill. 577.

[42] Merritt v. Westerman, 165 Mich. 535, 131 N. W. 66.

[43] Kendrick v. Latham, 25 Fla. 819, 6 So. 871.

[44] Louisville & N. R. Co. v. Philyaw, 88 Ala. 264, 6 So. 837.

[45] Thompson v. Kauffelt, 110 Pa. St. 209, 1 Atl. 267.

purchase to inquire whether the possession is founded on any right or title. It is notice of the rights of the occupant, whatever they may be; and if he claim by deed, his possession is regarded by most authorities as equivalent to the recording of such deed.[46] In a few states, however, actual notice is essential in order to dispense with registration, and consequently possession does not amount to notice, and does not have the effect of putting a purchaser upon inquiry, though proof of possession may be made in connection with evidence of actual notice.[47] The prevailing rule, however, is that possession is notice although it be not actually known to the purchaser. It is a fact which the purchaser should know, and he is thereby put upon inquiry as to the possessor's rights.[48] A purchaser who negligently or intentionally fails to inquire as to the fact of possession, or as to the title or interest of the person in possession, is affected with notice of such title or interest as the possessor actually has. Such a purchaser can not claim the position of a purchaser in good faith without notice.[49]

A purchaser of land in the possession of a tenant of the vendor has notice of the actual interest of the tenant and of the whole extent of that interest, and is bound to admit the tenant's claim so far as it could be enforced against the vendor.[50]

Actual possession of land, by one who holds an unrecorded contract of purchase, or a bond for a deed, is notice of his rights to one who takes a mortgage on the land from the vendor, and the mortgagee will take a lien only on the vendor's right.[51]

Possession may also be notice of the homestead rights of the possessor.[52] But possession, to operate as implied notice to a pur-

[46] Noyes v. Hall, 97 U. S. 34, 24 L. ed. 909; Price v. Bell, 91 Ala., 180, 8 So. 565; Long v. Langsdale, 56 Ark. 239, 19 S. W. 603; Scheerer v. Cuddy, 85 Cal. 270, 24 Pac. 713; Harral v. Leverty, 50 Conn. 46, 47 Am. Rep. 608.

[47] Harral v. Leverty, 50 Conn. 46, 47 Am. Rep. 608; Moore v. Jourdan, 14 La. Ann. 414; Beal v. Gordon, 55 Maine 482; Lamb v. Pierce, 113 Mass. 72; Drey v. Doyle, 99 Mo. 459, 12 S. W. 287; Brinkman v. Jones, 44 Wis. 498.

[48] Pique v. Arendale, 71 Ala. 91; Loughridge v. Bowland, 52 Miss. 546.

[49] Simmons Creek Coal Co. v. Doran, 142 U. S. 417, 12 Sup. Ct. 239, 35 L. ed. 1063.

[50] Peasley v. McFadden, 68 Cal. 611, 10 Pac. 179; Cunningham v. Pattee, 99 Mass. 248; Seymour v. McKinstry, 106 N. Y. 230, 12 N. E. 348, 14 N. E. 94; Marsh v. Nelson, 101 Pa. St. 51; Doolittle v. Cook, 75 Ill. 354.

[51] Bright v. Buckman, 39 Fed. 243; Jaeger v. Hardy, 48 Ohio St. 335, 27 N. E. 863.

[52] Texas Land & Loan Co. v. Blalock, 76 Tex. 85, 13 S. W. 12.

chaser, must be visible and open, notorious and exclusive, and not merely a constructive possession.[53] Also possession, to operate as notice, should be inconsistent with the title upon which the purchaser relies.[54] Possession by a grantor, after a full recorded conveyance, is not constructive notice to subsequent purchasers of any right reserved in the land or claimed by the grantor.[55]

§ 693. Estates or property subject to adverse possession. —The title to land and the rights incident to such title may be acquired by adverse possession, without regard to whether or not such incidental rights could be acquired independently by any means whatsoever.[56] On the other hand, rights and interests in lands may be acquired by adverse possession, without regard to the ownership of the fee to the land.[57] Thus easements, water rights and the like, may be created or acquired by adverse user and enjoyment.[58] It is held that title to a building may be acquired by adverse possession, although the title to the supporting land is in another.[59] Also the title to the surface estate may be acquired by adverse possession where the original owner of the entire estate has conducted such mining operations thereon as amount to a severance of the minerals.[60]

Title by adverse possession may be acquired to the lands of a married woman,[61] or to the right of dower of a widow.[62]

Title can be gained as against a railroad by adverse possession for the statutory period of limitation.[63] But the adverse user of a railway right of way must be inconsistent with the use and enjoyment of the easement by the railway company.[64] Title by

[53] Townsend v. Little, 109 U. S. 504, 3 Sup. Ct. 357, 27 L. ed. 1012; Bernstein v. Humes, 71 Ala. 260; Smith v. Yule, 31 Cal. 180, 89 Am. Dec. 167; Mason v. Mullahey, 145 Ill. 383, 34 N. E. 36; Smith v. Greenop, 60 Mich. 61, 26 N. W. Rep. 832; Tankard v. Tankard, 79 N. Car. 54; Ellis v. Young, 31 S. Car. 322, 9 S. E. 955.

[54] Smith v. Yule, 31 Cal. 180, 89 Am. Dec. 167.

[55] Gill v. Hardin, 48 Ark. 409, 3 S. W. 519; Quick v. Milligan, 108 Ind. 419, 9 N. E. 392, 58 Am. Rep. 49; Dodge v. Davis, 85 Iowa 77, 52 N. W. 2.

[56] Golden v. Murphy, 31 Nev. 395, 103 Pac. 394, 105 Pac. 99.

[57] Rhoades v. Barnes, 54 Wash. 145, 102 Pac. 884.

[58] Alderman v. New Haven, 81 Conn. 137, 70 Atl. 626, 18 L. R. A. (N. S.) 74.

[59] Fairbanks v. San Francisco R. Co., 115 Cal. 579, 47 Pac. 450.

[60] Delaware & H. Canal Co. v. Hughes, 183 Pa. St. 66, 38 Atl. 568, 63 Am. St. 743, 38 L. R. A. 826.

[61] Trail v. Turner, 22 Ky. L. 100, 56 S. W. 645.

[62] Brown v. Morrisey, 124 N. Car. 292, 32 S. E. 687.

[63] Louisville & N. R. Co. v. Smith, 31 Ky. L. 1, 101 S. W. 317.

[64] Moran v. Chicago, &c. R. Co., 83 Nebr. 680, 120 N. W. 192, 35 L. R. A. (N. S.) 919n.

adverse possession may be acquired to lands held in trust.[65] But at common law, as against the public, no right can be created by mere prescription or adverse possession.[66] So the general rule is that the mere possession of land, though open, exclusive, and uninterrupted for the statutory period of limitation, creates no impediment to a recovery by the government, and of course none to a recovery by one who within that period receives its conveyance.[67] But upon the question as to whether title to property held for public use can be acquired by adverse possession there is some conflict of authority.[68]

§ 694. Who may acquire title by adverse possession.—As a general rule, title by adverse possession may be acquired by every class and description of persons, natural or artificial.[69] Thus title by adverse possession may be acquired by the nation,[70] by a state,[71] or by a municipality.[72] A private corporation may acquire land by adverse possession,[73] although the corporation is incapable under its charter of holding real estate.[74] Corporations having power to take under eminent domain have been held, in some cases, entitled to acquire real estate by adverse possession;[75] while in other cases this right has been denied.[76] Title by adverse possession may also be acquired by foreign corporations,[77] by aliens,[78] by nonresidents,[79] by infants,[80] and by married women.[81]

§ 695. Adverse title against reversioners and remaindermen.—The statute of limitations does not begin to run

[65] Snyder v. Snover, 56 N. J. L. 20, 27 Atl. 1013.

[66] Charlotte v. Pembroke Iron Works, 82 Maine 391, 19 Atl. 902, 8 L. R. A. 828.

[67] Oaksmith's Lessee v. Johnston, 92 U. S. 343, 23 L. ed. 682.

[68] See Ostrom v. San Antonio, 77 Tex. 345, 14 S. W. 66, holding that title to a street or a portion thereof may be acquired in this manner.

[69] Ohio River R. Co. v. Johnson, 50 W. Va. 499, 40 S. E. 407.

[70] Maryland v. West Virginia, 217 U. S. 577, 30 Sup. Ct. 630, 54 L. ed. 888.

[71] Rhode Island v. Massachusetts, 4 How. (U. S.) 591, 11 L. ed. 1116; Eldridge v. Binghamton, 120 N. Y. 309, 24 N. E. 462.

[72] New York v. Carleton, 113 N. Y. 284, 21 N. E. 55.

[73] Mills v. Zion Chapel, 119 Md. 510, 87 Atl. 257.

[74] Hanlon v. Union Pac. R. Co., 40 Nebr. 52, 58 N. W. 590.

[75] Louisville & N. R. Co v. Smith, 128 Fed. 1, 63 C. C. A. 1; Denver & R. G. R. Co. v. Doelz, 49 Colo. 48, 111 Pac. 595.

[76] Narron v. Wilmington &c. R. Co., 122 N. Car. 856, 29 S. E. 356, 40 L. R. A. 415.

[77] St. Paul v. Chicago &c. R. Co., 45 Minn. 387, 48 N. W. 17.

[78] Scottish American Mortg. Co. v. Butler, 99 Miss. 56, 54 So. 666, Ann. Cas. 1913C, 1236n.

[79] Lindenmayer v. Gunst, 70 Miss. 693, 13 So. 252, 35 Am. St. 685.

[80] Woodruff v. Roysden, 105 Tenn. 491, 58 S. W. 1066, 80 Am. St. 905.

[81] Clark v. Gilbert, 39 Conn. 94.

against any person until a right of action has accrued to him. Hence no disseisin on the part of any one can affect a reversioner or remainderman until the termination of the life estate.[82] An owner can not be barred while he has no right to possession or capacity to sue, or where for any other reason he is prevented by law from asserting his rights; hence the rule that the statute will not run against remaindermen during the existence of the precedent estate.[83] But it has been held that one holding possession of land adverse to the tenant in remainder for the statutory period, during which time he paid the taxes, acquired a valid title to the estate in remainder, notwithstanding the existence of an outstanding estate for life, the estate of such claimant not being in privity with the life tenant.[84] But the possession of the life tenant and of any person claiming under him does not become adverse as against the remainderman, until the cessation of the life estate.[85]

§ 696. Title by adverse possession between cotenants and joint owners.—Mere possession by one tenant in common for any period of time however long, is not accepted as evidence of a release from his cotenants, without additional evidence, giving to that possession a hostile character.[86] The possession of one tenant in common is regarded as the possession of all. In order for one cotenant to acquire title to the common estate by his exclusive possession of it, such possession must be held in known hostility to his cotenants and for the prescriptive period.[87] In order for the possession of the disseisor to be adverse to his cotenants they must have a knowledge of their rights and of his assertion of adverse title.[88] The cotenant against whom the adverse possession is asserted must have either actual notice of it or there must be such outward acts of exclusive ownership of an unequivocal character as to impart notice to him.[89] Acts of exclu-

[82] Allen v. DeGroodt, 98 Mo. 159, 11 S. W. 240, 14 Am. St. 626.

[83] Willwhite v. Berry, 232 Ill. 331, 83 N. E. 852; Gholson v. Desha, 32 Ky. L. 996, 107 S. W. 330.

[84] Nelson v. Davidson, 160 Ill. 254, 43 N. E. 361, 31 L. R. A. 325, 52 Am. St. 338.

[85] Moore v. Childress, 58 Ark. 510, 25 S. W. 833; Austin v. Brown, 37 W. Va. 634, 17 S. E. 207.

[86] Colburn v. Mason, 25 Maine 434, 43 Am. Dec. 292; Brown v. Wood, 17 Mass. 68; German v. Machin, 6 Paige (N. Y.) 288.

[87] Tharpe v. Holcomb, 126 N. Car. 365, 35 S. E. 608.

[88] Inglis v. Webb. 117 Ala. 387, 23 So. 125; Morgan v. Mitchell, 104 Ga. 596, 30 S. E. 792; Boyd v. Boyd, 176 Ill. 40, 51 N. E. 782, 68 Am. St. 169; Bader v. Dyer, 106 Iowa 715, 77 N. W. 469, 68 Am. St. 332.

[89] Casey v. Casey, 107 Iowa 192,

sive ownership by one cotenant, such as the open sale, conveyance and delivery of possession thereunder of the whole estate, amount to a complete ouster of the other cotenant, and unless he brings suit within the prescriptive period thereafter his right of recovery will be barred.[90] It has been held that as between themselves joint owners of land can not acquire title by adverse possession.[91]

§ 697. Persons under legal disability.—Title by adverse possession can not be acquired against a person under legal disability.[92] Thus possession for the statutory period of limitation has been held to yield no title against infants where no one was charged with the duty of bringing action, even though such possession be under color of title.[93] But where the statute barring actions for the recovery of real property makes no exception in favor of persons under disability the fact that the owner of the land was under disability at the time the adverse possession commenced does not suspend the running of the statute in his favor during the period of disability.[94] It has also been held that as against a married woman title by adverse possession can not be acquired.[95] It has been held that the disability of coverture can not be added to that of infancy and thus prevent the running of the statute until the removal of the disability of coverture.[96]

§ 698. Adverse title against state or municipality.—While title by adverse possession can not be acquired against the United States,[97] or against a state,[98] yet a grant from the state may be presumed by long continued possession.[99] A statute may also make the state subject to the statute of limitations.[1] In some

77 N. W. 844, 70 Am. St. 190; Beniost v. Rothschild, 145 Mo. 399, 46 S. W. 1081; Smith v. North Canyon Water Co., 16 Utah 194, 52 Pac. 283.

[90] Talbott v. Woodford, 48 W. Va. 449, 37 S. E. 580.

[91] Simon v. Richard, 42 La. 842, 8 So. 629.

[92] Harris v. McCrary, 17 Idaho 300, 105 Pac. 588.

[93] Brown v. Hooks, 133 Ga. 345, 65 S. E. 780.

[94] De Hatre v. Edmonds, 200 Mo. 246, 98 S. W. 744, 10 L. R. A. (N. S.) 86n; Steinberg v. Salzman, 139 Wis. 118, 120 N. W. 1005.

[95] Whittaker v. Thayes, 58 Tex. Civ. App. 282, 123 S. W. 1137.

[96] Quick v. Rufe, 164 Mo. 408, 64 S. W. 102.

[97] United States v. Dastervignes, 118 Fed. 199; Anderson v. Burnham, 52 Kans. 454, 34 Pac. 1056.

[98] Harvey v. Holles, 160 Fed. 531; Eble v. State, 77 Kans. 179, 93 Pac. 803, 127 Am. St. 412.

[99] Bullard v. Barksdale, 33 N. Car. 461.

[1] See St. Paul & D. R. Co. v. Hinckley, 53 Minn. 398, 55 N. W. 560.

states limitations run in favor of an adverse claimant against a municipality,[2] especially when the land in question is held by such municipality as private owner.[3] There is some conflict of authority, however, with reference to lands held by a municipality for a public purpose; some courts holding that such lands may be acquired by adverse possession,[4] while others take a contrary view.[5]

§ 699. **Effect of adverse possession.**—Adverse possession for sufficient time to bar an action to recover real estate confers title.[6] The title is as full and complete as if the possessor had always held the undisputed title of record.[7] The rule rests upon the theory that, when possession and use are long continued, they create a presumption of lawful origin; that is, they are founded upon such instruments and proceedings as in law would pass the right to the possession and use of the property.[8] It is held that there is no superiority in a title derived from a grant to that acquired by possession under color of title for the period of limitations, although the latter title is derived by force of statute.[9] The title thus acquired is respected in courts of equity as well as in courts of law,[10] and the title is such as will support an action to remove a cloud therefrom;[11] or to maintain trespass against one claiming under a senior grant, but without possession.[12] The effect of the possession of the adverse holder for the statutory period is not only to bar the remedy of the owner of the paper title but to divest his estate and vest it in the party holding adversely.[13]

[2] Nall v. Conover, 223 Mo. 477, 122 S. W. 1039.

[3] Cass Farm Co. v. Detroit, 139 Mich. 318, 102 N. W. 848; Timpson v. New York, 5 App. Div. 424, 39 N. Y. S. 248.

[4] Canton Co. v. Baltimore, 106 Md. 69, 66 Atl. 679, 67 Atl. 274, 11 L. R. A. (N. S.) 129n; Schneider v. Detroit, 135 Mich. 570, 98 N. W. 258.

[5] DeLand v. Dixon &c. Lighting Co., 225 Ill. 212, 80 N. E. 125; La Barre v. Bent, 154 Mich. 520, 118 N. W. 6.

[6] Jenkins v. Dewey, 49 Kans. 49, 30 Pac. 114; Logue v. Hutson, 24 Ore. 528, 34 Pac. 477; Carolina Sav. Bank v. McMahon, 37 S. Car. 309, 16 S. E. 31.

[7] Walker v. Converse, 148 Ill. 622, 36 N. E. 202; Dyer v. Eldridge, 136 Ind. 654, 36 N. E. 522.

[8] Fletcher v. Fuller, 120 U. S. 534, 7 Sup. Ct. 667, 30 L. ed. 759; Brown v. Oldham, 123 Mo. 621, 27 S. W. 409; Dunn v. Eaton, 92 Tenn. 743, 23 S. W. 163.

[9] Ellis v. Smith, 112 Ga. 480, 37 S. E. 739.

[10] Depue v. Miller, 65 W. Va. 120, 64 S. E. 740, 23 L. R. A. (N. S.) 775n.

[11] Work v. United Globe Mines, 12 Ariz. 339, 100 Pac. 813; Hardy v. Samuels, 92 Ark. 289, 122 S. W. 654.

[12] Charleroi Timber & Cannel Coal Co. v. Spaulding (Ky. App.), 117 S. W. 291.

[13] Owsley v. Matson, 156 Cal. 401, 104 Pac. 983; Tarver v. Depper, 132

After a title is once acquired by adverse possession, abandonment by the holder thereof does not divest him of title unless such abandonment brings about an estoppel or unless the title to the abandoned property vests in another by reason of such other's adverse possession.[14]

By the great weight of authority it is held that a purchaser may be compelled to take a title resting upon a hostile, adverse and uninterrupted possession, under color of title which has continued for a length of time sufficient to bar an action for the recovery of the property.[15] But in all cases where title is claimed through adverse possession, a diligent inquiry must be made into the facts upon which the title rests, and if such facts be clear and undisputed, the title stands upon the same ground as any other title founded upon matters in pais.[16]

§ 700. Evidence in support of title by adverse possession. In titles based on adverse possession there must be evidence to show: (1) That the possession has been open, notorious and uninterrupted for the statutory period; (2) that there is no saving to any person on account of personal disabilities; and (3) it must appear that there is no probability but what the means will always be at hand to establish such title should it be attacked.[17] To support title by adverse possession it is necessary to show that the claimant against whom it is asserted was not prevented by law from asserting his right during the period of the possession alleged to be adverse.[18]

Before passing on a title claimed through adverse possession counsel should acquaint himself with every fact tending to support same. He may find of record a judgment or decree rendered in an action to support the title, such as a decree quieting title in the disseisor, or a judgment in ejectment, and which is the highest and best evidence of title that can be adduced. He

Ga. 798, 65 S. E. 177, 24 L. R. A. (N. S.) 1161n; Hillman Land & Iron Co. v. Marshall, (Ky. App.), 119 S. W. 180; Safe Deposit & Trust Co. v. Marburg, 110 Md. 410, 72 Atl. 839; Neal v. Davis, 53 Ore. 423, 99 Pac. 69, 101 Pac. 212.

[14] Tarver v. Depper, 132 Ga. 798, 65 S. E. 177, 24 L. R. A. (N. S.) 1161n.

[15] Williams v. Porter (Ky. App.), 21 S. W. 643; Lurman v. Hubner, 75 Md. 268, 23 Atl. 646; Simis v. McElroy, 160 N. Y. 156, 54 N. E. 674, 73 Am. St. 673; Core v. Wigner, 32 W. Va. 277, 9 S. E. 36.

[16] Duvall v. Parker, 2 Duv. (Ky.), 182.

[17] Heller v. Cohen, 154 N. Y. 299, 48 N. E. 527.

[18] Breeden v. Moore, 82 S. Car. 534, 64 S. E. 604.

may also find of record some instrument giving the disseisor such color of title as will start the statute of limitations to running. The payment of taxes on the land is another fact, which, at least in some jurisdictions, tend to strengthen the title.[19] The mere payment of taxes, however, is not necessarily an element of adverse possession, but tends to show a claim of title.[20] Possession alone is not necessarily evidence of any particular title, but is only evidence of some title, and counsel must make inquiry outside the record to ascertain if all the elements which go to make up a title by adverse possession are present. If there is any present ground to apprehend that the title will be disputed, and the means of sustaining it are not available, the title should be rejected.

[19] Hardie v. Bissell, 80 Ark. 74, 94 S. W. 611.

[20] Cashman v. Cashman's Heirs, 123 Mo. 647, 27 S. W. 549.

CHAPTER XXX

TITLE BY DESCENT

SEC.
705. General considerations.
706. Civil death—Casting descent by imprisonment for life.
707. Ancestors.
708. Ancestral estates.
709. When seisin of ancestor essential.
710. Per stirpes and per capita.
711. Taking by representation.
712. Issue.
713. Descendants.
714. Heirs.
715. Forced heirs.
716. Surviving spouse as heir.
717. Children and children's children.
718. Adopted children.
719. Illegitimate children.
720. Pretermitted children.
721. Posthumous children.
722. Property subject to descent.
723. Devolution of real property to heir.
724. What laws govern.
725. Lines of descent.
726. Computing degrees of kindred.
727. Descent of estates of minors not having been married.
728. Brothers and sisters.
729. Next of kin.
730. Kindred of the half-blood.
731. Inheritance by parents of intestate.
732. Inheritance by and through aliens.
733. Right of persons causing death of intestate to inherit his property.
734. Descent of estate of devisee who dies before testator.
735. Release of expectant share to ancestor.
736. Inheritance liable for debts of decedent.
737. Advancements.
738. Proof of heirship.
739. Proof of death of ancestor.
740. Proof of birth and legitimacy.
741. Abstract of descents.

§ 705. **General considerations.**—When a person dies without leaving a will, his property, both real and personal, descends to his heirs under the laws of intestate succession.[1] The title to his real estate thus cast by law upon his heirs is in reality a continuation of the ancestor's title, although for practical purposes it is regarded as a new title, and when asserted must be proved.[2] It is intended by the laws of descent to make such a will for the intestate as, if he had died testate, he would have been most likely to have made for himself, and its obvious policy is to follow the lead of the natural affections, and to consider as most worthy the claims of those who stand nearest to the affections of the intestate.[3]

[1] Hannon v. Southern Pac. R. Co., 12 Cal. App. 350, 107 Pac. 335.
[2] Marshall v. Rose, 86 Ill. 374.
[3] Garland v. Harrison, 8 Leigh (Va.) 368.

The word "intestate" used in the rules of descent and distribution, refers to the property of the intestate undisposed of by will, and does not mean that a decedent shall literally die intestate.[4] A person also is said to die intestate when his will has been revoked or annulled as irregular. But where the word "intestate" is used with respect to particular property, it has reference to a person who dies without effectually disposing of that property by will, whether he left a will or not.

The descent and distribution of property by intestate succession is wholly statutory and subject to legislative control. The rights of heirs expectant are determined by the law in force at the ancestor's death, and the descent of realty is controlled by the law of situs.[5]

Upon the death of the ancestor intestate his real estate descends at once to his heirs, subject (where there is a deficiency of personalty for the purpose) to the payment of debts and administration expenses, and subject also to such allowance as may be provided by statute for the surviving spouse and children.[6]

While the personal property of the intestate is the primary fund out of which debts are to be paid, the fact that a decedent's real estate also is liable for his debts makes it important, so far as the title to the real estate is concerned, that there should be an administration of his estate; for if there is no evidence in the public records of an administration, it may prove difficult to show that the real estate may not be held liable for some unpaid debt of the decedent. At common law, the real estate of an intestate is at once cast upon his heir or heirs; that is, at the moment of the death of the ancestor, his heir becomes the owner of his real estate. This common-law rule is unchanged in many American states, but in a few states the administrator or probate court is vested with a trusteeship over both real and personal property until final settlement of the estate. The law regulating the devolution of the property of intestates is almost entirely statutory, and we have included in the appendix to this work a digest of the statutes of the various states pertaining to the subject. But it may be necessary to bear in mind that in most of the states the statutes

[4] Rocker v. Metzger, 171 Ind. 364, 86 N. E. 403.

[5] Brandies v. Atkins, 204 Mass. 471, 90 N. E. 861, 26 L. R. A. (N. S.) 230; In re Majot, 199 N. Y. 29, 92 N. E. 402, 29 L. R. A. (N. S.) 780n.

[6] In re Graves, 242 Ill. 212, 89 N. E. 978; Maitlen v. Maitlen, 44 Ind. App. 559, 89 N. E. 966; Ison v. Halcomb, 136 Ky. 523, 124 S. W. 813.

of descent are subject to, and must be construed with reference to the law concerning dower, tenancy by curtesy, partnership, homesteads, and exemption, and particularly to the law in favor of the widow and minor children for their immediate support.

§ 706. Civil death—Casting descent by imprisonment for life.—The term "civil death" is the state or condition of a living person who has been deprived of all his civil rights and capacities among his fellow members of society, and who, as to such rights and capacities is considered the same as if he were dead.[7] At common law it involved a total extinction of the civil rights and relations of the person, so that he could neither take nor hold property, but his estate passed to his heirs as though he were really dead.[8] It seems to be a necessary conclusion, from the rules of the common law governing rights of property as affected by forfeiture for crime, that civil death, one of the consequences of conviction for treason or felony, did not of itself, as a general rule, at least, operate to divest the offender of his title to his lands.[9] It is provided by statute in some states, that whenever any person who shall be imprisoned under a sentence of imprisonment for life his estate, property and effects shall be administered and disposed of in all respects as if he were naturally dead.[10] Under such a statute it has been held that a person sentenced to imprisonment in the state prison for life, is deemed civilly dead, and can not inherit from an ancestor dying after the term of imprisonment has begun.[11] In other states, however, the estate of such person does not descend or vest as in case of death.[12]

§ 707. Ancestors.—An ancestor is one from whom an estate is inheritable. The term merely means the person from whom the estate passes, and not as popularly understood, a pro-

[7] In re Donnelly, 125 Cal. 417, 58 Pac. 61, 73 Am. St. 62.

[8] Baltimore v. Chester, 53 Vt. 315, 38 Am. Rep. 677.

[9] Avery v. Everett, 110 N. Y. 317, 18 N. E. 148, 1 L. R. A. 264, 6 Am. St. 368.

[10] In re Donnelly, 125 Cal. 417, 58 Pac. 61, 73 Am. St. 62; State v. Reeves, 97 Mo. 668, 10 S. W. 841, 10 Am. St. 349; Platner v. Sherwood, 6 Johns. Ch. (N. Y.) 118; Baltimore v. Chester, 53 Vt. 315, 38 Am. Rep. 677.

[11] In re Donelly's Estate, 125 Cal. 417, 58 Pac. 61, 73 Am. St. 62; State v. Reeves, 97 Mo. 668, 10 S. W. 841, 10 Am. St. 349; Baltimore v. Chester, 53 Vt. 315, 38 Am. Rep. 677.

[12] Willingham v. King, 23 Fla. 478, 2 So. 851; Smith v. Becker, 62 Kans. 541, 64 Pac. 70, 53 L. R. A. 141; Avery v. Everett, 110 N. Y. 317, 18 N. E. 148, 1 L. R. A. 264, 6 Am. St. 368; Davis v. Laning, 85 Tex. 39, 19 S. W. 846, 18 L. R. A. 82, 34 Am. St. 784.

genitor.[13] It does not mean simply a lineal ancestor, but the person from whom property is derived by an heir under the statutes of descent and distribution.[14] But the term is sometimes used in statutes of descent to mean a lineal ascendant or progenitor.[15] In legal contemplation it is the last person seised of an estate of inheritance, and from whom such estate is transmitted to the heirs.[16] As the term is used in a statute of descent it means any one from whom the estate is inherited. In this sense an infant brother may be an "ancestor" of an adult brother, the former having died, and his estate having come to the latter as his heir.[17] It may also include a child,[18] or a husband or wife.[19] In most states the term embraces all persons from whom a title by descent could be derived, thus using it in a sense almost synonymous with the word kindred,[20] and embraces both lineals and collaterals.[21]

Where a statute provides that if an intestate had no children the estate should pass to the brothers and sisters of the intestate who may be of the blood of the "ancestor from whom the estate came," the word "ancestor" means the person from whom the estate was immediately inherited.[22] Also where a statute provides that the real estate which came to the intestate from his parent or "ancestor" shall belong equally to the brothers and sisters of the intestate, the term "ancestor" signifies the one from whom the estate immediately descended, and not from a remote ancestor.[23] Also, the word "ancestor," as used in a statute providing that if the land came to the intestate otherwise than by purchase, or, in some states, if it came to him either by descent or by gift or devise from an ancestor, it shall pass, not to his kindred generally, but only to such kindred as are of the blood of the ancestor from whom it was derived by him, is to be construed as meaning the immediate ancestor from whom the intestate received the inheritance, devise, or gift.[24]

[13] Bailey v. Bailey, 25 Mich. 185; Prickett v. Parker, 3 Ohio St. 394.

[14] Prickett v. Parker, 3 Ohio St. 394.

[15] Pratt v. Atwood, 108 Mass. 40; Valentine v. Witherill, 31 Barb. (N. Y.) 655.

[16] Gardner v. Collins, 2 Pet. (U. S.) 58, 7 L. ed. 347.

[17] Murphy v. Henry, 35 Ind. 442.

[18] Lavery v. Egan, 143 Mass. 389, 9 N. E. 699.

[19] Cornett v. Hough, 136 Ind. 387, 35 N. E. 699.

[20] Greenlee v. Davis, 19 Ind. 60.

[21] Wheeler v. Clutterbuck, 52 N. Y. 67.

[22] Clayton v. Drake, 17 Ohio St. 367; Cliver v. Sanders, 8 Ohio St. 501.

[23] Buckingham v. Jaques, 37 Conn. 402; Clark v. Shailer, 46 Conn. 119.

[24] Wheeler v. Clutterbuck, 52 N. Y. 67.

By the common law, in order to transmit lands to his heir, it was necessary for the ancestor from whom the descent was cast to have had actual possession of the land constituting the inheritance. Such actual seisin made a person the strip or stock from which future inheritance by right of blood was derived. The necessity for seisin in the ancestor is discussed in the next section.

§ 708. Ancestral estates.—An ancestral estate is one which came to a person by descent or devise from a now dead ancestor, or by deed of actual gift from a living one, there being no other consideration than that of blood, as distinguished from a nonancestral estate, which is one coming to a person in any other way.[25] "Ancestor" is sometimes referred to as "first purchaser," or one who acquired the lands by purchase. In this connection the word "ancestor" means a person related by blood to the intestate from whom the estate is immediately derived, and includes collaterals and refers to ancestors in estate, and not necessarily to ancestors in pedigree.[28] In some states, persons who are not of the blood of the ancestor from whom the estate came can not inherit at all;[27] in others they are merely postponed.[28] Such estate consists only in such property as came to the intestate from an immediate ancestor, from whom the estate descended, and not from whom it remotely descended, unless something in the language or context of the instrument passing it conditions a reference to an ancestor more remote.[29] The title to the land in question must have come to the intestate directly from the ancestor in order to come within the rule.[30] In determining the

[25] Brown v. Whaley, 58 Ohio St. 654, 49 N. E. 65 Am. St. 793. Real estate devised to a granddaughter by her grandfather, upon her death without issue, descends to his heirs, in preference to her next of kin. Coolidge v. Burke, 69 Ark. 237, 62 S. W. 583. Descent of property acquired from an ancestor. In re Pearson, 110 Cal. 524, 42 Pac. 960. The ancestral character of property is destroyed by a conveyance by the owner thereof to another, on a written agreement, that he will, upon request, reconvey it to the grantor. Kihlken v. Kihlken, 59 Ohio St. 106, 51 N. E. 969.

[26] Greenlee v. Davis, 19 Ind. 60.

[27] Clark v. Shailer, 46 Conn. 119; Gray v. Swerer, 47 Ind. App. 384, 94 N. E. 725; Power v. Dougherty, 83 Ky. 187, 6 Ky. L. 621, 7 Ky. L. 54; Cutter v. Waddingham, 22 Mo. 206; In re Simpson, 144 N. Y. S. 1099; Prickett v. Parker, 3 Ohio St. 394; Morris v. Potter, 10 R. I. 58.

[28] See digest of statutes of descent in appendix.

[29] Gardner v. Collins, 2 Pet. (U. S.) 58, 7 L. ed. 347; Clark v. Shailer, 46 Conn. 119; Wheeler v. Clutterbuck, 52 N. Y. 67; Curren v. Taylor, 19 Ohio 36; Morris v. Potter, 10 R. I. 58; Amy v. Amy, 12 Utah 278, 42 Pac. 1121.

[30] West v. Williams, 15 Ark. 682; Bristol v. Austin, 40 Conn. 438; Cornett v. Hough, 136 Ind. 387, 35 N. E. 699; Goodrich v. Adams, 138 Mass.

course of descent of an ancestral estate, all the kindred of the decedent who are not also kindred of the ancestor from whom the estate came must be omitted from consideration.[31] Thus if a daughter inherits real estate from her mother, and then dies without issue, or surviving husband, it descends to her sister, to the exclusion of her father, for the reason that the father is not related by consanguinity to the mother.[32] In Maine, however, if a minor dies unmarried, his estate which came to him by inheritance from one of his parents, in the event of his leaving no brother or sister, or any issue of any deceased brother or sister, his estate is not treated as ancestral estate, but descends to his next of kin in equal degree, whether or not they are related by consanguinity to the parent from whom the inheritance came.[33] Where an estate which an intestate received by descent or devise from his ancestor was acquired by the latter from his ancestor, it would seem that the last or immediate ancestor is the sole stock of descent, and that the kindred who inherit need be of the blood of only such last ancestor.[34] But where the fifth canon of the common law prevails, he who is to inherit an estate which descended to the intestate must also be related to him from whom it descended.[35] Where no distinction is made in the statute between ancestral and nonancestral lands, the source of the intestate's title is immaterial.[36] Where such distinction is made, collaterals of the half-blood take only in case they are of the blood of the ancestor from whom the inheritance came.[37]

Where the land came to the intestate by gift, devise, or descent from a parent, it will, in default of issue, go to the line of the parent from whom it came, unless there is a statute which provides

552; Barnum v. Barnum, 119 Mo. 63, 24 S. W. 780; Russell v. Bruer, 64 Ohio St. 1, 59 N. E. 740; In re McCabe, 15 R. I. 330, 5 Atl. 79.

[31] Beard v. Mosely, 30 Ark. 517; Johnson v. Lybrook, 16 Ind. 473; Wheeler v. Clutterbuck, 52 N. Y. 67; Brower v. Hunt, 18 Ohio St. 311; Danner v. Shissler, 31 Pa. St. 289.

[32] Churchill v. Reamer, 8 Bush (Ky.) 256; Tillinghast v. Coggeshall, 7 R. I. 383.

[33] Decoster v. Wing, 76 Maine 450; Albee v. Vose, 76 Maine 448.

[34] Oliver v. Vance, 34 Ark. 564; Clark v. Shalier, 46 Conn. 119; Wheeler v. Clutterbuck, 52 N. Y. 67; Curran v. Taylor, 19 Ohio 36. Descent of property acquired by descent, devise or gift from parent or other kindred of the testator. Whipple v. Latrobe, 20 R. I. 508, 40 Atl. 160.

[35] Lewis v. Gorman, 5 Pa. St. 164.

[36] In re Pearson, 110 Cal. 524, 42 Pac. 960; Peacock v. Smart, 17 Mo. 402; Prescott v. Carr, 29 N. H. 453, 61 Am. Dec. 652.

[37] In re Smith, 131 Cal. 433, 63 Pac. 729, 82 Am. St. 358; Ryan v. Andrews, 21 Mich. 229; Cutter v. Waddington, 22 Mo. 206.

that it shall go in a different course.[38] The distinction between the devolution of ancestral and nonancestral property is not usually construed as diverting the descent of an ancestral inheritance from the nearest of kin, but only from those not of the ancestor's blood who are in the same degree of kinship with others who are of the ancestor's blood.[39] The general object of ancestral inheritance is to continue the estate in the family of the intestate, and in effecting it, to pay due regard to the claims of the successive branches of the family, and principally to the paramount claim of the proximity of blood to the intestate.[40]

As a general rule ancestral property goes to the blood of the ancestor from whom it came in preference to the next of kin of the intestate not of his blood.[41] As the relation of heir and ancestor does not arise between husband and wife, property derived by a wife from her husband or by a husband from his wife, does not, in the absence of a statutory provision to the contrary, descend to the surviving spouse as ancestral estate.[42]

§ 709. When seisin of ancestor essential.—At common law, real property could descend only from one seised or in possession thereof at the time the particular estate was created.[43] The possession of one parcener or tenant in common was, however, the possession of all; and the possession of a tenant for years was considered as the possession of his lessor. Hence it was no objection to one claiming by descent that the estate at the time

[38] Beard v. Mosely, 30 Ark. 517; Murphy v. Henry, 35 Ind. 442; Garner v. Wood, 71 Md. 37, 17 Atl. 1031; Childress v. Cutter, 16 Mo. 24; Wells v. Seeley, 47 Hun 109, 13 N. Y. S. 239; Bell v. Dozier, 12 N. Car. 333; Stannard v. Case, 40 Ohio St. 211; Walker v. Dunshee, 38 Pa. St. 430. Where the owner of ancestral property died intestate leaving no brothers or sisters, and there were no other children of the ancestor, the mother of such intestate can not take as his legal representative, for the words of the state mean lineal descendants only and do not include parents. In re Tuttle, 77 Conn. 310, 59 Atl. 44.

[39] Ryan v. Andrews, 21 Mich. 229.

[40] Barnes v. Loyd, 37 Ind. 523; Coolidge v. Burke, 69 Ark. 237, 62 S. W. 583.

[41] In re Goetz, 13 Cal. App. 292, 190 Pac. 492; Stevenson v. Gray, 46 Ind. App. 412, 89 N. E. 509; Driskell v. Hanks, 18 B. Mon. (Ky.) 855; Garner v. Wood, 71 Md. 37, 17 Atl. 1031; Runey v. Edmands, 15 Mass. 291; Henderson v. Sherman, 47 Mich. 267, 11 N. W. 153; Haring v. Van Buskirk, 8 N. J. Eq. 545; Matter of McMillan, 126 App. Div. 155, 110 N. Y. S. 622; Wilkerson v. Bracken, 24 N. Car. 315; Brower v. Hunt, 18 Ohio St. 311; Schmucker v. Adams, 45 Pa. Super. Ct. 58.

[42] In re Proctor, 103 Iowa 232, 72 N. W. 516.

[43] 2 Bl. Comm. 209; Jackson v. Hendricks, 3 Johns. Cas. 214; Bates v. Shrader, 13 Johns. (N. Y.) 260.

the descent was cast was in the possession of a tenant for years, or a tenant in common or parcener of the ancestor under whom a claim was made.[44] This common-law rule requiring one claiming as heir to trace his descent from one actually seised is not in force in any of the states of this country, but descent is traced from the person last entitled to the land, regardless of whether he was seised, or whether he obtained the land by purchase or descent.[45] It is sufficient if the ancestor had an interest in the property, whether he was seised thereof or not. There exists one familiar instance where, under the statutes of many states, an heir may inherit that in which his ancestor never had any vested interest. Thus if a devise or bequest be made to a child, or other descendant of the testator, the death of the beneficiary before the testator rarely causes the devise or legacy to lapse, if the beneficiary leave issue. Such issue inherit as though the devise or legacy had vested in his parent in his or her lifetime, unless the will shows a clear intent to exclude them.[46]

§ 710. **Per stirpes and per capita.**—Where one dies intestate, who if he had lived would be entitled to an estate by inheritance as heir of one who has died intestate, his children or their descendants will be entitled to take his share of such inheritance by descent as his representatives. As such representatives they will be entitled to take just as much as their principal would have taken and no more. This rule of law is called taking property per stirpes, or by the right of representation; all the branches of each stirp or root taking the share of the inheritance which the root they represent would have taken. The term per stirpes, or according to the root, is used in distinction from taking per capita, or where each descendant takes a share of the inheritance in his own right as next of kin to the intestate.[47]

By the common law the inheritance invariably passed by right of representation to kindred in both the direct and collateral lines of descent; and this, too, regardless of whether or not such descendants stood in equal or unequal degrees of consanguinity to the intestate. The civil law was as strict in directing the de-

[44] Lyell v. Kennedy, 14 App. Cas. 437.

[45] 4 Kent Comm. 388.

[46] Ballard v. Camplin, 161 Ind. 16, 67 N. E. 505; In re Freeman, 146 Iowa 38, 124 N. W. 804; Mann v. Hyde, 71 Mich. 278, 39 N. W. 78; Rivers v. Rivers, 36 S. Car. 302, 15 S. E. 137.

[47] 1 Bl. Comm. 217.

scent per stirpes so long as the descent was confined to the direct line, but the rule was not applied to heirs of the collateral line only where they stood in equal degrees. Where such collateral descendants were all in equal degrees to the intestate, they took the inheritance per capita and not by representation.[48] The rule prevailing in America differs from both these, in that if the descendants, either lineal or collateral, stand in equal degrees from the common ancestor, they will take the inheritance per capita, but if they stand in unequal degree, they take per stirpes.[49] Hence, if the next of kin are a brother or a sister and the children of a deceased brother or sister, the children will take per stirpes; but if the intestate leaves, as his next of kin, only nephews and nieces, the children of deceased brothers and sisters, they will take his estate in equal shares.[50]

A stirp is a root of inheritance; it designates the ancestor from whom the heir derives title, and it necessarily presupposes the death of the ancestor. When issue take per stirpes it is meant that the descendants of the deceased person took the property to which he was entitled, or would have been entitled if living.[51] Where a testator devised property to his son and provided "and in case of his death without living heirs of his own, the whole shall then revert to my heirs; but should he have heirs of his own body at his decease, they shall share equally with the rest of my heirs," it was held that upon the death of such son the property descended to the heirs of the testator per stirpes.[52] As a general rule when several lineal descendants all of equal consanguinity to the intestate come into partition with others of a more remote degree, the former take per capita and the latter per stirpes.[53] Where the testator devised land to his wife for life with remainder to his heirs and her heirs and their heirs and assigns forever, share and share alike, and at the time of the wife's death there were three stocks of heirs, it was held that the heirs took as if there were but one class, that they took per capita but not per stirpes, and that the devise was to the heirs of the testator

[48] 1 Bl. Comm. 217; Sandar's Justinian pp. 344, 345 and 351, 352.

[49] 4 Kent Comm. 391; Blake v. Blake, 85 Ind. 65.

[50] In re Breg's Estate, 71 Minn. 11, 73 N. W. 511; Douglas v. Cameron, 47 Nebr. 358, 66 N. W. 430.

[51] Rotmanskey v. Heiss, 86 Md. 633, 39 Atl. 415.

[52] Thomas v. Miller, 161 Ill. 60, 43 N. E. 848.

[53] All v. Day, 133 Mo. 337, 34 S. W. 578.

living at the time of the death of the wife, and not at the time of the testator's death.[54] Where a will provided that, "after the death of the last of my children, I desire that my real estate shall be sold to the best advantage, and the proceeds equally divided among my wife or her heirs and my grandchildren or their heirs living at the time," it was held that the grandchildren took per capita and not per stirpes.[55] Where children and grandchildren took through an intervening ancestor and not direct from the original ancestor, they took per stirpes and not per capita.[56] Where there is to be a distribution between near and remote heirs the law will favor a distribution per stirpes in preference to per capita.[57] Where the next of kin of an intestate were nieces and nephews, it was held that they inherited directly and took per capita and not per stirpes.[58]

The question as to whether or not the inheritance is to pass by right of representation or per capita, is one of importance to the heir, as it will often make a difference whether distribution is to be made to all of the class equally, or representing two or more ancestors respectively whose offspring are not equally numerous. One effect of the rule of taking an inheritance per stirpes is to cause the heirs to take the estate subject to any advancements which have been made by the intestate to the parents of such heir, so that where descendants of unequal degrees take an inheritance, those of the more remote degrees will have charged against their shares any advancements made to their parents; but where they take per capita, or directly from the ancestor as his next of kin in their own right, they are not chargeable with advancements.[59]

§ 711. Taking by representation.—Inheritance or succession by right of representation takes place when the descendants of the deceased heir take the same share or right in the estate of another person that their parents would have taken if living. It means the same as taking per stirpes.[60] A right of representation invests the representative with the place, degree, and rights of the

[54] Bisson v. West Shore R. Co., 143 N. Y. 125, 38 N. E. 104.

[55] Morrill v. Phillips, 142 Mass. 240, 7 N. E. 771; Maguire v. Moore, 108 Mo. 267, 18 S. W. 897.

[56] Clark v. Cox, 115 N. Car. 93, 20 S. E. 176.

[57] Kilgore v. Kilgore, 127 Ind. 276, 26 N. E. 56.

[58] Baker v. Bourne, 127 Ind. 466, 26 N. E. 1078.

[59] Brown v. Taylor, 62 Ind. 295; Nelson v. Bush, 9 Dana (Ky.) 104.

[60] Siders v. Siders, 169 Mass. 523, 48 N. E. 277.

person represented. It was recognized both in the common and civil law as existing ad infinitum in the direct descending line.[61] This doctrine is one of necessity, and is only resorted to when the next of kin are in unequal degree, to prevent the exclusion of those in the remoter degree.[62] The right to take by representation is given by statute to children in all the states; and to the descendants of brothers and sisters in many of them, through all descending generations, while in others the right is limited to the children of brothers and sisters. Under the statutes of descent and distribution in a number of states, it has been held that no representation shall be admitted among collaterals after brothers' and sisters' children or descendants.[63] This rule is laid down by statute in Alabama, Connecticut, Georgia, Maine, Maryland, Massachusetts, Michigan, Mississippi, Nebraska, New Hampshire, New Jersey, Pennsylvania, South Carolina, and Vermont.[64] Under these statutes it has been held that the children of deceased uncles and aunts do not take by representation as the next of kin of the intestate.[65] It has also been held that where the right to take by representation is limited to the children of brothers and sisters of the intestate children of first cousins who have died before the intestate are not entitled to take by right of representation.[66] In Georgia, Maryland, Massachusetts, New Hampshire, Pennsylvania, and South Carolina, the common-law rule which restricted the right of representation among collateral kindred to the children of deceased brothers and sisters, prevails.[67] The right of representation seems not to be restricted, but to extend to the

[61] Gaines v. Strong, 40 Vt. 354.

[62] In re Breg, 71 Minn. 11, 73 N. W. 511.

[63] Ector v. Grant, 112 Ga. 557, 37 S. E. 984, 53 L. R. A. 723; Quinby v. Higgins, 14 Maine 309; McComas v. Amos, 29 Md. 132; Conant v. Kent, 130 Mass. 178; Clary v. Watkins, 64 Nebr. 386, 89 N. W. 1042; Page v. Parker, 61 N. H. 65; Davis v. Vanderveer, 23 N. J. Eq. 558; In re Underhill, 62 Misc. 456, 116 N. Y. S. 798; Contra, Whitaker's Estate, 175 Pa. St. 139, 34 Atl. 572; In re Rogers, 131 Pa. St. 382, 18 Atl. 871.

[64] See digest of statutes of descent in appendix.

[65] Chambers v. Chambers, 249 Ill. 126, 94 N. E. 108; Porter v. Askew, 11 Gill & J. (Md.) 346; Page v. Parker, 61 N. H. 65; Bailey v. Ross, 32 N. J. Eq. 544; In re Davenport, 172 N. Y. 454, 65 N. E. 275; Matter of Nichols' Estate, 60 Misc. 299, 113 N. Y. S. 277; Johnston v. Chesson, 59 N. Car. 146; Clayton v. Drake, 17 Ohio St. 367. Contra, Whitaker's Estate, 175 Pa. St. 139, 34 Atl. 572.

[66] In re Campbell's Appeal, 64 Conn. 277, 29 Atl. 494, 24 L. R. A. 667; Ratcliffe v. Ratcliffe, 7 Mart. (N. S.) 335; Davis v. Vanderveer, 23 N. J. Eq. 558; Adee v. Campbell, 79 N. Y. 52; Matter of Underhill, 62 Misc. 456, 116 N. Y. S. 798.

[67] See digest of statutes of descent in appendix.

descendants of collateral relatives in Delaware, Florida, Kansas, Kentucky, North Carolina, and Rhode Island.[68] In Maine, if a decedent leaves a brother or sister, or a child or children of a deceased brother or sister, such child or children take by right of representation.[69] In Pennsylvania, the right of representation is extended to the grandchildren of brothers and sisters and the children of uncles and aunts.[70] "Where the right of representation does prevail, as among descendants, if they are all in the same degree of kindred, as all the grandchildren, or all great-grandchildren, they take in equal shares, though they would be very equal if they took per stirpes and by right of representation. The rule of representation applies only from necessity, or where there are lineal heirs in different degrees, as children, and the children of a deceased child or children, or brothers and sisters, and the child of a deceased brother or sister."[71]

§ 712. **Issue.**—The term "issue," as applied to the descent of estates, includes all the lawful lineal descendants of the ancestor. The word "issue," as used in statutes of descent and distribution, necessarily includes children.[72] Thus where the word "issue" is used with reference to the parent of such issue, as where the issue is to take the shares of the deceased parent, it must mean his children.[73] While the word "issue" includes all descendants, it does not include the heirs at law of a person dying without children.[74] In some jurisdictions, the word, when used in a statute to define the rights of a surviving husband or wife in the estate of the deceased spouse, has been held to include an adopted child.[75] But there are contrary conclusions in other jurisdictions.[76] Under a statute which provides that if a decedent leaves no surviving husband or wife, but leaves issue, the whole

[68] See digest of statutes of descent in appendix.

[69] In re Reynolds, 57 Maine 350.

[70] In re Hayes, 89 Pa. St. 256.

[71] Knapp v. Windsor, 6 Cush. (Mass.) 156.

[72] Bigelow v. Morong, 103 Mass. 287.

[73] Madison v. Larmon, 170 Ill. 65, 48 N. E. 556, 62 Am. St. 356; King v. Savage, 121 Mass. 303; Drake v. Drake, 134 N. Y. 220, 32 N. E. 114, 17 L. R. A. 664; Parkhurst v. Harrower, 142 Pa. 432, 21 Atl. 826, 24 Am. St. 507.

[74] Bodine v. Brown, 12 App. Div. 335, 42 N. Y. S. 202.

[75] Drain v. Violett, 2 Bush. (Ky.) 155; Atchison v. Atchison, 89 Ky. 488, 11 Ky. L. 705, 12 S. W. 942; Buckley v. Frasier, 153 Mass. 525, 27 N. E. 768; In re Rowan, 6 Pa. Co. Ct. 461.

[76] Morse v. Osborne, 75 N. H. 487, 77 Atl. 403, 30 L. R. A. (N. S.) 914n, Ann. Cas. 1912A, 324; Murdock v. Murdock, 74 N. H. 77, 65 Atl. 392.

estate goes to such issue, it is held that the word "issue" includes an adopted child.[77] It has been held that the word "issue," as used in a statute providing that when a devise is made to any child or other relative of the testator, and such child or other relative shall die leaving issue surviving the testator, such issue shall take the estate, means "child of the body" or "heir of the body" of the deceased relative of the testator, and not an adopted child of the testator.[78] But it would seem that an adopted child is a "lineal descendant" of the adoptive parent, such as will prevent a legacy to such parent from lapsing by the death of the legatee before the testator.[79] It has been held that an adopted child is not within the meaning of a statute providing that a conveyance or devise attempting to create an estate tail shall vest a life estate in the grantee or devisee, and upon his death the lands shall pass to his "child" in fee, or in case there is no issue, to his "heirs."[80] An adopted child is held not to be within the term "legitimate issue" as used in a statute with reference to the revocation of a will upon the birth of legitimate issue.[81]

§ 713. **Descendants.**—Descendants are those who have issued from an individual, including his children, grandchildren, and their children to the remotest degree,[82] but does not include "next of kin" or "heirs at law" generally, as these terms comprehend descendants as well as ascendants and collaterals.[83] Thus a husband is not a "descendant" of his wife.[84]

According to its accurate lexicographical and legal meaning the word "descendant" generally designates the issue of a deceased person, and does not describe the child of a parent who is still living. The word is correlative to "ancestor" or "ascendant." [85] It includes the most remote lineal offspring and is prac-

[77] In re Newman, 75 Cal. 213, 16 Pac. 887, 7 Am. St. 146.

[78] Phillips v. McConica, 59 Ohio St. 1, 51 N. E. 445, 69 Am. St. 753.

[79] Warren v. Prescott, 84 Maine 483, 24 Atl. 948, 17 L. R. A. 435, 30 Am. St. 370.

[80] Clarkson v. Hatton, 143 Mo. 47, 44 S. W. 761, 39 L. R. A. 748, 65 Am. St. 635.

[81] Davis v. Fogle, 124 Ind. 41, 23 N. E. 860, 7 L. R. A. 485.

[82] Lich v. Lich, 158 Mo. App. 400, 138 S. W. 558.

[83] Tompkins v. Verplanck, 10 App. Div. 572, 42 N. Y. S. 412; Hamlin v. Osgood, 1 Redf. Surr. (N. Y.) 409.

[84] Prather v. Prather, 58 Ind. 141. "Descendants of such sisters and brothers," includes only legitimate descendants. Giles v. Wilhoit (Tenn.), 48 S. W. 268.

[85] Hillen v. Iselin, 144 N. Y. 365, 39 N. E. 368.

tically synonymous with "issue" in its legal meaning,[86] but does not embrace as much as the word "relations."[87] It does not include relatives in the ascending line;[88] nor does it include collateral relations.[89]

§ 714. Heirs.—At common law, an heir is one upon whom the law casts an estate in lands immediately upon the death of an ancestor.[90] It included only those born in lawful wedlock.[91] But the civil law gives a more extensive meaning to the term. By this law all persons who are entitled to succeed to the estate, both real and personal, whether by act of the party or by operation of law, are included in the term.[92]

The word "heir" refers to a class of persons legally entitled to an estate under the statutes of descent and distribution.[93] In its strict sense it involves the idea of descent or inheritance by operation of law, and is not properly applicable to persons who take under the will of a decedent.[94]

[86] Bates v. Gillett, 132 Ill. 287, 24 N. E. 611; Tichenor v. Brewer's Exr., 98 Ky. 349, 17 Ky. L. 936, 33 S. W. 86.

[87] Jewell v. Jewell, 28 Cal. 232.

[88] Tichenor v. Brewer's Exr., 98 Ky. 349, 17 Ky. L. 936, 33 S. W. 86; Schmiaunz v. Goss, 132 Mass. 141; Mitchell v. Thorne, 134 N. Y. 536, 32 N. E. 10, 30 Am. St. 699.

[89] Bates v. Gillett, 132 Ill. 287, 24 N. E. 611; Baker v. Baker, 8 Gray (Mass.) 101. But see Turley v. Turley, 11 Ohio St. 173.

[90] 2 Bl. Comm. 201; Meadowcroft v. Winnebago, 181 Ill. 504, 54 N. E. 949; Rountree v. Pursell, 11 Ind. App. 522, 39 N. E. 747; Delashmutt v. Parrent, 40 Kans. 641, 20 Pac. 504; In re Weir, 9 Dana (Ky.) 434.

[91] Hoover v. Smith, 96 Md. 393, 54 Atl. 102; Jarboe v. Hey, 122 Mo. 341, 26 S. W. 968.

[92] Adams v. Akerlund, 168 Ill. 632, 48 N. E. 454; Butterfield v. Sawyer, 187 Ill. 598, 58 N. E. 602, 52 L. R. A. 75, 79 Am. St. 246; Morin v. Holliday, 39 Ind. App. 201, 77 N. E. 861; Price v. Griffin, 150 N. Car. 523, 64 S. E. 372, 29 L. R. A. (N. S.) 935.

[93] Mason v. Baily, 6 Del. Ch. 129, 14 Atl. 309; Morton v. Barrett, 22 Maine 257, 39 Am. Dec. 575; Haley v. Boston, 108 Mass. 576; Montignani v. Blade, 145 N. Y. 111, 39 N. E. 719; Corbitt v. Corbitt, 54 N. Car. 114; Weston v. Weston, 38 Ohio St. 473; In re McCrea, 180 Pa. St. 81, 36 Atl. 412; Hanna v. Hanna, 10 Tex. Civ. App. 97, 30 S. W. 820.

[94] Slayton v. Blount, 93 Ala. 575, 9 So. 241; Johnson v. Knights of Honor, 53 Ark. 255, 13 S. W. 794, 8 L. R. A. 732; Hochstein v. Berghauser, 123 Cal. 681, 56 Pac. 547; Mason v. Baily, 6 Del. Ch. 129, 14 Atl. 309; Butterfield v. Sawyer, 187 Ill. 598, 58 N. E. 602, 42 L. R. A. 75, 79 Am. St. 246; Granger v. Granger, 147 Ind. 95, 44 N. E. 189, 46 N. E. 80, 36 L. R. A. 186, 190; Phillips v. Carpenter, 79 Iowa 600, 44 N. W. 898; O'Brien v. Bugbee, 46 Kans. 1, 26 Pac. 428; Kent v. Owensboro Deposit Bank, 91 Ky. 70, 12 Ky. L. 668, 14 S. W. 962; Lyon v. Lyon, 88 Maine 395, 34 Atl. 180; Hoover v. Smith, 96 Md. 393, 54 Atl. 102; Hayden v. Barrett, 172 Mass. 472, 52 N. E. 530, 70 Am. St. 295; Hascall v. Cox, 49 Mich. 435, 13 N. W. 807; Rozier v. Graham, 146 Mo. 352, 48 S. W. 470; State v. Engle, 21 N. J. L. 347; Bodine v. Brown, 12 App. Div. 335, 42 N. Y. S. 202; May v. Lewis, 132 N. Car. 115, 43 S. E. 550; Jamieson v. Knights Templar &c. Assn., 9 Ohio Dec. (Reprint) 388, 12 Wkly. L. Bul. 272;

Ordinarily the statute of distribution must be looked to, to ascertain the persons who are entitled to the character of heirs.[95]

Heirs at law and general heirs are synonymous terms and include all who, upon the death of the ancestor, have the right to succeed to his estate.[96]

The words "heirs of the body" are technical words of limitation,[97] meaning such of the offspring or issue as may by law inherit.[98]

The fact of heirship must be proved, as this is a question for the court to decide, and it is necessary for the person claiming to be heir, to show his relationship and to leave the court to decide upon his status. And he must not only show his relationship, but also that no other relation exists who would impede the course of descent, or who could affect the quantity of the estate coming to him.[99]

The term "heir apparent" applies to persons who will probably inherit from a live ancestor.[1] But such prospective heir will not be permitted to traffic upon his prospective inheritance, unless the ancestor has given his consent thereto.[2]

Heirs are lineal and collateral, but the generic term includes both classes. Children in the lifetime of the parents may be heirs presumptive, but they are not heirs. No one can be an heir during the lifetime of the ancestor.[3] A "lineal heir" is one who inherits in a line either ascending or descending from the common source, as distinguished from a collateral heir.[4] An heir is not deprived of his right of inheritance to lands not devised, although his ancestor's will declares he shall be.[5]

In re Nichol, 128 Pa. St. 428, 18 Atl. 333, 5 L. R. A. 597; Cook v. First Universalist Church, 23 R. I. 62, 49 Atl. 389; Barclay v. Cameron, 25 Tex. 232; Allison v. Allison, 101 Va. 537, 44 S. E. 904, 63 L. R. A. 920; McGonigal v. Colter, 32 Wis. 614.

[95] Dukes v. Faulk, 37 S. Car. 255, 16 S. E. 122, 34 Am. St. 745.

[96] Forrest v. Porch, 100 Tenn. 391, 45 S. W. 676.

[97] Pearsol v. Maxwell, 68 Fed. 513; In re Bacon's Estate, 202 Pa. 535, 52 Atl. 135.

[98] Black v. Cartmell, 49 Ky. 188.

[99] Daugherty v. Deardorf, 107 Ind. 527, 8 N. E. 296; Skinner v. Fulton, 39 Ill. 484; Anson v. Stein, 6 Iowa 150.

[1] Ward v. Stow, 17 N. Car. 509, 27 Am. Dec. 238.

[2] McClure v. Raben, 125 Ind. 139, 25 N. E. 179, 9 L. R. A. 477; Hart v. Gregg, 32 Ohio St. 502.

[3] Booker v. Tarwater, 138 Ind. 385, 37 N. E. 979; Schoonmaker v. Sheely, 3 Denio (N. Y.) 485; Robins v. Quinliven, 79 Pa. St. 333.

[4] Rocky Mountain Fuel Co. v. Kovaics, 26 Colo. App. 554, 144 Pac. 863.

[5] Ames v. Holmes, 190 Ill. 561, 60 N. E. 858.

§ 715. **Forced heirs.**—It is a general rule of law that a person may, by gift during life, or by will after death, divest himself of his entire estate to the exclusion of his heirs and every one having any interest therein except his creditors. Such disinheritance may be worked as against the heir in favor of an entire stranger. But this rule, like many others, is subject to exceptions, one of which is the right given by statute in nearly all the states to the surviving husband or wife. To these respective rights all rules of descent and distribution are made subservient, and a person's right to control the distribution of his estate by will is thus limited by the statutory rights given to the surviving husband or wife. Such statutes create a class who can not be disinherited, and who in thus far may be denominated forced heirs, a term which is used in the civil law to designate a class who can not be disinherited. It means those persons who can not by gift or will, be deprived of the portion of the estate which the law reserves to them.[6] Forced heirs are nothing more than certain legal heirs, who, by reason of their relationship to the deceased have reserved to them the right to claim as heirs, if they so like, a certain portion of the property of the deceased, which he may have disposed of to their prejudice.[7] The natural children of a decedent can not be regarded as his forced heirs.[8]

Under a statute conferring upon a second or subsequent childless wife a fee in her deceased husband's real estate, and at her death casting the descent of such fee upon the children of such husband by a former wife, a species of forced heirship is created, and it has been held that such children by the former wife took the descent, not from the father, but as forced heirs of the subsequent childless wife through whom the fee was made to pass.[9] Where the law of forced heirship obtains, forced heirs can not be deprived of their rights by will,[10] or postponed without their consent.[11] Neither can forced heirs be postponed by the

[6] Wells v. Goss, 110 La. 347, 34 So. 470; Hagerty v. Hagerty, 12 Tex. 456.

[7] Miller v. Miller, 105 La. 257, 29 So. 802.

[8] Reed v. Crocker, 12 La. Ann. 436, 443.

[9] Thorp v. Hanes, 107 Ind. 324, 6 N. E. 920; Utterback v. Terhune, 75 Ind. 363.

[10] Cox v. Von Ahlefeldt, 105 La. 543, 30 So. 175; Conn v. Davis, 33 Tex. 203.

[11] Portis v. Cummings, 14 Tex. 171.

intervention of a life estate in the portion to which they are entitled.[12]

§ 716. **Surviving spouse as heir.**—At common law, the surviving husband was entitled to an estate by curtesy in his wife's real estate, and the surviving wife had her right of dower in the husband's realty. In several of the states of this country, curtesy and dower have been abolished by statute, and the rights of the surviving spouse are very generally regulated by legislative enactment, giving to the survivor a certain portion of the deceased spouse's property. The interest given by statute to the surviving husband or wife is given as a substitute for the estate he or she formerly had in the deceased spouse's lands by curtesy or dower. The surviving spouse can not, perhaps, be said to be an heir in the strict common-law sense of the term, but the statute at least clothes such a spouse with the material attributes of an heir, and places him or her in that relation.[13] The better opinion, however, would seem to be that the surviving spouse is not to be regarded as an heir, and that the interest which he or she has in the estate of the intestate spouse should be treated as existing by virtue of the marital relation rather than as heir to the decedent."[14] A widow is only an heir of her deceased husband in a special and limited sense, and not in the general sense in which the term is usually used and understood.[15] Some cases, hold, however, that on the death of a resident owner of real estate without descendants, leaving a widow, the widow is one of his heirs at law within the strict legal sense of the term.[16] Some cases hold that the surviving spouse is a statutory heir,[17] or an heir at law under the statutes of descent.[18]

Generally, a surviving husband or wife can not derive from or through the deceased spouse an interest in any estate to which the latter was not entitled during his or her lifetime.[19] Nor can

[12] Parker v. Parker, 10 Tex. 83.

[13] Fletcher v. Holmes, 32 Ind. 497. A surviving wife takes the property of her intestate husband as heir, subject to the payment of decedent's debts. Eastes v. Walley, 51 Colo. 166, 117 Pac. 136.

[14] Gauch v. St. Louis Mut. L. Ins. Co., 88 Ill. 251, 30 Am. Rep. 554; Journell v. Leighton, 49 Iowa 601; Richardson v. Martin, 55 N. H. 45.

[15] Unfried v. Heberer, 63 Ind. 67.

[16] Smith v. Winsor, 239 Ill. 567, 88 N. E. 482.

[17] In re Ryan's Estate, 14 Wkly. Notes Cas. (Pa.) 79.

[18] Weston v. Weston, 38 Ohio St. 473.

[19] Prather v. Prather, 58 Ind. 141; Lane v. McKinstry, 31 Ohio St. 640.

a widow of a deceased husband inherit from a child who died in the lifetime of such husband.[20]

§ 717. **Children and children's children.**—We have said that the term "descendants" means children or children's children to the remotest degree; but it may be said that the words "children" and "descendants" are not ordinarily synonymous.[21] While children are descendants, descendants are not always children;[22] for the better rule is, that the words "child" or "children" do not include grandchildren, unless there is some expression in the statute denoting that the words were employed to designate all descendants of an intestate.[23]

Where a statute provides for descent to "children" of any deceased brother or sister, it has been held that the term has reference to sons and daughters of such brother or sister, and does not include grandsons or granddaughters or other more remote descendants.[24] The above rule is subject to some exceptions in the cases of wills and other conveyances, when it was apparent that it was intended to give the expression a more extended signification.[25] The commonly accepted definition of the word "child" is a son or daughter in the first degree. Grandchildren are rarely called "children," the word "descendants" being ordinarily considered more comprehensive than the word "children" or "grandchildren." The term "children" can not be said to have a technical or peculiar meaning in the law so it has been held to extend to grandchildren in some cases.[26] The descent of real estate to children may be considered under three contingencies: (1) Where the heirs of the deceased consist solely of his children; (2) where they consist of children and the issue of deceased children; and (3) where they consist of grandchildren only. If there are surviving children, and no issue of deceased children, the inheritance must be divided equally among such children. If there are surviving children and issue of de-

[20] In re Overdeick, 50 Iowa 244.

[21] Neilson v. Brett, 99 Va. 673, 40 S. E. 32.

[22] Bates v. Gillett, 132 Ill. 287, 24 N. E. 611.

[23] Starrett v. McKim, 90 Ark. 520, 119 S. W. 824; Shanks v. Mills, 25 S. Car. 358; Waldron v. Taylor, 52 W. Va. 284, 45 S. E. 336.

[24] Burns v. Tiffee, 49 Okla. 262, 152 Pac. 368.

[25] McGuire v. Westmoreland, 36 Ala. 594; In re Curry's Estate, 39 Cal. 529; Willis v. Jenkins, 30 Ga. 167; Burgess v. Hargrove, 64 Tex. 110.

[26] In re Curry's Estate, 39 Cal. 529; In re Roberts' Estate, 84 Wash. 163, 146 Pac. 398.

ceased children, the share which would have descended to the parents of such children's children will descend to them. In other words, the surviving children take per capita, while the issue of deceased children take per stirpes. If, however, none of the children of decedent have survived, or two or more of them have left children surviving them, these children's children no longer take per stirpes, but share equally the estate of their grandparents. If the descendants of the deceased consist solely of grandchildren, his estate will be divided among them, but if they consist of grandchildren and the descendants of deceased grandchildren, then such estate descends to the grandchildren and to the issue of the deceased grandchildren, per stirpes, to the remotest degree.[27]

Upon these subjects there is substantial unanimity in the statutory law of this country. Again, the term "children" includes all the legitimate children of the intestate in being at the time of his death, whether the issue of one or more lawful marriages.[28] The words "children and their descendants" used in first rule of the statutes of descent and distribution of Florida is held not to include step-children.[29]

§ 718. Adopted children.—The adoption of children and strangers to the blood was unknown to the common law of England, and exists in this country only by virtue of statute.[30] Most statutes provide that an adopted child shall be to all intents and purposes the child and legal heir of the adoptive parent or parents, and entitled to all the rights and privileges, and subject to all the obligations, as a child of such parent or parents, begotten

[27] Cox v. Cox, 44 Ind. 368; Crump v. Faucett, 70 N. Car. 345. Where but one child and no surviving wife, the child becomes sole distributee. Buckner v. Buckner, 120 Ky. 596, 87 S. W. 776.

[28] Blacklaws v. Milne, 82 Ill. 505, 15 Am. Rep. 339; Coffman v. Bartsch, 25 Ind. 201; Jackson v. Hocke, 171 Ind. 371, 84 N. E. 830; Croan v. Phelps' Adm'x, 94 Ky. 213, 14 Ky. L. 915, 21 S. W. 874, 23 L. R. A. 753; Kent v. Barker, 68 Mass. 535; Bates v. Cotton, 32 Miss. 266.

[29] Houston v. McKinney, 54 Fla. 600, 45 So. 480. See also Tepper v. Supreme Council of Royal Arcanum, 59 N. J. Eq. 321, 45 Atl. 111. Children of decedent's husband by former wife can not inherit from the decedent an estate acquired by descent. Amy v. Amy, 12 Utah 278, 42 Pac. 1121.

[30] Abney v. De Loach, 84 Ala. 393, 4 So. 757; Morrison v. Session's Estate, 70 Mich. 297, 38 N. W. 249, 14 Am. St. 500; In re Thorne, 155 N. Y. 140, 49 N. E. 661; Ballard v. Ward, 89 Pa. St. 358. Statute of adoption construed and applied. Hilpire v. Claude, 109 Iowa 159, 80 N. W. 332, 46 L. R. A. 171, 77 Am. St. 524.

in lawful wedlock.[31] Under such a statute it is held that an adopted child inherits from its adoptive parent, but not through him from his ancestors, nor will he ordinarily be allowed to succeed to the estate of any member of the adopting family or collaterals of the adopting parent, nor to the estate of children born to the adopting parent.[32]

A child, when adopted, may take the family name of the person adopting it, and after adoption, the two usually sustain toward each other the legal relation of parent and child, and have all the rights and are subject to all the duties of that relation.[33]

[31] In re Jobson, 164 Cal. 312, 128 Pac. 938, 43 L. R. A. (N. S.) 1062n; In re Newman, 75 Cal. 213, 16 Pac. 887, 7 Am. St. 146; Barnes v. Allen, 25 Ind. 222. The heirship of an adopted child is established by the order of the court adopting such child. Brown v. Brown, 101 Ind. 340. Legal status of adopted child same as that of natural child. Warren v. Prescott 84 Maine 483, 24 Atl. 948, 17 L. R. A. 435, 30 Am. St. 370. Duly adopted child as a child capable of inheriting. Moran v. Stewart, 132 Mo. 73, 33 S. W. 443; Lathrop v. Young, 25 Ohio St. 451; Schafer v. Eneu, 54 Pa. St. 304. Giving an adopted child a right to inherit does not make him a son in fact, and he is so regarded in law only to give the right to inherit. Commonwealth v. Nancrede, 32 Pa. St. 389. Legal status of adopted child same as that of natural child. Hilpire v. Claude, 109 Iowa, 159, 80 N. W. 332, 46 L. R. A. 171, 77 Am. St. 524. The widow of a deceased testator who dies leaving an adopted child, can not elect to take one-half of her husband's real estate under a statute giving her this right in case he "leave no child." Power v. Hafley, 85 Ky. 671, 9 Ky. L. 369, 4 S. W. 683. A deed to a person for life with remainder to his "bodily heirs" does not include an adopted child of such life tenant. Clarkson v. Hallon, 143 Mo. 47, 44 S. W. 761, 39 L. R. A. 748, 65 Am. St. 635. Legal status of adopted child same as that of child born in lawful wedlock. Glascott v. Bragg, 111 Wis. 605, 87 N. W. 853, 56 L. R. A. 258.

[32] Van Matre v. Sankey, 148 Ill. 536, 36 N. E. 628, 23 L. R. A. 665, 39 Am. St. 196; In re Sunderland, 60 Iowa 732, 13 N. W. 655; Phillips v. McConica, 59 Ohio St. 1, 51 N. E. 445, 69 Am. St. 753. Adopted child not heir of adoptive parent's kindred. Shelton v. Wright, 25 Ga. 636; Pace v. Klink, 51 Ga. 220; Keegan v. Geraghty, 101 Ill. 26; Barnhizel v. Ferrell, 47 Ind. 335; In re Sunderland, 60 Iowa 732, 13 N. W. 655; Power v. Hafley, 85 Ky. 676, 9 Ky. L. 369, 4 S. W. 683; Wyeth v. Stone, 144 Mass. 441, 11 N. E. 729; Van Derlyn v. Mack, 137 Mich. 146, 100 N. W. 278, 66 L. R. A. 437, 109 Am. St. 669; Hockaday v. Lynn, 200 Mo. 456, 98 S. W. 585, 8 L. R. A. (N. S.) 117n; 118 Am. St. 672n, 9 Ann. Cas. 775; Meader v. Archer, 65 N. H. 214, 23 Atl. 521; Phillips v. McConica, 59 Ohio St. 1, 51 N. E. 445, 69 Am. St. 753; Helms v. Elliott, 89 Tenn. 446, 14 S. W. 930, 10 L. R. A. 535; Moore v. Moore, 35 Vt. 98. Statute of adoption must be strictly complied with. Ex parte Clark, 87 Cal. 638, 25 Pac. 967. Where an intestate had adopted his grandchild as his own, it was held that such adopted child could take only the interest of a natural child, and can not take in the dual capacity of a grandchild and as an adopted child. Billings v. Head, 184 Ind. 361, 111 N. E. 177. The inheritance given to an adopted child under this rule is limited to its adoptive parents, and it can not take from the estate of their collateral kindred. Boaz v. Swinney, 79 Kans. 332, 99 Pac. 621.

[33] In re Jobson, 164 Cal. 312, 128 Pac. 938, 43 L. R. A. (N. S.) 1062n.

Where the law permits a husband to adopt a child without the assent of his wife, the child so adopted becomes the heir of the husband alone, and it sustains no relation to and is not heir of the wife.[34] Where a husband can not adopt a child without his wife's consent, it is held that he may confer upon a child the right of an heir by an executed contract made with the natural father of such child.[35] Where the child, by virtue of its adoption, inherits from its adopting parents, it does not lose the right to inherit from its natural parents.[36] While an adopted child is heir both to its natural and its adopting parents, both do not inherit from it, and upon its death unmarried and without descendants, its estate, in the absence of a statute to the contrary, vests in its natural, to the exclusion of its adopting parents;[37] although such estate may have been derived from the adopting parents.[38] But some statutes provide that when any adopted child shall die seised or possessed of any estate which came to such a child by inheritance from or upon distribution of the estate of any parent by adoption, not having lawfully devised the same and leaving no surviving wife, husband, issue or descendants, the same shall not go to the kindred of the blood or next of kin of such adopted child, but shall descend to the heirs or be distributed to the next of kin of such parents by adoption.[39] If an adopted child predeceases its adopting parents, its children succeed to its share in the estate in the same manner as if it had been a natural child.[40] The legal relation does not end with the death of the adoptive child, and so the line of descent goes back, in default of wife or

The expression "adopted into his family," as used in the statute means admitted and received into one's family, given the family name, and acknowledged and recognized as a child. Estate of Morton v. Morton, 62 Nebr. 420, 87 N. W. 182.

[34] Barnhizel v. Ferrell, 47 Ind. 335. Child adopted by a husband does not become the child of his wife so as to be entitled to claim rights in her estate. Keith v. Ault, 144 Ind. 626, 43 N. E. 924. A child adopted by a special statute as the heir of one of his adopting parents does not thereby become entitled to inherit from the other. Webb v. Jackson, 6 Colo. App. 211, 40 Pac. 467. Where a wife acts conjointly with her husband in adopting a child, such child sustains the same relations to her as to her husband. Balch v. Johnson, 106 Tenn. 249, 61 S. W. 289.

[35] Middleworth v. Ordway, 191 N. Y. 404, 84 N. E. 291.

[36] Wagner v. Varner, 50 Iowa 532.

[37] Upson v. Noble, 35 Ohio St. 655; Lathrop v. Young, 25 Ohio St. 451; Hole v. Robbins, 53 Wis. 514, 10 N. W. 617.

[38] Reinders v. Koppelman, 68 Mo. 482, 30 Am. Rep. 802.

[39] Illinois: Hurd's Rev. Stats. (1915-16), p. 36, § 6; Wisconsin: Statutes (1915), § 2272a.

[40] Pace v. Klink, 51 Ga. 220. Contra, In re Sunderland, 60 Iowa 732, 13 N. W. 655.

children, to the source from which the property came.[41] Under some statutes it has been held that an adult person may be adopted and rendered capable of inheriting from the foster parent,[42] but other courts have held that the word "child," as used in a statute relating to adoption can not be construed to authorize the adoption of an adult.[43] Many courts have held that the proceedings for adoption must be in substantial conformity with the provisions of the statute;[44] while others hold that the proceedings must be in strict conformity with the statute.[45] But it would seem that omissions from the strict statutory requirements will not necessarily annul the established status of the person adopted.[46] In some jurisdictions an adopted child does not inherit from its adoptive parents in the absence of an affirmative statement to that effect in the statement made and filed with the court, or the use of language which clearly indicates the intention of the foster parents that the child shall inherit.[47]

Generally a decree of adoption rendered in a state whose laws make an adopted child the heir of an adopting parent, entitles such child to inherit the parent's land situated in another state.[48] It would seem that upon adoption a child obtains a status at the place of its domicile, and that the status thus obtained will be everywhere recognized.[49] But on the other hand, if the state in

[41] Paul v. Davis, 100 Ind. 422.

[42] Sheffield v. Franklin, 151 Ala. 492, 44 So. 373, 12 L. R. A. (N. S.) 884n, 125 Am. St. 37, 15 Ann. Cas. 90; In re Moran, 151 Mo. 555, 52 S. W. 377.

[43] In re Moore, 14 R. I. 38; Williams v. Knight, 18 R. I. 333, 27 Atl. 210.

[44] In re Woodward, 81 Conn. 152, 70 Atl. 453; Non-She-Po v. Wa-Win-Ta, 37 Ore. 213, 62 Pac. 15, 82 Am. St. 749; Nugent v. Powell, 4 Wyo. 173, 33 Pac. 23, 20 L. R. A. 199, 62 Am. St. 17.

[45] Keegan v. Geraghty, 101 Ill. 26; Watts v. Dull, 184 Ill. 86, 56 N. E. 303, 75 Am. St. 141; Furgeson v. Jones, 17 Ore. 204, 20 Pac. 842, 3 L. R. A. 620, 11 Am. St. 808. Statute of adoption must be strictly complied with. Tyler v. Reynolds, 53 Iowa 146, 4 N. W. 902.

[46] Barnard v. Barnard, 119 Ill. 92, 8 N. E. 320; Flannigan v. Howard, 200 Ill. 396, 65 N. E. 782, 59 L. R. A. 664, 93 Am. St. 201; Jones v. Leeds, 41 Ind. App. 164, 83 N. E. 526; Ferguson v. Herr, 64 Nebr. 649, 90 N. W. 625, 94 N. W. 542; Wilson v. Otis, 71 N. H. 483, 53 Atl. 439, 93 Am. St. 564; Quinn v. Quinn, 5 S. Dak. 328, 58 N. W. 808, 49 Am. St. 875; Crocker v. Balch, 104 Tenn. 6, 55 S. W. 307; Parsons v. Parsons, 101 Wis. 76, 77 N. W. 147, 70 Am. St. 894.

[47] Ferguson v. Herr, 64 Nebr. 649, 90 N. W. 625, 94 N. W. 542.

[48] Gloss v. Sankey, 148 Ill. 536, 36 N. E. 628, 23 L. R. A. 665, 39 Am. St. 196; Ross v. Ross, 129 Mass. 243, 37 Am. Rep. 321; Melvin v. Martin, 18 R. I. 650, 30 Atl. 467. Persons adopting must be residents of the state. Eddie v. Eddie, 8 N. Dak. 376, 79 N. W. 856, 73 Am. St. 765.

[49] Scott v. Key, 11 La. Ann. 232; Ross v. Ross, 129 Mass. 243, 37 Am. Rep. 321; Smith v. Kelly, 23 Miss. 167, 55 Am. Dec. 87. Legal status of

which the claim of the adopted child is urged has no statute upon the subject of adoption, or a statute essentially dissimilar from that of the state in which the adoption took place, the law of the adopting state will not be allowed to prevail, nor will the adopted child be conceded any right of inheritance not given it by the law of the state in which the inheritance is claimed.[50]

§ 719. Illegitimate children.—An illegitimate is one who is born out of lawful wedlock; or one not born within a competent time after the termination of such wedlock; or one who is born out of wedlock, the parents do not intermarry and the father does not acknowledge the child as his own; or one who is born in lawful wedlock when procreation by the husband is shown to have been impossible.[51] At common law, however, one born out of lawful wedlock was not made legitimate by the subsequent intermarriage of the parents.[52] In the absence of positive evidence to the contrary, every child is presumed to be legitimate; and this is true, though the date of the mother's marriage is shown, and there are circumstances from which it appears probable that the birth of the child occurred at a prior date.[53]

Generally, every child born during wedlock is presumed to be legitimate, and nothing short of evidence excluding the possibility of its legitimacy will remove this presumption.[54] The presumption of legitimacy may arise if the relation of parent and child has been established by proof that the child has always

adopted child same as that of natural child. Flannigan v. Howard, 200 Ill. 396, 65 N. E. 782, 59 L. R. A. 664, 93 Am. St. 201. Adoption of child according to laws of another state given full faith and credit in Louisiana. Succession of Caldwell, 114 La. 195, 38 So. 140, 108 Am. St. 341.

[50] Lingen v. Lingen, 45 Ala. 410. The statute has no extra-territorial effect. Brown v. Finley, 157 Ala. 424, 47 So. 577, 21 L. R. A. (N. S.) 679n, 131 Am. St. 68, 16 Ann. Cas. 778; Barnum v. Barnum, 42 Md. 241. Rights of child adopted in one state to inherit lands in another state. Van Matre v. Sankey, 148 Ill. 536, 36 N. E. 628, 23 L. R. A. 665, 39 Am. St. 196; Gray v. Holmes, 57 Kans. 217, 45 Pac. 596, 33 L. R. A. 207; Ross v. Ross, 129 Mass. 243, 37 Am. Rep. 321.

[51] 1 Bl. Comm. 457; Smith v. Perry, 80 Va. 563.

[52] In re Walker's Estate, 5 Ariz. 70, 46 Pac. 67; Brock v. State, 85 Ind. 397.

[53] Orthwein v. Thomas, 127 Ill. 554, 21 N. E. 430, 4 L. R. A. 434, 11 Am. St. 159; Strode v. Magowan, 2 Bush (Ky.) 621; Caujolle v. Ferrié, 26 Barb. 177 (aff'd. 23 N. Y. 90); State v. McDowell, 101 N. Car. 734, 7 S. E. 785; Dennison v. Page, 29 Pa. St. 420, 72 Am. Dec. 644. Child begotten before but born after void marriage between parents held legitimate. Swinney v. Klippert, 20 Ky. L. 2014, 50 S. W. 841.

[54] Weatherford v. Weatherford, 20 Ala. 548, 56 Am. Dec. 206.

borne the name of the father to whom he claims to belong, and that the father has treated him as his child.[55] Though a child is conceded to have been born out of wedlock, it will in many jurisdictions, be legitimatized by the subsequent marriage of its parents, thereby enabling it to inherit to the same extent as other children born after such marriage.[56]

By statute in some states, the innocent children of a marriage de facto are legitimate.[57] Under statutes requiring an acknowledgment of the illegitimate child by the father, it is held that such acknowledgment may take place either before or after the taking effect of the statute.[58] At common law if the parents have been formally married and such marriage is void for any reason, the issue thereof is illegitimate; but if the marriage is voidable only, and requires something to be done to avoid it the issue thereof is legitimate.[59]

That an illegitimate child may be legitimatized is a principle that is unquestioned. The power to effect such legitimation is one which is inherent in the legislature, and it may be effected in special cases or by acts which prevent a general method of legitimation. Such acts may be both retrospective and retroactive in their effects, but will not be permitted to take effect to

[55] Lay v. Fuller (Ala.), 59 So. 609.

[58] Houston v. Davidson, 45 Ga. 574; Jackson v. Moore, 8 Dana (Ky.) 170; Miller v. Miller, 91 N. Y. 315, 43 Am. Rep. 669. The marriage of parents of illegitimate children does not legitimize the latter, except as provided in the statute. Trayer v. Setzer, 72 Nebr. 845, 101 N. W. 989. The illegitimate child of an unmarried man and a married woman who subsequently marry after she has been divorced from her husband is legitimated thereby and entitled to inheritance from the father if he has acknowledged the child as his child. Ives v. McNicoll, 59 Ohio St. 402, 53 N. E. 60, 43 L. R. A. 772, 69 Am. St. 780.

[57] Dyer v. Brannoch, 66 Mo. 391, 27 Am. Rep. 359; Wright v. Lore, 12 Ohio St. 619. Legitimatization of children of slaves living together in good faith as husband and wife. Lee v. Lee, 161 Mo. 52, 61 S. W. 630.

[58] Townsend v. Meneley, 37 Ind. App. 127, 74 N. E. 274, 76 N. E. 321. Acknowledgment of legitimacy of child can not be subsequently contradicted. Binns v. Dazey, 147 Ind. 536, 44 N. E. 644; Alston v. Alston, 114 Iowa 29, 86 N. W. 55. A writing, to constitute an acknowledgment of paternity within the provisions of the statute, must be one in which the paternity is directly, unequivocally, and unquestionably acknowledged. Moore v. Flack, 77 Nebr. 52, 108 N. W. 143. No intention to make the child an heir, and no distinct statement that it is an illegitimate child, need appear in the writing. Thomas v. Thomas' Estate, 64 Nebr. 581, 90 N. W. 630. Writing held not a sufficient acknowlment of an illegitimate child to give it the right of inheritance. Lind v. Burke, 56 Nebr. 785, 77 N. W. 444.

[59] Sneed v. Ewing, 5 J. J. Marsh (Ky.) 460, 22 Am. Dec. 41. Marriage between a white woman and a negro being void their children can not inherit from their father. Moore v. Moore, 30 Ky. L. 383, 98 S. W. 1027.

divest rights which have vested prior to their passage, and a descent that has been cast will not be opened to admit an illegitimate who has since been legitimatized.[60]

By virtue of the general principle governing the conflict of laws that the policy of a state in which land is situated must prevail in matters appertaining to that land, statutes of legitimation can have no force as to land outside of the state in which they have been passed so as to enable a person who has been made legitimate in one state to take land by inheritance in another, where the law of that other state would not hold him as legitimate if he were a citizen of that state.[61] But a contrary view has been announced in some of the states, and it has been held that such statutes fix the status of the person in the place of his domicil, and that this status once fixed remains to the person and accompanies him into any other state or county into which he may remove.[62] At common law an illegitimate person can acquire and transmit no rights of inheritance except such as may result from his own marriage. He does not inherit from his own mother nor she from him; nor from his father, though the paternity be stated; nor through the other children of the same mother, nor they through him.[63]

By both the common and civil law the most important disability under which an illegitimate labored was that he possessed no inheritable blood and was incapable of becoming heir to either his father or mother or to any one else, nor could he transmit inheritance, save only to heirs born of his own body. In this respect the well settled American rule differs from that of both the common and civil law, as legitimation by subsequent marriage between the parents is the principle which is very generally admitted in the legislation of the different states. The

[60] Gregley v. Jackson, 38 Ark. 487; McGunnigle v. McKee, 77 Pa. St. 81, 18 Am. Rep. 428; Garland v. Harrison, 8 Leigh (Va.) 368. Legitimizing bastards by subsequent marriage of parents and recognition of child. Houghton v. Dickinson, 196 Mass. 389, 82 N. E. 481.

[61] Lingen v. Lingen, 45 Ala. 410; Stoltz v. Doering, 112 Ill. 234; Barnum v. Barnum, 42 Md. 251; Smith v. Derr, 34 Pa. St. 126, 75 Am. Dec. 641.

[62] Harvey v. Ball, 32 Ind. 98; Scott v. Key, 11 La. Ann. 232; Ross v. Ross, 129 Mass. 243, 37 Am. Rep. 321; Miller v. Miller, 91 N. Y. 315, 43 Am. Rep. 669. The law of the state of the father's domicile determines the status of both father and child. Blythe v. Ayres, 96 Cal. 532, 31 Pac. 915, 19 L. R. A. 40.

[63] Orthwein v. Thomas, 127 Ill. 554, 21 N. E. 430, 4 L. R. A. 434, 11 Am. St. 159; Hughes v. Decker, 38 Maine 153; Bent v. St. Vrain, 30 Mo. 268.

rule, too, is pretty generally recognized by statute, that permits illegitimate children to inherit from the father under certain restrictions; and also that an illegitimate child and its mother shall mutually inherit one from the other.[64] Illegitimates have been made heirs of their mother by statute in New Jersey, New York, and North Carolina,[65] in default of lawful issue; and in all of the other states they inherit from the mother with the legitimate children, share and share alike.[66] In Arkansas, Florida, Illinois, Indiana, Mississippi, Missouri, New Mexico, Ohio, Pennsylvania, Rhode Island, Texas, Virginia, and West Virginia, illegitimate children not only inherit from their mother, but represent her so as to inherit from her kin, share and share alike, with legitimate children.[67] In Arizona, California, Idaho, Kentucky, Louisiana, Maine, Michigan, Minnesota, Montana, Nebraska, Nevada, North Carolina, North Dakota, Oregon, South Dakota, Washington, and Wisconsin, illegitimate children do not represent their mother so as to claim any estate from her kindred whether lineal or collateral.[68]

The courts of some states restrict the operation of statutes giving to illegitimate children rights of inheritance by them from their mother or by her from them.[69] Where this is the case, the right of an illegitimate to inherit from his legitimate brothers

[64] Descent of property from illegitimate child. Ward v. Mathews, 122 Ala. 188, 25 So. 50. Illegitimate child of testator's daughter to whom he has devised land takes such devise as issue of such daughter. Cherry v. Mitchell, 108 Ky. 1, 21 Ky. L. 1547, 55 S. W. 689.

[65] See digest of statutes of descent in appendix.

[66] Alexander v. Alexander, 31 Ala. 241; In re Magee, 63 Cal. 414; Krug v. Davis, 87 Ind. 590; McGuire v. Brown, 41 Iowa 650; Black v. Cartmell, 10 B. Mon. (Ky.) 188; In re Opdyke's Appeal, 49 Pa. St. 373.

[67] See digest of statutes of descent in appendix. Illegitimate child inherits his deceased mother's share of her brother's estate. Moore v. Moore, 169 Mo. 432, 69 S. W. 278, 58 L. R. A. 451. Rights of widow as against deceased husband's grandchildren by an illegitimate daughter. Hope v. Hoover (Miss.), 21 So. 134. The right to inherit under this section does not extend to collateral kindred. Hudnall v. Ham, 183 Ill. 486, 56 N. E. 172, 48 L. R. A. 557, 75 Am. St. 124. Where an illegitimate left a widow, collateral heirs were precluded from inheriting, although the widow had released her right to inherit by an antenuptial agreement. Hudnall v. Ham, 183 Ill. 486, 56 N. E. 172, 48 L. R. A. 557, 75 Am. St. 124.

[68] See digest of statutes of descent in appendix. An illegitimate child can not inherit directly from the ancestors of his mother. Hogan v. Hogan, 19 Ky. L. 1960, 44 S. W. 953. Rights of illegitimate and legitimated children. Marionneaux v. Dupuy, 48 La. 496, 19 So. 466. Inheritance by illegitimate children. Messer v. Jones, 88 Maine 349, 34 Atl. 177. Rights of illegitimates. In re Scholl, 100 Wis. 650, 76 N. W. 616.

[69] Jackson v. Jackson, 78 Ky. 390, 39 Am. Rep. 246; Curtis v. Hewens, 11 Metc. (Mass.) 294; In re Steckel, 64 Pa. St. 493.

and sisters is denied.[70] In a majority of the states, the mother of an illegitimate child inherits from it, if it dies unmarried, and without issue.[71] From this it will be seen that the right of illegitimates to inherit, or to transmit inheritance save in the lineal descending line, is entirely statutory. As a rule statutes giving illegitimates the right to inherit from the mother do not carry heritable blood generally between the illegitimate and his collateral maternal relations, but the taking of the inheritance is limited to cases of lineal ascent or descent.[72] Such statutes confer upon illegitimates the right of inheritance by representation through the mother, both in the lineal and in the collateral line as fully as if they were legitimate; and they will take as heir of the mother from any person from whom the mother might have taken inheritance had she been living.[73]

An illegitimate person dying without issue, his or her surviving husband or wife may become entitled to the whole of the estate.[74] The right of illegitimate children born of the same mother to inherit from each other is recognized in some of the states.[75] Statutes enabling illegitimates to inherit property their mother would have taken if living, do not grant such right in case the mother is dead.[76]

[70] Doe v. Bates, 6 Blackf. (Ind.) 533; Pratt v. Atwood, 108 Mass. 40; In re Woltemate's Appeal, 86 Pa. St. 219; Burlington v. Fosby, 6 Vt. 83, 27 Am. Dec. 535. Right of illegitimate child to inherit from its parents does not extend to the estates of either lineal or collateral kindred of either parent. Eddie v. Eddie, 8 N. Dak. 376, 79 N. W. 856, 73 Am. St. 765.

[71] In re Neil's Appeal, 92 Pa. St. 193.

[72] Parks v. Kimes, 100 Ind. 148; Remmington v. Lewis, 8 B. Mon. (Ky.) 606; Bent v. St. Vrain, 30 Mo. 268; Bacon v. McBride, 32 Vt. 585.

[73] Parks v. Kimes, 100 Ind. 148. Children of an illegitimate who is entitled to inherit may inherit through such illegitimate. Johnson v. Bodine, 108 Iowa 594, 79 N. W. 348. An illegitimate son takes under a devise to his mother to be distributed at her death to her "heirs of blood." Heyden v. Barrett, 172 Mass. 472, 52 N. E. 530, 70 Am. St. 295.

[74] Southgate v. Annon, 31 Md. 113; Hawkins v. Jones, 19 Ohio St. 22. Inheritance of property from illegitimates. McSurley v. Venters, 31 Ky. L. 963, 104 S. W. 365.

[75] Brewer v. Blougher, 14 Pet. (U. S.) 178, 10 L. ed. 408; In re Magee, 63 Cal. 414; In re Dickinson's Appeal, 42 Conn. 491, 19 Am. Rep. 553; Houston v. Davidson, 45 Ga. 574; Miller v. Williams, 66 Ill. 91; Powers v. Kite, 83 N. Car. 156; Briggs v. Greene, 10 R. I. 495. A legitimate child will inherit, as the heir of his grandmother, through his deceased illegitimate mother, the property of another illegitimate daughter by such grandmother, dying intestate and without issue, and subsequent to the death of such mother and grandmother. In re Magee, 63 Cal. 414. Descent of estate of illegitimate intestate dying without heirs. Meadowcroft v. Winnebago, 181 Ill. 504, 54 N. E. 949.

[76] Truelove v. Truelove, 172 Ind. 441, 86 N. E. 1018, 88 N. E. 516, 27

As a general rule the father is not considered an heir of his illegitimate child and will not inherit from such child, unless the child be made legitimate by the father. But in most states illegitimates are permitted to take by descent from the father, if some formal acknowledgment of the relationship has been made by the father in his lifetime.[77]

As a general rule the law of the state of the father's domicil determines the status of both child and father;[78] but there are decisions to the contrary.[79]

§ 720. Pretermitted children.—If, after the making of a will, a child is born to the testator, such child will be entitled to participate in the estate of its ancestor to the same extent as if such will had never been made, though the testator lives sufficiently long after the execution of the will to have revoked it if he had so desired.[80] Though children be living at the time of the execution of a will they will generally share in their ancestor's estate, unless his omission to provide for them in the will appears to have been intentional.[81] The omitted child shall take the same share of the testator's estate that it would have been entitled to had he died intestate, unless it shall have been provided for by the testator in his lifetime, or unless it shall appear

L. R. A. (N. S.) 220n, 139 Am. St. 404.

[77] Pina v. Peck, 31 Cal. 359; Cox v. Rash, 82 Ind. 519; Crane v. Crane, 31 Iowa 296; Brown v. Belmarde, 3 Kans. 41. When father may inherit from illegitimate children. Alston v. Alston, 114 Iowa 29, 86 N. W. 55. Sufficiency of recognition by father. Markey v. Markey, 108 Iowa, 373, 79 N. W. 258; Watson v. Richardson, 110 Iowa, 673, 80 N. W. 407. Rule confers right of inheritance on child who has been acknowledged by its father before passage of act, though the father was a nonresident alien. Moen v. Moen, 16 S. Dak. 210, 92 N. W. 13. A general and notorious recognition by the father of an illegitimate child, although taking place in another state where the parties resided at the time and in which the child may have no right to inherit, is held sufficient. Van Horn v. Van Horn, 107 Iowa 247, 77 N. W. 846, 45 L. R. A. 93. Recognition of a child by a man as his son is not alone sufficient to render the child legitimate. It must appear that he was the father. Stein's Adm'r v. Stein, 32 Ky. L. 664, 106 S. W. 860.

[78] Scott v. Key, 11 La. Ann. 232; Irving v. Ford, 183 Mass. 448, 67 N. E. 366, 65 L. R. A. 177, 97 Am. St. 447; Miller v. Miller, 91 N. Y. 315, 43 Am. Rep. 669; Morris v. Williams, 39 Ohio St. 554.

[79] Williams v. Kimball, 35 Fla. 49, 16 So. 783, 26 L. R. A. 746, 48 Am. St. 238; Smith v. Derr, 34 Pa. 126, 75 Am. Dec. 641.

[80] Ward v. Ward, 120 Ill., 111, 11 N. E. 336. Rights of pretermitted child or issue of child. Rowe v. Allison, 87 Ark. 206, 112 S. W. 395. A child adopted by a testator after the execution of his will, in which no provision is made for such child, has the same rights as an afterborn child occupying the same position. Flannigan v. Howard, 200 Ill. 396, 65 N. E. 782, 59 L. R. A. 664, 93 Am. St. 201.

[81] In re Wardell, 57 Cal. 484.

that such omission was intentional, and not occasioned by any mistake or accident.[82]

Statutes generally provide that if, after the making of a will, a testator shall have born to him legitimate issue, then such will shall be deemed revoked, unless provision shall have been made in the will for such issue. Under such statutes the pretermitted child will take the same share in the estate and hold by the same title as though the testator had died intestate,[83] unless the estate would go to the father if there had been an intestacy.[84] Statutes containing such provisions prevail in Connecticut, Delaware, Georgia, Indiana, Kansas, New Jersey and Ohio.[85] Under such statutes a pretermitted child born after the execution of the will and before the death of the testator, or a pretermitted posthumous child, take that share which he or she would have taken if the deceased had died intestate. In many states it is provided by statute that if a child or children be born after making a last will, and there is nothing in the context to show that it was the intention of the testator to disinherit such child or children, the will is not revoked on that account, but the devises and legacies will be abated in equal proportions to raise a portion for such child or children equal to that which such child or children would have been entitled to receive if the testator had died intestate.[86] Similar provisions will be found in the statutes of Alabama, Arkansas, California, Colorado, Delaware, Iowa, Maine, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New York, Oregon, Rhode Island, South Carolina, Tennessee, Texas, Utah, Virginia, Washington,

[82] Hurley v. O'Sullivan, 137 Mass. 86. Where a testator devised lands to a daughter, having other children whom he did not mention, the will providing that the rest of his estate other than the devise to the daughter be disposed of as the law directs, it was held that there was no provision in the will for the other children sufficient to validate the devise to the daughter. Williamson v. Roberts (Mo.), 187 S. W. 19.

[83] Rowe v. Allison, 87 Ark. 206, 112 S. W. 395; In re Callaghan, 119 Cal. 571, 51 Pac. 860, 39 L. R. A. 689; Tavshanjian v. Abbott, 59 Misc. 642, 112 N. Y. S. 583; Lowery v. Hawker, 22 N. Dak. 318, 133 N. W. 918, 37 L. R. A. (N. S.) 1143n; In re Brown, 22 Okla. 216, 97 Pac. 613; Neal v. Davis, 53 Ore. 423, 99 Pac. 69, 101 Pac. 212; Roach v. Roach, 25 R. I. 454, 56 Atl. 684; Mansfield v. Neff, 43 Utah 258, 134 Pac. 1160; Van Brocklin v. Wood, 38 Wash. 384, 80 Pac. 530; Sandon v. Sandon, 123 Wis. 603, 101 N. W. 1089.

[84] In re Witter, 15 N. Y. S. 133, 2 Con. Sur. 530.

[85] See digest of statutes of wills in appendix.

[86] Lowery v. Harlow, 22 Colo. App. 73, 123 Pac. 143; Kidder's Exrs. v. Kidder (N. J. Eq.), 56 Atl. 154.

West Virginia, and Wisconsin.[87] In some states the birth of a pretermitted child after the making of the will operates to make the devises and bequests of the will contingent upon the death of such child, unmarried and without issue, before it reaches the age of twenty-one years. Such provisions are contained in the statutes of Kentucky, Mississippi, Texas, Virginia, and West Virginia.[88] Marriage and birth of issue after the making of a will in which no provision is made for the children, revokes the will pro tanto in Pennsylvania.[89] The statutes of many states provide that whenever a devisee or legatee in any last will and testament, being a child or grandchild of the testator, shall die before such testator, and no provision shall be made for such contingency, the issue, if any there be, of such devisee or legatee, shall take the estate devised or bequeathed as the devisee or legatee would have done had he survived the testator, and if there be no such issue at the time of the death of such testator, the estate disposed of by such devise or legacy is considered and treated in all respects as intestate property.[90]

§ 721. Posthumous children.—A child born after the death of its intestate parent is regarded as in being at the time of such death for the purpose of its inheriting real property at common law.[91] Modern statutes generally declare that if a child be born alive, it is to inherit in the same manner as if it had been born in the lifetime of the intestate and had outlived him.[92] The rule may be said to be practically universal in this country, particularly as between an intestate and his own children, that posthumous children, born within the usual period of gestation after the death of the intestate, will be entitled to share in the estate of the intestate father as if they were born during his lifetime and had survived him.[93] For the purpose of inheritance, a pos-

[87] See digest of statute of wills in appendix.

[88] See digest of statute of wills in appendix.

[89] See digest of statute of wills in appendix.

[90] Beers v. Narramore, 61 Conn. 13, 22 Atl. 1061; Gill v. Grand Tower Min. &c. Co., 92 Ill. 249; Heald v. Heald, 56 Md. 300; Hudson v. Gray, 58 Miss. 882; Yard v. Murray, 86 Pa. St. 113; Kelly v. Nichols, 18 R. I. 62, 25 Atl. 840, 19 L. R. A. 413; Stonestreet v. Doyle, 75 Va. 356, 40 Am. Rep. 731.

[91] 1 Bl. Comm. 130; Marsellis v. Thalhimer, 2 Paige (N. Y.) 35, 21 Am. Dec. 66.

[92] Barr v. Gardner, 259 Ill. 256, 102 N. E. 287; Crisfield v. Storr, 36 Md. 129, 11 Am. Rep. 480; Barker v. Pearce, 30 Pa. St. 173, 72 Am. Dec. 691; Pearson v. Carlton, 18 S. Car. 47.

[93] Morrow v. Scott, 7 Ga. 535; Cox v. Matthews, 17 Ind. 367.

thumous child is, in contemplation of law, in existence from the time of its conception. If its ancestor dies before its birth, its share of the inheritance vests in it at the moment of its ancestor's death, and can not be divested by any proceeding to which it is not a party.[94]

If real estate of the ancestor be sold in ignorance of the existence of such child, its interest can not be affected thereby, and the property may be reclaimed from the possession of an innocent purchaser thereof in good faith and for a valuable consideration.[95] In Tennessee, the right of posthumous children to inherit is dependent on their birth within ten months after the death of their ancestor.[96] Posthumous relatives other than children of an intestate are treated as not in being in his lifetime, and therefore can not inherit any interest in his estate.[97] A posthumous child may be excluded from an inheritance by appropriate words in a will.

§ 722. **Property subject to descent.**—The term "descent," in its technical legal meaning, applies to real estate only,[98] but as used in some statutes, it includes the course of transmission, by operation of law, of both the real and personal property of an intestate.[99]

Inasmuch as we are concerned only in title to real property by descent, our inquiry will be limited to such property as descend to heirs as real estate upon the death of the intestate. The term "real estate," as used in this connection includes all lands, tenements, and hereditaments, and all rights thereto, and all interests therein possessed and claimed in fee simple or for the life of a third person.[1] As a general rule all vested rights and

[94] Bishop v. Hampton, 11 Ala. 254; Botsford v. O'Connor, 57 Ill. 72; Sansberry v. McElroy, 6 Bush (Ky.) 440; Catholic Mutual Ben. Assn. v. Firnane, 50 Mich. 82, 14 N. W. 707.

[95] Detrick v. Migatt, 19 Ill. 146, 68 Am. Dec. 584; Massie v. Hiatt, 82 Ky. 314, 6 Ky. L. 176; Pearson v. Carlton, 18 S. Car. 47.

[96] Melton v. Davidson, 86 Tenn. 129, 5 S. W. 530.

[97] Shriver v. State, 65 Md. 278, 4 Atl. 679.

[98] Hudnall v. Ham, 172 Ill. 76, 49 N. E. 985; Brower v. Hunt, 18 Ohio St. 311.

[99] Hudnall v. Ham, 172 Ill. 76, 49 N. E. 985.

[1] Remington's (Wash.) Codes and Statutes (1915) § 1354. The character of the estate at the death of the intestate, as impressed upon it by his act, determines the course of its descent. Zimmerer v. Stuart, 88 Nebr. 530, 130 N. W. 300. In determining questions as to descent of real estate, regard is had to the legal title only; and where the legal title is acquired by purchase, and equity in the property by inheritance, the legal title and equitable interest at once unite, and upon the death of the

interests in real estate, and all contingent interests where the person is certain, descend to the intestate's heirs.[2]

It has been held that the interest of a vendee in possession of real estate under a contract of sale, part of the purchase price of the land having been paid, at his death descends to his heirs.[3] But the interest of a vendor who retains the legal title, giving a bond for a deed, or delivering the deed in escrow, descends to the heirs of the intestate, who hold it only as security for the purchase money, subject to the equitable rights of the purchaser, and when the purchase money is paid it goes to the executor or administrator.[4] The holder of state lands under certificates of purchase own such an equitable estate as descends to his heirs.[5] Likewise an intestate's interest in public land warrants and settlement claims descends to his heirs the same as other lands.[6] A person who has complied with all the requirements necessary to entitle him to a patent of lands from the government is regarded as the equitable owner thereof, and in the event of his death, the land will form a part of his estate and will descend to his heirs in accordance with state laws.[7] Possessory right of a locator of a mining claim is property, and on the death of such locator descends to his heirs.[8] Where an ancestor has only an equity of redemption in lands, the legal estate does not pass

owner the descent of the property will be cast as an estate which came by purchase. Higgins v. Higgins, 57 Ohio St. 239, 48 N. E. 943.

[2] Murray v. Cazier, 23 Ind. App. 600, 53 N. E. 476, 55 N. E. 880; Potter v. Worley, 57 Iowa 66, 7 N. W. 685, 10 N. W. 298; Mooney v. Olsen, 21 Kans. 691; Hicks v. Phillips, 148 Ky. 670, 147 S. W. 42, 47 L. R. A. (N. S.) 882; Codman v. Bradley, 201 Mass. 361, 87 N. E. 591; Manners v. Manners, 20 N. J. L. 142; Robertson v. Fleming, 57 N. Car. 387; Midyette v. Grubbs, 145 N. Car. 85, 58 S. E. 795, 13 L. R. A. (N. S.) 278n; Crist v. Cosby, 11 Okla. 635, 69 Pac. 885; Keller v. Auble, 58 Pa. St. 410, 98 Am. Dec. 297.

[3] Flomerfelt v. Siglin, 155 Ala. 633, 47 So. 106, 130 Am. St. 67; Hill v. Heard, 104 Ark. 23, 148 S. W. 254; Wallace v. Hudson, 170 Cal. 596, 150 Pac. 988; Cutler v. Meeker, 71 Nebr. 732, 99 N. W. 514; Mauzy v. Hinrichs, 89 Nebr. 280, 131 N. W. 218.

[4] Davie v. Davie (Ark.), 18 S. W. 935; Litsey v. Phelps, 5 Ky. L. 513; Flagg v. Teneick, 29 N. J. L. 25; McCord v. Hames, 38 Tex. Civ. App. 239, 85 S. W. 504. Contra, Bledsoe v. Fitts, 47 Tex. Civ. App. 578, 105 S. W. 1142.

[5] In re Grandjean's Estate, 78 Nebr. 349, 110 N. W. 1108, 15 Ann. Cas. 577.

[6] Atwood v. Beck, 21 Ala. 590; Fillmore v. Reithman, 6 Colo. 120; Council Improvement Co. v. Draper, 16 Idaho 541, 102 Pac. 7; Mauzy v. Hinrichs, 90 Nebr. 735, 134 N. W. 527; Gould v. Tucker, 20 S. Dak. 226, 105 N. W. 624; Fields v. Burnett, 49 Tex. Civ. App. 446, 108 S. W. 1048; Hotchkin v. Bussell, 46 Wash. 7, 89 Pac. 183.

[7] Doran v. Kennedy, 122 Minn. 1, 141 N. W. 851.

[8] O'Connell v. Pinnacle Gold Mines Co., 140 Fed. 854, 72 C. C. A. 645, 4 L. R. A. (N. S.) 919n.

to his heirs,[9] but his equity or rights to redeem is subject to descent.[10] When the equitable and legal estate in land unite in the same person, the equitable title is merged in the legal estate which descends according to the rules of law; the legal title only determining the course of descent and succession.[11] A deceased partner's interest in partnership real estate descends to his heirs at law, subject to the equitable rights of the firm and its creditors.[12] The law of descent and distribution operates upon the property of the individual, and not upon the property of a partnership; and there is no individual property until the firm property is at an end, which does not occur until its debts are paid, its affairs closed, and the residue of the assets distributed.[13]

Where a deed conveyed a life estate, with a contingent remainder to others, the fee remained in the grantor, subject to be divested by the happening of the contingency upon which the title would vest in the remaindermen, and descended to the heirs of the grantor in case of his death before the happening of the contingency.[14] If a remainder is vested in a member of a class, the maximum number of which is to be ascertained in the future, and therefore will open to let in new members, it will descend to heirs.[15] It is also true that a contingent remainder is descendible where the contingency is not as to the persons who will take the ultimate remainder in case it should ever vest.[16] Where a devise is to one and his children forever, and the first taker dies without issue, the contingent remainder fails, and if there is no residuary clause in the will, the share to which the remainder pertained descends to the heirs-at-law of the testator.[17]

The authorities lay down the rule that the possibility of reverter, while it can not be alienated or devised by the grantor, may descend to his heirs.[18]

Franchises of indeterminate and unlimited duration, may be

[9] Russell v. Roberts, 121 N. Car. 322, 28 S. E. 406.

[10] Bowery Nat. Bank v. Duncan, 12 Hun (N. Y.) 405; Avery v. Dufrees, 9 Ohio 145; Harvey v. Steptoe, 17 Gratt. (Va.) 289.

[11] Howard v. Grant, 107 Ark. 594, 156 S. W. 433.

[12] Davidson v. Richmond, 24 Ky. L. 699, 69 S. W. 794.

[13] Coolidge v. Burke, 69 Ark. 237, 62 S. W. 583.

[14] Collins v. Sanitary Dist. of Chicago, 270 Ill. 108, 110 N. E. 318.

[15] Drury v. Drury, 271 Ill. 336, 111 N. E. 140.

[16] Drury v. Drury, 271 Ill. 336, 111 N. E. 140.

[17] Interior & W. Va. R. Co. v. Epling, 70 W. Va. 6, 73 S. E. 51.

[18] Church v. Venable, 159 Ill. 215, 42 N. E. 836, 50 Am. St. 159; North v. Graham, 235 Ill. 178, 85 N. E. 267.

treated as incorporeal hereditaments capable of descending to the heirs at law of the owner.[19]

Such rights as a fee conditional,[20] the unexpired term of a deceased lessee,[21] a personal right to use land,[22] or a right of a person interested to contest a will,[23] have been held not to pass by inheritance.

§ 723. Devolution of real property to heir.—The title to lands, unless otherwise devised, vests eo instante upon death in the heirs of the decedent; the right of the personal representative being limited to selling the land for debts.[24] The heirs take and retain such title with all the rights and incidents belonging thereto, until the personal representative effectively asserts his right thereto for the purposes provided in the statute.[25] The right of action in ejectment and for waste and injury to the freehold after the ancestor's death is in the heirs and not in the administrator.[26] The administrator is not entitled to the possession of the real estate of his decedent unless it becomes necessary to sell it to pay debts. For this reason he can not maintain an action for possession, or in any manner litigate the title; nor can he claim the right to possession in such a manner as to make that possession adverse to the heirs.[27] Until it becomes necessary to sell an intestate's land to pay debts his administrator's right therein is a mere naked power resting only on the contingency that the personal property will be insufficient to pay such debts.[28] Until the happening of that contingency the pos-

[19] Van Dyck v. Bloede, 128 Md. 330, 97 Atl. 630.

[20] Owings v. Hunt, 53 S. Car. 187, 31 S. E. 237.

[21] McCormick v. Stephany, 57 N. J. Eq. 257, 41 Atl. 840.

[22] Field v. Morris, 88 Ark. 148, 114 S. W. 206.

[23] Selden v. Illinois Trust & Savings Bank, 239 Ill. 67, 87 N. E. 860, 130 Am. St. 180n.

[24] Randolph v. Vails, 180 Ala. 82, 60 So. 159; Rucker v. Tennessee Coal, &c. R. Co., 176 Ala. 456, 58 So. 465; McMillan v. State, 160 Ala. 115, 49 So. 680; Phelps v. Grady, 168 Cal. 73, 141 Pac. 926; Raulet v. Northwestern Nat. Ins. Co., 157 Cal. 213, 107 Pac. 292; Parker v. Betts, 47 Colo. 428, 107 Pac. 816.

[25] Beckett v. Selover, 7 Cal. 215, 68 Am. Dec. 237; Shaw v. Hoadley, 8 Blackf. (Ind.) 165; Streeter v. Paton, 7 Mich. 341; Overturf v. Dugan, 29 Ohio St. 230; Jones v. Billstein, 28 Wis. 221.

[26] Wilson v. Kirkland, 172 Ala. 72, 55 So. 174; Mitchell v. State, 63 Ind. 574; Brown v. Webster, 87 Nebr. 788, 128 N. W. 635; Marsh v. Waupaca County, 38 Wis. 250.

[27] Hart v. Kendall, 82 Ala. 144, 3 So. 41; Kidwell v. Kidwell, 84 Ind. 224; Noon v. Finnegan, 29 Minn. 418, 13 N. W. 197; King v. Boyd, 4 Ore. 326; Flood v. Pilgrim, 32 Wis. 376.

[28] Harding v. LeMoyne, 114 Ill. 65, 29 N. E. 188; Tippecanoe Loan & Trust Co. v. Carr, 40 Ind. App. 125,

session belongs to the heirs; and if there should be no debts, or sufficient personal property to pay them, the administrator has no right to the possession of the real estate.[29]

In some states, however, the land passes to the heirs of the intestate, subject to the control of the probate court, and to the possession of the administrator for the purpose of administration.[30]

§ 724. What laws govern.—The law in force at the time of the death of the intestate governs and regulates the descent of his estate. Thus, if, at the time descent is claimed to an estate, it appears that a statutory change has been made in the laws of descent since the death of the ancestor under whom the right is claimed, the law in force at the time of such death must control, rather than that which is subsequently enacted.[31] Hence, in tracing a title through a course of several descents, it often becomes necessary to refer to laws long repealed or modified. Upon the death of an intestate his estate immediately vests in those who by the laws which then exist are declared to be his heirs. The interest which they thus acquire by descent is, subject to the payment of debts of their ancestor and the expenses of administration, assured to them as unalterably as if it had been acquired by purchase, and it is beyond the power of the legislature, should it make the attempt, to divest the title previously acquired by descent.[32]

The descent of land is also governed by the law of the place where the land is situated, or as some times expressed, by the

78 N. E. 1043; Fike v. Green, 64 N. Car. 665; Laidley v. Kline, 8 W. Va. 218.

[29] Stewart v. Smiley, 46 Ark. 373; Phelps v. Funkhouser, 39 Ill. 401; Gladson v. Whitney, 9 Iowa 267; Hillman v. Stephens, 16 N. Y. 278.

[30] Banks v. Speers, 97 Ala. 560, 11 So. 841; Oury v. Duffield, 1 Ariz. 509, 25 Pac. 533; Chowning v. Stanfield, 49 Ark. 87, 4 S. W. 276; Crosby v. Dowd, 61 Cal. 557; Doyle v. Wade, 23 Fla. 90, 1 So. 516, 11 Am. St. 334; State v. Prob. Ct., 25 Minn. (Gil. 85) 22; Northcraft v. Oliver, 74 Tex. 162, 11 S. W. 1121; Austin v. Bailey, 37 Vt. 219, 86 Am. Dec. 703; Hazelton v. Bogardus, 8 Wash. 102, 35 Pac. 602; Jones v. Billstein, 28 Wis. 221.

[31] Kochersperger v. Drake, 167 Ill. 122, 47 N. E. 321, 41 L. R. A. 446; Stewart v. Wells, 47 Ind. App. 228, 94 N. E. 235; Brown v. Critchell, 110 Ind. 31, 7 N. E. 888, 11 N. E. 486; Succession of Davis, 126 La 178, 52 So. 266; Holmes v. Adams, 110 Maine 167, 85 Atl. 492; Messer v. Jones, 88 Maine 349, 34 Atl. 177; Holcomb v. Lake, 24 N. J. L. 686; Matter of Kiernan, 38 Misc. 394, 77 N. Y. S. 924; In re Wood's Appeal, 18 Pa. St. 478.

[32] Hosack v. Rogers, 6 Paige (N. Y.) 415; Norman v. Heist, 5 Watts & S. (Pa.) 171, 40 Am. Dec. 493.

lex rei sitae,[33] and the title to the same can not be affected by the decree of a court of another state.[34] The lex rei sitae governs regardless of the residence of the intestate or claimant,[35] unless some rule of descent makes the right of inheritance to depend upon the personal status of the heir, then only is such descent governed by the law of the domicil, and such personal status is determined by the law of the domicil.[36] Also Indians have been permitted to remain in a state without being subject to its laws, but owing obedience to the laws of their own tribe or nation, and where this is the case laws to which such persons are subject may control the descent of their property, rather than laws of the state in which they and it are situated.[37]

The lex rei sitae applies not only to the descent and disposition of real estate, but to all contracts and instruments affecting the title thereto, together with all immovable property. The principle is unquestioned that the title to and the disposition of real property must be subject exclusively to the law of the country where situated.[38] The state in which any real estate is situated can not suffer its own laws to be changed by the laws of foreign states, or by the disposition or will of citizens of other states, without great confusion and prejudice to its own interests, and for this reason the law of the place where real property is situated governs exclusively as to the tenure, the title, and the descent of such property.

[33] Wilson v. Storthz, 117 Ark. 418, 175 S. W. 45; Crossett Lumber Co. v. Files, 104 Ark. 600 149 S. W. 908; Williams v. Kimball, 35 Fla. 49, 16 So. 783, 26 L. R. A. 746, 48 Am. St. 238; Putbrees v. James, 162 Iowa 618, 144 N. W. 607; McLean, v. McLean, 92 Kans. 326, 140 Pac. 847; Cooper v. Ives, 62 Kans. 395, 63 Pac. 434; Whitman v. Huefner, 221 Mass. 265, 108 N. E. 1054; Rackemann v. Taylor, 204 Mass. 394, 90 N. E. 552; Doran v. Beale, 106 Miss. 305 63 So. 647; Pratt v. Douglas, 38 N. J. Eq. 516; In re Majot, 199 N. Y. 29, 92 N. E. 402, 29 L. R. A. (N. S.) 780n; Bonati v. Welsch, 24 N. Y. 157; In re Barnes' Estate, 47 Okla. 117, 147 Pa. 504; State v. McDonald, 59 Ore. 520, 117 Pac. 281; Hohn v. Bidwell, 27 S. Dak. 249, 130 N. W. 837; Waterman v. Carlton, 102 Tex. 510, 120 S. W. 171. In Lee v. Belknap, 163 Ky. 418, 173 S. W. 1129, it was held that title to property left in trust within one state descended according to the laws of that state, although the intestate resided in another state at the time of death.

[34] Cooper v. Ives, 62 Kans. 395, 63 Pac. 434.

[35] Boeing v. Owsley, 122 Minn. 190, 142 N. W. 129.

[36] Harvey v. Ball, 32 Ind. 98.

[37] Brown v. Steele, 23 Kans. 672. Indian lands descend to the heirs of the deceased owner according to the laws of descent and distribution of the Creek Nation. Irving v. Diamond, 23 Okla. 325, 100 Pac. 557.

[38] Darby v. Mayer, 10 Wheat. (U. S.) 465, 6 L. ed. 367; Kerr v. Moon, 9 Wheat, (U. S.) 565, 6 L. ed. 161; United States v. Crosby, 7 Cranch (U. S.) 115, 3 L. ed. 287; Bethell v. Bethell, 54 Ind. 428, 23 Am. Rep. 650.

§ 725. **Lines of descent.**—Lines of descent are composed of a series of persons who have descended from the common ancestor, placed one under the other in the order of their birth; and such line of descent is either direct or collateral. These two lines are independent and have no connection except by their union in the person of the common ancestor. It is at this point of connection that the relations existing between the persons composing the two lines is formed. Each of these lines may also be paternal or maternal, according as the line of descent is traced through the father or mother.[39] The direct line of descent is composed of all the persons who are descended from each other. This line is divided into two parts, a descending line and an ascending line, and constitutes lineal descent. The term collateral is used in this connection in opposition to lineal, for the collateral line of descent, considered by itself and in relation to the common ancestor, is a direct line of descent, and can only be considered as collateral when placed alongside of another line of descent, below the common ancestor, in whom both lines unite. Those who descend from the same common ancestor and not from one another compose what is called the collateral line. Collateral kindred descend from the same stock but not one from the other.[40]

§ 726. **Computing degrees of kindred.**—In computing degrees of consanguinity, according to the common-law canons of descent, it is necessary to begin with the common ancestor and reckon downward to the most remote descendants involved in the inquiry. This method also applies in computing degrees in the ascending line. Each step in the line from the common ancestor constitutes a degree. Thus a son and a grandfather each stand in the same degree of relationship as to the intermediate ancestor.[41] Each step in the line from the common ancestor constitutes a degree. Collateral relationship is reckoned in the same manner. By this method an uncle and a nephew are related in the same degree. Two brothers are related to each other in the first degree, because from the father to each is one degree. An uncle and nephew are related to each other in the

[39] Barnitz v. Casey, 7 Cranch (U. S.) 456, 3 L. ed. 403.

[40] Descent to collaterals on failure of lineal descendants. Draper v. Bradley, 126 N. Car. 72, 35 S. E. 228.

[41] 2 Bl. Comm. 203.

second degree, because each is distant from the common ancestor two degrees.[42]

The mode of computing degrees of consanguinity according to the civil law, which is the one generally adopted in this country, differs somewhat from the common-law method. The civil-law method of computation is to begin at either of the persons to be reckoned from and count up to the common ancestor and then downward to the other person, calling it a degree for each person, both ascending and descending. Computing by this method two brothers would be related in the second degree; an uncle and nephew would be related in the third degree, while a cousin would be in the fourth degree of kindred.[43]

Rules of canons of descent should not be confounded with rules for ascertaining the degrees of kindred. A canon of descent is one thing, and a rule for the ascertainment of the next of kin is another.[44] The degrees of affinity are computed in the same way as are those of consanguinity.[45] The method of computing the degrees of collateral kindred both by the common and canon law begins with the common ancestor, reckoning downward, and in whatever degree the claimant is distant from the ancestor common to him and the intestate, is their degree of relationship. But the civil law counts upward from the intestate to the common ancestor, and from him downward to the heir, reckoning one degree for each step taken, and the sum of the two shows the degree in which they are related.[46] As to which of the decedent's kindred are his next of kin is to be determined by a computation made according to the rules either of the common or civil law. The states which have adopted the civil law mode of computing kindred are, Alabama, Arizona, Connecticut, Delaware, Idaho, Illinois, Indiana, Iowa, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Nebraska, Nevada, New Jersey, New Mexico, New York, Ohio, Oregon, Pennsylvania, South Carolina, Washington, and Wisconsin.[47] The states adopting the common-law mode of computation are Georgia, Maryland and North Carolina.[48]

[42] 2 Wash. Real Prop. 406.

[43] 2 Bl. Comm. 206; Cloud v. Bruce, 61 Ind. 171.

[44] Cloud v. Bruce, 61 Ind. 171.

[45] Kelly v. Neely, 12 Ark. 657, 56 Am. Dec. 288n.

[46] In re Sullivan's Estate, 48 Wash. 631, 94 Pac. 483, 95 Pac. 71.

[47] See digest of statutes of descent in Appendix.

[48] See digest of statutes of descent in appendix.

§ 727. **Descent of estates of minors not having been married.**—In many of the states special provision has been made for the descent of estates of intestate minors not having been married. The general tendency of these statutes is to direct the reversion of the property of such a minor to the donor, or to the parent from whom it came, if still living, or, if the estate came to such minor by inheritance from a parent to the brothers or sisters or the representatives of deceased brothers and sisters, just as if they had inherited directly from such deceased parent, or as if the minor had predeceased such parent.[49] Such statutes are found in Arkansas, California, Connecticut, Florida, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, Oklahoma, Oregon, Virginia, Washington, and Wisconsin.[50] Under such statutes the inheritance is regarded as coming, not from the deceased child, but from the father or other parent from whom the child inherited it, and is divided among the surviving brothers and sisters, or their issue, as though the child had died in the lifetime of its ancestor.[51] If, however, under the provisions of these statutes a minor inherits property from his deceased minor brother or sister, and subsequently dies, its share thus acquired is not controlled by the statute, and may descend to its heirs other than its brothers and sisters. Under the Maine statute, if a deceased minor left no parent, brother, or sister, or the issue of any deceased brother or sister, his property, though inherited from his father, descends to his next of kin, whether related to his father or not.[52]

[49] In re North's Estate, 48 Conn. 583.

[50] See digest of statutes of descent in appendix. Persons entitled to inherit under this rule. Carnes v. Bingham, 134 Ky. 96, 119 S. W. 738. Where an infant died without issue seised of real estate held by deeds from others than a parent, but the purchase price of which was paid by one of the parents, the real estate descends to both parents equally. Guier v. Bridges, 114 Ky. 148, 24 Ky. L. 945, 70 S. W. 288. Upon the death in infancy of one of two children, heirs of their mother, the survivor takes the estate of the mother, subject only to the curtesy of the surviving husband. Veeder v. McKinley &c. Trust Co., 61 Nebr. 892, 86 N. W. 982. Under such statute it was held that where parents have separated, a parent can not inherit as sole heir from a minor dying without issue, unless shown to have borne practically the entire burden of parental duty and maintenance toward such minor at his death and during practically the entire period of separation. Bruce v. McIntosh (Okla.), 159 Pac. 261.

[51] Nash v. Cutler, 16 Pick. (Mass.) 491; Burke v. Burke, 34 Mich. 451; Perkins v. Simonds, 28 Wis. 90.

[52] Albee v. Vose, 76 Maine 448; Decoster v. Wing, 76 Maine 450; Goodrich v. Adams, 138 Mass. 552.

Where the estate of the deceased minor was received by grant in consideration of love and affection, it reverts to the grantor.[53] Where an adopted child dies intestate, leaving no wife or issue, the whole of his estate goes to his adopting parent.[54]

§ 728. **Brothers and sisters.**—Brothers and sisters of an intestate are in the collateral line of kindred, and are usually placed in the direct ascending line of descent with the father and mother. In the absence of children or their descendants, the law casts on the brothers and sisters of the intestate the descent of the property, subject to the rights of the surviving husband or wife, if any, and generally in connection with the father and mother, or both. In case any brother or sister predeceased the intestate, leaving descendants, these represent the deceased parent and take the share of such parent by right of representation.[55] Brothers and sisters and their descendants take, in default of children, and subject to the rights of a surviving husband or wife, if any, to the exclusion of parents and more remote kindred, in Connecticut, Delaware, Mississippi, New Jersey, North Carolina, Ohio, Pennsylvania, and Tennessee. In Florida, Georgia, Indiana, Maine, Nebraska, Nevada, New Hampshire, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Texas, Virginia, and West Virginia, brothers and sisters and their descendants are postponed to the father, and are entitled to inherit with the mother, to the exclusion of more remote kindred.[56] In Alabama and Arizona brothers and sisters and their descendants are postponed to both parents if both be living, but they take together with the survivor, if one be dead; while they are postponed to both parents in Arkansas, California, Colorado, Idaho, Kentucky, Massachusetts, Michigan, Minnesota, New York, Washington, and Wisconsin.[57] In Illinois, Missouri and Wyoming, brothers and sisters and their descendants, take, in default of issue, and subject to the rights of the surviving husband or wife, if any, each an equal part with

[53] Amos v. Amos, 117 Ind. 37, 19 N. E. 539.

[54] Gray v. Holmes, 57 Kans. 217, 45 Pac. 596, 33 L. R. A. 207.

[55] De Castro v. Barry, 18 Cal. 96.

[56] See digest of statutes of descent in appendix. The terms "brothers and sisters" and "their descendants" apply to legitimate brothers and sisters. Truelove v. Truelove, 172 Ind. 441, 86 N. E. 1018, 88 N. E. 516, 27 L. R. A. (N. S.) 220n, 139 Am. St. 404.

[57] See digest of statutes of descent in appendix.

the father and mother,[58] and in Louisiana the father and mother take one-half together, and the brothers and sisters and their descendants by representation the other half.[59] Where the estate came through the intestate's father, and he leaves brothers and sisters, but no issue, the estate will pass to his brothers and sisters to the exclusion of his mother.[60] Under a statute providing that where, upon the descent of an estate to children, and one of them dies under age, not having been married, his share of the inheritance goes to the surviving brothers and sisters, the share of such deceased minor child must be considered as descending from the parent and not from the deceased child.[61] It has been held that brothers and sisters born subsequent to the death of the intestate take the same as if they had been born at the time of such death;[62] but there are cases qualifying this rule so as to include only those subsequently born who were in ventre sa mere at the time of the intestate's death.[63]

§ 729. Next of kin.—The term "next of kin" is limited in legal meaning, as in common use, to blood relations, and it ordinarily includes ancestors as well as descendants in the same degree of consanguinity.[64] The term does not include all those who would take under the statutes of descent and distribution.[65] It signifies those who stand in the nearest relationship to the intestate according to the rules of the civil law for computing degrees of kinship.[66] So, as a rule, no one is included in the term "next of kin" who does not come within the statutes of descent and distribution.[67] The term is never construed so as

[58] See digest of statutes of descent in appendix.

[59] See digest of statutes of descent in appendix.

[60] Wells v. Seeley, 47 Hun (N. Y.) 109, 13 N. Y. St. 239; Walker v. Dunshee, 38 Pa. St. 430. Descent of property of intestate dying without descendants or father or mother. Barber v. Brundage, 169 N. Y. 368, 62 N. E. 417.

[61] Wiesner v. Zaun, 39 Wis. 188.

[62] Cutlar v. Cutlar, 9 N. Car. 324; Springer v. Fortune, 2 Handy (Ohio) 52, 12 Ohio Dec. (Reprint) 325; Baker v. Heiskell, 1 Coldw. (Tenn.) 641. Contra, Goodwin v. Keerl, 3 Harr. & M. (Md.) 403.

[63] Grant v. Bustin, 21 N. Car. 77; Melton v. Davidson, 86 Tenn. 129, 5 S. W. 530.

[64] Clark v. Mack, 161 Mich. 545, 126 N. W. 632, 28 L. R. A. (N. S.) 479n; Bishop v. Rider, 31 Ohio C. C. 332.

[65] Fargo v. Miller, 150 Mass. 225, 22 N. E. 1003, 5 L. R. A. 690; Swasey v. Jaques, 144 Mass. 135, 10 N. E. 758, 59 Am. Rep. 65; Redmond v. Burroughs, 63 N. Car. 242.

[66] Clark v. Mack, 161 Mich. 545, 126 N. W. 632, 28 L. R. A. (N. S.) 479n.

[67] Orr v. White, 106 Ind. 341, 6 N. E. 909.

to include representatives of next of kin, and while the term is limited in legal meaning as well as in common use, to blood relations, and does not include husband and wife, who are not connected by consanguinity,[68] yet in many states they inherit from each other as heirs at common law by force of the statute.[69] But in the absence of such a statute, a surviving husband or wife can not inherit as the next of kin of the deceased spouse.[70] Where the intestate leaves no parent, husband, wife, child, brother, or sister, or the descendants of any deceased child, brother, or sister, his estate goes to his next of kin, according to the civil law, in equal degree, except that when there are two or more in the same degree, those claiming through the nearest ancestor are preferred in Alabama, Arizona, California, Delaware, Idaho, Maine, Massachusetts, Minnesota, Montana, Nebraska, Nevada, North Dakota, Oregon, Pennsylvania, South Dakota, Utah, Washington, and Wisconsin;[71] and to the next of kin in Illinois, Louisiana, Mississippi, New Hampshire, and Vermont.[72] It will be observed that the statutes of many states do not specify who shall inherit the estate, further than to declare that it shall go to the next of kin of the decedent. In Alabama, Florida, Rhode Island, Virginia and West Virginia, the estate is divided, and one-half goes to the paternal and the other half of the maternal kindred, in the order as follows: (1) To the grandfather; (2) to the grandmother and uncles and aunts on the same side, and their descendants, if deceased, in equal shares per stirpes; (3) to the great-grandfathers or great-grandfather if but one; (4) to the great-grandmothers or great-grandmother, or brothers and sisters of grandfathers and grandmothers, and the descendants of such of them as are dead, in equal shares, per stirpes; (5) and so on, passing to nearest lineal male ancestors, and if none of them, to nearest lineal female ancestors in the same degree, and descendants of such male and female ancestors; (6) if no such maternal or paternal kindred, both halves go to the paternal or maternal kindred respectively; (7) if no such kindred, to the husband or wife; if the husband or wife be dead, to his or her kindred, as if such husband or wife had

[68] Haraden v. Larrabee, 113 Mass. 430.

[69] Gardner v. Gardner, 13 Ohio St. 426.

[70] Prather v. Prather, 58 Ind. 141.

[71] See digest of statutes of descent in appendix.

[72] See digest of statutes of descent in appendix.

survived the intestate, and died entitled to the estate.[73] In Connecticut, New Jersey, Ohio, and Pennsylvania, if the intestate left neither parent, child, husband, wife, brother, nor sister, nor the descendants of any deceased child, brother or sister, the estate goes to the brothers and sisters of the half-blood, and their issue; if none, to the next of kin in equal degree;[74] but in Arkansas, Colorado, Missouri and Wyoming, the estate goes to the grandfathers, grandmothers, uncles, and aunts of the deceased, and their descendants, if deceased, per stirpes;[75] and in New York to the brothers and sisters both of the father and mother of the intestate and their issue in equal shares, in the same manner as if they had been brothers and sisters of the intestate; but if none such, it descends according to the common law.[76] In Iowa and Kansas, if the parents are dead, the estate descends as if they had outlived the intestate, and died seised, and so on through the ascending ancestors.[77]

§ 730. Kindred of the half-blood.—The common law did not extend collateral inheritance to persons of the half-blood.[78] By such law, if a man died intestate seised of an estate of inheritance, leaving a brother of the half-blood, but no heirs of the whole-blood, the estate did not go to such brother of the half-blood, but escheated to the lord for want of heirs.[79] But by the Statute of Descents, 364 Wm. IV, Chap. 106, a kinsman of the half-blood shall be capable of being heir; and that such kinsman shall inherit next after a kinsman in the same degree of the whole-blood, and after the issue of such kinsman, when the common ancestor is a male, and next after the common ancestor when such ancestor is a female. In this country the matter is regulated by statute, and is therefore dependent upon the provisions of the various statutes, which, with very few exceptions, expressly provide for the descent and distribution of estates

[73] See digest of statutes of descent in appendix. Rucker v. Jackson, 180 Ala. 109, 60 So. 139, Ann. Cas. 1915C, 1058n (holding that grandparents take before uncles and aunts).

[74] See digest of statutes of descent in appendix.

[75] Rule of descent where there are no children, nor descendants, nor father, mother, brother, sisters, nor descendants of deceased brothers or sisters, nor husband nor wife living. Thatcher v. Thatcher, 17 Colo. 404, 29 Pac. 800.

[76] See digest of statutes of descent in appendix.

[77] See digest of statutes of descent in appendix.

[78] 2 Bl. Comm. 224.

[79] Brown v. Brown, 1 D. Chip. (Vt.) 360.

among kindred of the half-blood. The expression "brothers and sisters," as used in statutes of descent, have been held to include brothers and sisters of the half-blood as well as those of the whole-blood.[80] Likewise, the expression "next of kin," includes kindred of the half-blood as well as those of the whole-blood.[81] There is no distinction as to the descent of real or personal property between kindred of the half-blood and those of the whole-blood in Delaware, Illinois, Kansas, Maryland, Massachusetts, North Carolina, Oregon, and Washington.[82] In Colorado, Florida, Kentucky, Louisiana, Missouri, Texas, Virginia, West Virginia and Wyoming, collaterals of the half-blood inherit only half as much as those of the whole-blood;[83] and in Connecticut and Massachusetts, kindred of the half-blood take after kindred of the whole-blood of the same degree.[84]

Most of the statutes make a distinction in the case of real estate when the estate is ancestral in character, in which case those of the whole-blood of the ancestor are preferred.[85] The

[80] Cox v. Clark, 93 Ala. 400, 9 So. 457; In re Lynch, 132 Cal. 214, 64 Pac. 284; Aldridge v. Montgomery, 9 Ind. 302; Clay v. Cousins, 1 T. B. Mon. (Ky.) 75; Sheffield v. Lovering, 12 Mass. 490; Rowley v. Stray, 32 Mich. 70; Prescott v. Carr, 29 N. H. 453, 61 Am. Dec. 652; Beebee v. Griffing, 14 N. Y. 235; Wood v. Mitchell, 61 How. Pr. (N. Y.) 48; Shull v. Johnson, 55 N. Car. 202; White v. White, 19 Ohio St. 531; Stockton v. Frazier, 81 Ohio St. 227, 90 N. E. 168, 26 L. R. A. (N. S.) 603n; Luce v. Harris, 79 Pa. St. 432; McNeal v. Sherwood, 24 R. I. 314, 53 Atl. 43; Marlow v. King, 17 Tex. 177; State v. Wyman, 59 Vt. 527, 8 Atl. 900, 59 Am. Rep. 753.

[81] McKinney v. Mellon, 3 Houst. (Del.) 277; Edwards v. Barksdale, 2 Hill Eq. (S. Car.) 416, Riley Eq. 16.

[82] See digest of statutes of descent in appendix. See also Carter v. Carter, 234 Ill. 507, 85 N. E. 292; Tays v. Robinson, 68 Kans. 53, 74 Pac. 623.

[83] See digest of statutes of descent in appendix. See also King v. Middlesboro Town &c. Co., 106 Ky. 73, 20 Ky. L. 1859, 50 S. W. 37, 1108.

[84] See digest of statutes of descent in appendix.

[85] Johnson v. Phillips, 85 Ark. 86, 107 S. W. 170; Kelly v. McGuire, 15 Ark. 555; In re Smith, 131 Cal. 433, 63 Pac. 729, 82 Am. St. 358; Lynch v. Lynch, 132 Cal. 214, 64 Pac. 284. Such a statute has no application to real property acquired by a wife by gift from her husband, who was the father of only one of her two children, even assuming that the husband was the ancestor of the wife, since, while the children were kindred of the half blood as to each other, their mother was, as to both of them, of the whole blood. In re McKenna's Estate, 168 Cal. 339, 143 Pac. 605. The exception in the statute has no application between kindred in different degrees. In re Smith's Estate, 131 Cal. 433, 63 Pac. 729, 82 Am. St. 358; Stevenson v. Gray, 46 Ind. App. 412, 89 N. E. 509; Neeley v. Wise, 44 Iowa 544; McIntyre v. Gelvin, 77 Kans. 779, 95 Pac. 389; Lowe v. Maccubbin, 1 Harr. & J. (Md.) 550; Ryan v. Andrews, 21 Mich. 229; Cutter v. Waddingham, 22 Mo. 206; Valentine v. Wetherill, 31 Barb. (N. Y.) 655. See also Stockton v. Frazier, 81 Ohio St. 227, 90 N. E. 168, 26 L. R. A. (N. S.) 603n; In re Bell, 34 N. Y. S. 191; Henszey v. Gross, 185 Pa. St. 353, 39 Atl. 949; In re Amy, 12 Utah 278, 42 Pac. 1121; Shuman v. Shuman, 80 Wis. 479, 50 N. W. 670.

phrase "blood of the ancestor" has been held to include those of the half-blood as well as those of the whole-blood.[86] If the half-blood is of the blood of the ancestor from whom the property came, he takes the same to the exclusion of such ancestor's brothers and sisters.[87] In applying such statutes it must not be confined to cases where the ancestor from whom the estate came leaves children by different mothers, for those who are children of a common mother but have different fathers are no less brothers and sisters of the half-blood than those who are children of a common father but have a different mother.[88] A half-blood relative of the intestate, though not of the blood of the ancestor through whom the property came, who stands in a nearer degree of relationship than the descendants of those of the blood of such ancestor, will inherit in preference to them.[89]

Generally, the exclusion of kindred of the half-blood is carried so far only as will prevent them from taking an estate which their ancestor acquired by descent from an ancestor to whom they bore no relationship by consanguinity.[90] The terms "of the blood" and "heir" are not synonymous nor convertible terms; and while "next of blood" and "next of kin" are synonymous in law, the phrases "next of blood" and "of the blood" are not.[91]

§ 731. Inheritance by parents of intestate.—At common law parents and all lineal ascendants were excluded from any share in the lands of an intestate, though an uncle might take the estate and it might pass from him to the father of the intestate.[92] But this rule has been entirely changed in this country, and the statutes now generally make provision for the surviving parent or parents. Some of these statutes provide that where

[86] Gardner v. Collins, 2 Pet. (U. S.) 58, 7 L. ed. 347.

[87] Banes v. Finney, 209 Pa. 191, 58 Atl. 136.

[88] Oglesby Coal Co. v. Pasco, 79 Ill. 164; Robertson v. Burrell, 40 Ind. 328.

[89] Coleman v. Foster, 112 Ala. 506, 20 So. 509. A first cousin of the half blood on the maternal side will take the estate in preference to a second cousin of the whole blood. Ector v. Grant, 112 Ga. 557, 37 S. E. 984, 53 L. R. A. 723.

[90] Eatman v. Eatman, 83 Ala. 478. In Cox v. Clark, 93 Ala. 400, 9 So. 457, it was held that half-brothers, although not of the blood of the ancestor, are entitled to inherit in preference to uncles and aunts. Armington v. Armington, 28 Ind. 74; Van Sickle v. Gibson, 40 Mich. 170; McCracken v. Rogers, 6 Wis. 278; Den v. Urison, 2 N. J. L. 212; Prichitt v. Kirkman, 2 Tenn. Ch. 390; Perkins v. Simonds, 28 Wis. 90.

[91] Delaplaine v. Jones, 8 N. J. L. 340; Cooper v. Denison, 13 Sim. 290.

[92] 2 Bl. Comm. 211; 4 Kent Comm. 395.

the intestate leaves no child or descendants, the residue of the estate after the payment of debts and expenses of administration, and subject to the provisions for the immediate relief of the family and the paramount claims of husband and wife, shall go to the father, and if he be dead to the mother. This seems to be the rule in Arkansas, Colorado, Minnesota, New York, North Dakota, and South Carolina.[93] In Florida, Maine, Nebraska, Nevada, New Hampshire, Oklahoma, Oregon, Rhode Island, South Dakota, and West Virginia, the residue, in such case, goes to the father, and if he be dead, to the mother together with brothers and sisters and descendants of such by representation.[94] In Alabama, Arizona, California, Idaho, Indiana, Iowa, Kansas, Kentucky, Massachusetts, Michigan, Montana, Pennsylvania, Texas, Utah, Vermont, Washington, Wisconsin, and Wyoming, such residue goes to the father and mother in common.[95] In Georgia, if the intestate leave no issue, the father takes equally with brothers and sisters, and if he be dead the mother, subject to the rights of a surviving husband or wife,[96] and in Connecticut, Delaware, Mississippi, New Jersey, North Carolina, Ohio, and Tennessee, the father is postponed to brothers and sisters.[97] In Illinois, Louisiana, and Missouri, the father, mother, brothers and sisters and their descendants by representation take in equal shares.[98] In Utah the father is postponed to the mother.[99] Where the intestate leaves neither issue nor parents, some statutes direct that the estate shall go one-half to the heirs of each parent the same as if they had survived the intestate and died in possession of the portion coming to them. In such case the heirs inherit directly from the intestate, and not from the parents,[1] and each

[93] See digest of statutes of descent in appendix.

[94] See digest of statutes of descent in appendix. See also descent to paternal and maternal kindred. Estes v. Nicholson, 39 Fla. 759, 23 So. 490. Where the intestate left no issue nor father, but leaving a mother and half-brothers and sisters and children of a deceased half-sister, the mother takes the entire estate to the exclusion of such half-brothers and sisters and the children of such deceased half-sister. Squint Eye v. Crooked Arm (Okla.), 155 Pac. 1147. Descent to paternal and maternal kindred. Cozzens v. Joslin, 1 R. I. 122.

[95] See digest of statute of descent in appendix. Property inherited by an intestate must remain in specie in order to pass to maternal or paternal heirs. Gray v. Swerer, 47 Ind. App. 384, 94 N. E. 725.

[96] See digest of statutes of descent in appendix.

[97] See digest of statutes of descent in appendix.

[98] See digest of statutes of descent in appendix.

[99] See digest of statutes of descent in appendix.

[1] Lash v. Lash, 57 Iowa 88, 10 N. W. 302; Lawley v. Keyes, 172 Iowa 320, 154 N. W. 940. A cousin does

moiety goes, as if it were an independent estate, to the next of kin of each parent, without regard to their relative nearness to the intestate.[2] In states where the canon of the common law forbidding lineal ascendants of estates has been abolished, though there is no other relationship between the deceased and a parent than that of parent and child, the parent may inherit as next of kin. Hence a mother inherits the estate of her child, though not specially named in the statute of descent and distribution, when she is the next of kin, and no person is living to whom the statute gives precedence over her.[3]

§ 732. **Inheritance by and through aliens.**—At common law inheritance is understood to descend through the channel of blood or consanguinity, and as an alien has no inheritable blood he is prohibited from inheriting.[4] It was therefore fatal to one's claim to an inheritance that he was himself an alien, or that it was necessary for him to trace his claim through an alien.[5] Where an alien stands in such a position that he would take as heir but for his alienage, the title vests in the next of kin to the intestate who has inheritable blood and who does not claim through the alien, just as though the alien were not in existence.[6] He can neither receive nor transmit an inheritance, and when it becomes necessary to derive title through an alien intestate, such title fails, even though it is sought to be made collateral from one who is not an alien.[7] In a majority of the states statutes have been enacted under which the rights of aliens to hold and transmit property by descent has been conferred. This is true in Alabama, Arkansas, California, Florida, Iowa, Maine, Michigan, Minnesota, Mississippi, Missouri, Nevada, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Ten-

not inherit immediately from a cousin, but only mediately through the parents of each. Meier v. Lee, 106 Iowa 303, 76 N. W. 712.

[2] McKinny v. Abbott, 49 Tex. 371.

[3] Loftis v. Glass, 15 Ark. 680; Macomb v. Miller, 9 Paige (N. Y.) 265; McCullough v. Lee, 7 Ohio 15, pt. 1.

[4] Harley v. State, 40 Ala. 689; Farrell v. Enright, 12 Cal. 450; Wunderle v. Wunderle, 144 Ill. 40, 33 N. E. 195, 19 L. R. A. 84; Farrar v. Dean, 24 Mo. 16; McGregor v. Comstock, 3 N. Y. 408.

[5] Orr v. Hodgson, 4 Wheat. (U. S.) 453, 4 L. ed. 613; Mooers v. White, 6 Johns. Ch. (N. Y.) 360.

[6] Orr v. Hodgson, 4 Wheat. (U. S.) 453, 4 L. ed. 613; Doe v. Lazenby, 1 Ind. 234, Smith 203.

[7] Levy v. McCartee, 6 Pet. (U. S.) 102, 8 L. ed. 334; Jackson v. Fitz-Simmons, 10 Wend. (N. Y.) 9, 24 Am. Dec. 198.

nessee, Washington, and Wisconsin.[8] This privilege is, however, restricted to resident aliens in Connecticut, Indiana, and New Hampshire;[9] and in Maryland, New Jersey, Pennsylvania, Virginia, and West Virginia, to alien friends.[10] In Colorado, Montana, and Utah, non-resident aliens must appear and claim the property within five years from the death of the ancestor, or be barred.[11] In Kentucky, aliens may take and hold lands by descent, if they become citizens before proceedings for escheat has been commenced.[12] In some states it seems to be necessary for alien residents to make declaration of their intention to become citizens in order to retain their inheritance of real estate. This seems to be the rule in Delaware, Indiana, New York, Pennsylvania, and Texas.[13]

The right of a state to enact laws regulating the descent of property within its limits, and to permit inheritance by or from an alien, is well established.[14] The constitution of some states provide that no distinction shall ever be made by law between resident aliens and citizens in reference to the possession, enjoyment or descent of property.[15] Some statutes confer upon aliens the right to inherit and transmit inheritance, but specify a time during which the land inherited must be conveyed to a bona fide purchaser for value, during which time if such alien has not become a citizen, and if the land is not so conveyed, it may be sold and the proceeds delivered to the state.[16] In some states an alien's declaration of intention to become a citizen, will entitle him to inherit, but if such alien die before naturalization, it has been held that his children do not succeed to the inheritance as his heirs.[17]

§ 733. Right of persons causing death of intestate to inherit his property.—Upon the question as to whether one who has caused the death of another can take his estate by descent the authorities are not in harmony. The courts of Great Britain

[8] See digest of statutes of descent in appendix.

[9] See digest of statutes of descent in appendix.

[10] See digest of statutes of descent in appendix.

[11] See digest of statutes of descent in appendix.

[12] See digest of statutes of descent in appendix.

[13] See digest of statutes of descent in appendix.

[14] Harley v. State, 40 Ala. 689; In re Gill's Estate, 79 Iowa 296, 44 N. W. 553, 9 L. R. A. 126.

[15] Nebr. Const., art. 1, § 25.

[16] Ill. Hurd's Rev. Stats. (1915-16), ch. 6, pp. 51, 52.

[17] State v. Beackmo, 6 Blackf. (Ind.) 488.

do not seem to have been called upon to pass upon the question until in very recent years, doubtless because of the ancient common-law doctrine of attainder and corruption of blood. Under the civil law one could not take property by inheritance or will from an ancestor or testator whom he had murdered, but such deprivation plainly was intended in the nature of a punishment, as the property in such case, escheated to the exchequer.[18] In most states the statutes of descent are based upon the rules of the civil law, but each state has its own rules. Some cases are based on the ground of public policy, following the maxim that one can not take advantage of his own wrong.[19] On the other hand, it has been held, where there are explicit rules governing descent of property by statute and there is nothing contained therein to justify exclusion, the one upon whom the law casts the property can not, because of the murder by him of the intestate, be deprived of it by the court.[20] The statutes of some states expressly provide that such person shall not take by descent or devise the property of the person murdered by him, but it has been held that such statute does not apply to a wife who has murdered her husband, as the wife takes her distributive share as a matter of contract and right and not by inheritance.[21]

The person who murders another does not forfeit his own estate, but is simply prevented from inheriting from the person whom he has murdered. His act does not prevent his heirs from inheriting through him property rightfully his at the time of his demise. The state can not by law take a criminal's property, but it can prevent him from acquiring property in an unauthorized and unlawful way.[22]

[18] Riggs v. Palmer, 115 N. Y. 506, 22 N. E. 188, 5 L. R. A. 340, 12 Am. St. 819.

[19] New York Mutual Life Ins. Co. v. Armstrong, 117 U. S. 591, 6 Sup. Ct. 877, 29 L. ed. 997; Perry v. Strawbridge, 209 Mo. 621, 108 S. W. 641, 16 L. R. A. (N. S.) 244, 123 Am. St. 510, 14 Ann. Cas. 92; Ellerson v. Wescott, 148 N. Y. 149, 42 N. E. 540; Riggs v. Palmer, 115 N. Y. 506, 22 N. E. 188, 5 L. R. A. 340, 12 Am. St. 819; Lundy v. Lundy, 24 Can. Sup. Ct. 650.

[20] Wall v. Pfanschmidt, 265 Ill. 180, 106 N. E. 785, L. R. A. 1915C, 328n; Shellenberger v. Ransom, 41 Nebr. 631, 59 N. W. 935, 25 L. R. A. 564; Owens v. Owens, 100 N. Car. 240, 6 S. E. 794; Deem v. Millikin, 53 Ohio St. 668, 44 N. E. 1134; Holloway v. McCormick, 41 Okla. 1, 136 Pac. 1111; In re Carpenter's Estate, 170 Pa. 203, 32 Atl. 637, 29 L. R. A. 145, 50 Am. St. 765.

[21] In re Kuhn's Estate, 125 Iowa 449, 101 N. W. 151, 2 Ann. Cas. 607.

[22] Perry v. Strawbridge, 209 Mo. 621, 108 N. W. 641, 123 Am. St. 510.

§ 734. Descent of estate of devisee who dies before testator.—Where a devisee under a will dies before the testator the devise will lapse; but the statutes of most states prevent the devise from lapsing by providing that in such case it vests in the heirs of the devisee as if he had survived the testator and died intestate.[23] Some of these statutes apply only to cases in which the devisee is a child,[24] or other descendant of the testator.[25] The statutes of other states include gifts to a child or other relative by consanguinity of the testator,[26] while in New Jersey and Pennsylvania the statutes apply to gifts to children or other specified relatives of the testator.[27]

Under statutes allowing the heirs of a devisee who predeceased the testator to take the property devised, it has been held not to include the widow of the deceased devisee,[28] nor the widow of the testator who was the mother of the devisee.[29] Under a statute which provides that the devise shall descend to the issue or lineal descendants of the devisee in case such devisee predeceases the testator, it is held that the devise may go to the legally adopted child of the deceased devisee,[30] or, in case the devisee be a female and she left an illegitimate child, to such child;[31] but the devise will not pass to the husband[32] or mother[33] of the deceased devisee.

[23] Ritch v. Talbot, 74 Conn. 137, 50 Atl. 42; Ellis v. Dumond, 259 Ill. 483, 102 N. E. 801; Ballard v. Camplin, 161 Ind. 16, 67 N. E. 505; Lindsay v. Wilson, 103 Md. 252, 63 Atl. 566, 2 L. R. A. (N. S.) 408; Loveren v. Donaldson, 69 N. H. 639, 45 Atl. 715; Canfield v. Canfield, 62 N. J. Eq. 578, 50 Atl. 471; Pimel v. Betjemann, 99 App. Div. 559, 91 N. Y. S. 49; Larwill v. Ewing, 73 Ohio St. 177, 76 N. E. 503; Harrison's Estate, 18 Pa. Super. Ct. 588; Howard v. Harrington, 27 R. I. 586, 65 Atl. 282; Watkins v. Blount, 43 Tex. Civ. App. 460, 94 S. W. 1116; Wildberger v. Cheek, 94 Va. 517, 27 S. E. 441.

[24] Pratt v. McGhee, 17 S. Car. 428.

[25] Jones v. Jones, 37 Ala. 646; Rudolph v. Rudolph, 207 Ill. 266, 69 N. E. 834, 99 Am. St. 211; Ballard v. Camplin, 161 Ind. 16, 67 N. E. 505; In re Wells, 113 N. Y. 396, 21 N. E. 137, 10 Am. St. 457; Cox v. Ward, 107 N. Car. 507, 12 S. E. 379; Watkins v. Blount, 43 Tex. Civ. App. 460, 94 S. W. 1116.

[26] In re Ross, 140 Cal. 282, 73 Pac. 976; Warren v. Prescott, 84 Maine 483, 24 Atl. 948, 17 L. R. A. 435, 30 Am. St. 370; Tilton v. Tilton, 196 Mass. 562, 82 N. E. 704; Strong v. Smith, 84 Mich. 567, 48 N. W. 183; Jamison v. Hay, 46 Mo. 546; Schaefer v. Bernhardt, 76 Ohio St. 443, 81 N. E. 640, 10 Ann. Cas. 919; In re Renton, 10 Wash. 533, 39 Pac. 145.

[27] Reichle v. Steitz, 64 N. J. Eq. 789, 56 Atl. 741; In re Harrison's Estate, 18 Pa. Super. Ct. 588.

[28] Blackman v. Wadworth, 65 Iowa 80, 21 N. W. 190.

[29] In re Overdieck, 50 Iowa 244.

[30] Warren v. Prescott, 84 Maine 483, 24 Atl. 948, 17 L. R. A. 435, 30 Am. St. 370.

[31] Goodwin v. Colby, 64 N. H. 401, 13 Atl. 866.

[32] Norwood v. Mills, 3 Ohio S. & C. P. Dec. 356, 1 Ohio (N. P.) 314.

[33] Morse v. Hayden, 82 Maine 227, 19 Atl. 443.

§ 735. **Release of expectant share to ancestor.**—An estate in expectancy is an appropriate subject of contract, and agreements by expectant heirs in regard to their future contingent estates, when fairly made for a valuable consideration will be enforced in equity,[34] and such heirs will be estopped from asserting any claim to the estate against the other heirs and distributees.[35] Thus where a son, by a contract with his father, relinquishes his expectancy in the latter's estate, the contract will be enforced.[36] A release to the ancestor, by an heir, of his expectancy as heir, operates not as a contract or as a transfer or a conveyance either to the ancestor or to other heirs, but an extinguishment of his right to take any estate by descent.[37] The release by an heir of his interest in the ancestor's estate, made in consideration of an advancement of his share in the estate, is binding on such heir.[38] A release, when executed between parent and child, if fair and for a present advancement of money or land out of the parent's estate will operate as a release of all right of the child to share in the division and partition of the residue of the estate of the parent dying intestate.[39] But we do not find that the law of advancements, or of release between parent and child, has ever been carried to the extent of upholding such a contract or release between grandparent and grandchild during the life of the child's parent, so as to cut off the right of the child to inherit or participate in the distribution of his parent's estate.[40]

§ 736. **Inheritance liable for debts of decedent.**—By the early common law a decedent's debts had to be paid out of his personal estate. His lands were inalienable and could not be sold for the payment of his debts. This doctrine grew out of the peculiar manner in which real estate was held under the feudal system but the growth of trade and commerce made it necessary that creditors should be provided with some means for

[34] Bolin v. Bolin, 245 Ill. 613, 92 N. E. 530; Hudson v. Hudson, 222 Ill. 527, 78 N. E. 917.

[35] Squires v. Squires, 65 W. Va. 611, 64 S. E. 911.

[36] Longshore v. Longshore, 200 Ill. 470, 65 N. E. 1081.

[37] Mires v. Laubenheimer, 271 Ill. 296, 111 N. E. 106.

[38] Felton v. Brown, 102 Ark. 658, 145 S. W. 552.

[39] Quarles v. Quarles, 4 Mass. 680; Pritchard v. Pritchard, 76 W. Va. 91, 85 S. E. 29.

[40] Davis v. Hayden, 9 Mass. 514; In re Thompson's Estate, 26 S. Dak. 576, 128 N. W. 1127, Ann. Cas. 1913B, 446n; Pritchard v. Pritchard, 76 W. Va. 91, 85 S. E. 29.

satisfying their claims by compulsory process against a debtor's land. Hence has grown the right of execution, attachment, etc., against a debtor's real estate in his lifetime, and the right of his executor or administrator, after his death, to sell his real estate to make assets with which to pay his debts. By virtue of statute in all the states, the real estate of an intestate is as completely subject to his debts as his personal estate, and even though the personal estate is wasted by the administrator, the purchaser of the real estate from an heir is not protected.[41]

While the wasting of the personal assets of the decedent by the personal representative does not relieve the real estate from liability for debts,[42] if such wasting on the part of the administrator be wrongful, he will be liable on his bond.[43] But if the assets are wasted or destroyed without fault of the personal representative; or by reason of a decrease in the value of such assets, or the insolvency of the personal representative and his sureties, the loss falls on the estate.[44]

Both the real and personal estate of the intestate are equally chargeable with the payment of his debts, with the exception that the personal estate must be exhausted first.[45]

Those who succeed to the property of the decedent are liable for his obligations to the value of the property inherited.[46] But an heir is not personally liable for the promise of his ancestor.[47] Heirs are not liable for the debts of the ancestor unless they have received property from his estate. If they have received any portion of the estate, they are liable to the extent of what they have received, but beyond that they are neither liable in law nor in equity.[48] The estate of an intestate wife is liable for her debts

[41] Fiscus v. Moore, 121 Ind. 547, 23 N. E. 362, 7 L. R. A. 235. Lands of deceased wife descend subject to her debts. Miller v. Hanna, 89 Nebr. 224, 131 N. W. 226, Ann. Cas. 1912C, 573n.

[42] Conger v. Cook, 56 Iowa 117, 8 N. W. 782; Van Bibber v. Julian, 81 Mo. 618; Smith v. Brown, 99 N. Car. 377, 6 S. E. 667.

[43] Foley v. McDonald, 46 Miss. 238; Merritt v. Merritt, 62 Mo. 150; Carlton v. Byers, 70 N. Car. 691.

[44] May v. Parham, 68 Ala. 253; Evans v. Fisher, 40 Miss. 643; Lilly v. Wooley, 94 N. Car. 412; Faran v. Robinson, 17 Ohio St. 242, 93 Am. Dec. 617.

[45] Nelson v. Murphee, 69 Ala. 598; Fiscus v. Moore, 121 Ind. 547, 23 N. E. 362, 7 L. R. A. 235.

[46] Phelps v. Grandy, 168 Cal. 73, 141 Pac. 926; Cooper v. Ives, 62 Kans. 395, 63 Pac. 434. In the absence of personal estate each child's share in the realty is subject to the debts of decedent. Keever v. Hunter, 62 Ohio St. 616, 57 N. E. 454.

[47] Dempsey v. Poore, 75 W. Va. 107, 83 S. E. 300.

[48] Byrd v. Belding, 18 Ark. 118;

only, and not for the debts of her husband.[49] It has been frequently held that a creditor can proceed in equity against the heirs who have received the ancestor's estate for satisfaction of his claim against such estate which has accrued after the lapse of the time limited for authenticating it against the administrator, or after the close of his administration.[50]

§ 737. **Advancements.**—An advancement is given by a party to his child or heir, by way of anticipation, the whole or a part of what it is supposed the donee will be entitled to on the death of the donor.[51] To constitute an advancement the gift must have been made by the intestate in his lifetime,[52] and he must transfer to the party advanced the absolute control over the property.[53] The gift must take effect when made and be absolutely irrevocable.[54] Actual delivery or transfer of possession of the property is usually required in order to constitute a gift an advancement.[55]

All gifts and grants are made as advancements, if expressed in the gift or grant to be so made, or if charged in writing by the decedent as an advancement, or acknowledged in writing as such by the child or other successor or heir.[56]

If the amount of the advancement is in excess of the share of

Cutright v. Stanford, 81 Ill. 240; Walker v. Deavér, 79 Mo. 664; Schmidtke v. Miller, 71 Tex. 103, 8 S. W. 638; Bacon v. Thornton, 16 Utah 138, 51 Pac. 153.

[49] People v. Rardin, 171 Ill. App. 226.

[50] Wallace v. Swepston, 74 Ark. 520, 86 S. W. 398, 100 Am. St. 94; Chitty v. Gillett, 46 Okla. 724, 148 Pac. 1048.

[51] Cotton v. Citizens' Bank, 97 Ark. 568, 135 S. W. 340; Strasburger v. Hoffman, 175 Ill. App. 120.

[52] Gavin v. Gaines, 5 Ky. L. 247; Flower v. Myrick, 49 La. Ann. 321, 21 So. 542.

[53] Crosby v. Covington, 24 Miss. 619.

[54] Herkimer v. McGregor, 126 Ind. 247, 25 N. E. 145, 26 N. E. 44. But see Lowe v. Wiseman, 46 Ind. App. 405, 91 N. E. 364, 92 N. E. 344.

[55] Butler v. Merchants Ins. Co., 14 Ala. 777; Joyce v. Hamilton, 111 Ind. 163, 12 N. E. 294.

[56] Bolin v. Bolin, 245 Ill. 613, 92 N. E. 530; Gary v. Newton, 201 Ill. 170, 66 N. E. 267; Porter v. Porter, 51 Maine 376; Lodge v. Fitch, 72 Nebr. 652, 101 N. W. 338; Fellows v. Little, 46 N. H. 27; Law v. Smith, 2 R. I. 244; Pomeroy v. Pomeroy, 93 Wis. 262, 67 N. W. 430. The support and maintenance of a helpless adult child is not to be considered an advancement. Crain v. Mallone, 130 Ky. 125, 113 S. W. 67, 132 Am. St. 355, 22 L. R. A. (N. S.) 1165n. Where an heir of lawful age accepts from his ancestor as an advancement his full share of such ancestor's estate and a receipt given by him to such effect such receipt will bar his claim of any further interest in the estate. Simon v. Simon's Estate, 158 Mich. 256, 122 N. W. 544, 17 Ann. Cas. 723. Child receiving a portion of the estate in lifetime of testator and giving receipt therefor is disregarded in distribution. Callicott v. Callicott (Miss.), 43 So. 616.

the person to whom made, he will be excluded from any further portion,[57] but will not ordinarily be required to refund any part of the advancement, and if his share be more than the advancement, he will generally be entitled to so much more as will give him a full share of the estate.[58]

If the person to whom the advancement has been made, dies before the decedent, leaving issue, the advancement will be taken into consideration in the distribution of the estate in like manner as if the advancement had been made to such issue.[59]

The weight of authority recognizes the right of the heir who has attained majority to accept presently in advancement his full share of the estate of the parent. Whether the arrangement is called a contract not to take or a release to take further in the future, the principle is the same. When the estate is cast by the death of the ancestor, it operates to estop the heir to take what he has agreed he will not claim.[60]

The doctrine of advancement rests wholly upon statute, and applies only in cases of intestacy.[61] A gift, or conveyance of land by a parent to a child, from a consideration of love and affection only, or where the purchase-money is paid by the parent and the land conveyed by another direct to the child, is, in law, presumed to be an advancement. And such presumption, while not conclusive, is strong enough to throw the burden of

[57] Grattan v. Grattan, 18 Ill. 167, 65 Am. Dec. 726; Nicholson v. Caress, 59 Ind. 39; Scroggs v. Stevenson, 100 N. Car. 354, 6 S. E. 111.

[58] McClave v. McClave, 60 Nebr. 464, 83 N. W. 668; Nesmith v. Dinsmore, 17 N. H. 515; Norwood v. Cobb, 37 Tex. 141; Liginger v. Field, 78 Wis. 367, 47 N. W. 613. Rule applies to advancements made to grandchildren as well as children. Johnson v. Antrikin, 205 Mo. 244, 103 S. W. 936.

[59] Brown v. Taylor, 62 Ind. 295; Barber v. Taylor, 9 Dana (Ky.) 84; Succession of Meyer, 44 La. Ann. 871, 11 So. 532; In re Williams, 62 Mo. App. 339, 1 Mo. App. 516; Headen v. Headen, 42 N. Car. 159; Parsons v. Parsons, 52 Ohio St. 470, 40 N. E. 165; In re Person's Appeal, 74 Pa. St. 121.

[60] Remington's Codes and Stats. (1915), § 1366; Simpson v. Simpson, 114 Ill. 603, 4 N. E. 137, 7 N. E. 287. The release to a living ancestor by his prospective heir of such heir's expectancy is held not within the terms of the statute relating to advancements. Donough v. Garland, 269 Ill. 565, 109 N. E. 1015, Ann. Cas. 1916E, 1238n; Jones v. Jones, 46 Iowa 466; Curtis v. Curtis, 40 Maine 24, 63 Am. Dec. 651; Quarles v. Quarles, 4 Mass. 680; Simon v. Simon's Estate, 158 Mich. 256, 122 N. W. 544, 17 Am. Cas. 723; In re Power's Appeal, 63 Pa. St. 443; Coffman v. Coffman, 41 W. Va. 8, 23 S. E. 523; In re Lewis, 29 Ont. 609.

[61] Marshall v. Rench, 3 Del. Ch. 239; Huggins v. Huggins, 71 Ga. 66; Barnes v. Allen, 25 Ind. 222; In re Turner's Appeal, 48 Mich. 369, 12 N. W. 493; Clark v. Kingsley, 37 Hun (N. Y.) 246; Allen v. Allen, 13 S. Car. 512, 36 Am. Rep. 716.

proof upon the party claiming it to be anything else.[62] Whether or not a conveyance of land or a transfer of money or other property to a child, is to be regarded as an advancement, is to be determined by the intention of the parent at the time it was made. In the absence of anything in the transaction indicating a contrary intention, the law presumes it to be an advancement.[63]

§ 738. Proof of heirship.—Title by descent can be asserted only by the person or persons who can establish the fact of heirship within the line of succession provided by statute. Some of the statutes point out the method of proof with great minuteness. Generally, however, it is only necessary for the heir in a direct line to prove: (1) The death of the ancestor, and his lawful seisin of the land at the time of his death; (2) the marriage of the ancestor with the heir's other parent; and (3) legitimacy or lawful adoption. But where the claimant is in the collateral line he must show the descent of himself and the person last seised from a common ancestor, and the absence of any heirs in the direct line.[64]

Decrees, recitals and records in administration proceedings as to who are the next of kin to the decedent for the purpose of a distribution of personal property, are not necessarily conclusive

[62] Dille v. Webb, 61 Ind. 85; McCaw v. Burk, 31 Ind. 56; In re Dutch's Appeal, 57 Pa. St. 461. Heir estopped to take what he has agreed not to claim. Jones v. Jones, 46 Iowa 466. Voluntary conveyance from parent to child presumed to be an advancement. Finch v. Garrett, 102 Iowa 381, 71 N. W. 429. Oral testimony incompetent to prove advancements. Boden v. Mier, 71 Nebr. 191, 98 N. W. 701.

[63] Woolery v. Woolery, 29 Ind. 249, 95 Am. Dec. 629; Ruch v. Biery, 110 Ind. 444, 11 N. E. 312. Land purchased by father who caused conveyance to be made to his minor sons, considered as advancement. Rhea v. Bagley, 63 Ark. 374, 38 S. W. 1039, 36 L. R. A. 86. A voluntary conveyance from the parent to the child or other lineal descendant, or where the difference between the consideration named in the deed and the actual value of the land is great, will be presumed to be an advancement. Mossestad v. Gunderson, 140 Iowa 290, 118 N. W. 374. Conveyance reciting valuable and substantial consideration near the full value of the property, not presumed to be an advancement. Kiger v. Terry, 119 N. Car. 456, 26 S. E. 38. Where a wife's father grants land to her husband during coverture, reciting no consideration, it is presumptively an advancement to the wife. White v. White, 72 W. Va. 144, 77 S. E. 911. A conveyance by a father of a portion of his land to one of his sons by deed reciting no consideration, practically contemporaneous with conveyances to other children, admittedly made by way of advancement out of his estate, is presumptively an advancement, and intended to be in lieu of the share in the land such son would have taken by partition on the death of the father intestate. White v. White, 64 W. Va. 30, 60 S. E. 885.

[64] Emerson v. White, 29 N. H. 482.

concerning the heirs' title to real estate, but these are frequently the only proof available in the compilation of an abstract. A subsequent purchaser must, at his peril, ascertain whether those claiming as heirs are really such, and, if so, whether they are all the heirs. As time goes on this becomes more difficult to ascertain. The statutes of limitation may in time remove some difficulties arising from this cause, but owing to the many exceptions made in them a defect arising from uncertainty as to heirs may not be settled for a long time. Statutes in some states exist for determining who are the heirs of a deceased person, by proper petition and evidence; but by the terms of some such statutes the result is only prima facie evidence of such heirship.[65] Where title by inheritance depends upon matters in pais, or facts resting in the knowledge of witnesses, and such facts be clearly sufficient to establish the right of a vendor as heir, it is apprehended that the purchaser can not object to the title simply because it can not be established by record evidence.[66] But a different case is presented where the fact of inheritance itself is in doubt. There may be circumstances to show that the ancestor is not dead, or that he has left a will, or that the vendor is not sole heir. Then it is that the title becomes unmarketable from the necessity of parol proof to remove the doubts which surround it.

§ 739. **Proof of death of ancestor.**—Proof of some kind must be made that the person upon whose estate administration is asked is dead. This is a jurisdictional fact about which the court should be informed for there can be no valid administration upon the estate of a living person, and if administration should be granted in such a case it would be invalid. It is true that an unexplained absence for a period of years may justify an administration upon the estate of such absentee, but authority for such proceeding is found in a special statute. The fact of death, may, it seems, be proved by hearsay evidence; for if a person has been missing at a particular time, accompanied with a report and general belief of his death, must be, in many cases, not only the best, but the only evidence which can support the existence of death.[67] Entries in church registers of the date of

[65] Lorimer v. Wayne Circuit Judge, 116 Mich. 682, 75 N. W. 133.

[66] Walton v. Meeks, 120 N. Y. 79, 23 N. E. 115.

[67] Primm v. Stewart, 7 Tex. 178.

burial of a person have been admitted to show by way of inference that such person died prior to the date of burial, of which fact they seem to be evidence. Where the statutes provide that all births, marriages, and deaths shall be registered in the permanent archives of the county, such registers, or a certified copy thereof, may be admitted in evidence to show the fact of death.

The affidavit of the attending physician, the undertaker, or any other person who saw the remains, are often resorted to in cases where no better evidence is obtainable.

Where the fact of the death of a person becomes material to show title in another claiming through descent from the ancestor, and the fact of the ancestor's death is a matter of record, the abstract should contain a synopsis of the certificate or register, an example of which is as follows:

Proof of Death of John Jones	Certificate of Geo. W. Wright, M. D. Dated July 1, 1893. Recorded July 2, 1893. Register of Deaths "B," Page 75.

Certifies that John Jones, white, male, age seventy-five years, departed this life on the 29th day of June, 1893, at the city of Indianapolis, Indiana, of dropsy, and was buried in Crown Hill Cemetery.

§ 740. Proof of birth and legitimacy.—As a rule the one thing required of one who is to inherit is that he shall be the legitimate heir of the ancestor from whom the inheritance comes. In a civilized community every child is presumed to be legitimate where the mother has been cohabited with and recognized by the father as his wife, and where there is no proof to the contrary no other evidence will be necessary to establish the marriage and legitimatize the offspring of it.[68] The legal presumption that he is the father of the child whom the nuptials show to be so is the foundation of every man's birth or status. The legal presumption of legitimacy underlies the whole social fabric.

[68] Strode v. Magowan, 2 Bush (Ky.) 621.

Birth may be established by the production of the certificate of marriage of the parents and the baptism of the child within a reasonable time after marriage. For want of better evidence, the affidavit of some person who was present and witnessed the marriage would be competent evidence of the marriage.[69] Also proof of cohabitation, admissions and declarations would be competent to establish the fact of marriage.[70] Where it does not appear that there is any other higher evidence obtainable, marriage and birth may be proved by parol evidence, such as reputation and other corroborating facts.[71] Declarations of deceased members of a family may be proved to show the fact and time of the birth of a child belonging to that family, although there may be a family register of births in existence; for the one kind of evidence is of no higher dignity than the other.[72]

§ 741. **Abstract of descents.**—Titles depending on descent may be abstracted by setting forth the probate proceedings or other proceeding of a judicial nature determining the rights of heirs; but in the absence of probate or judicial determination of such rights the abstracter should not attempt to introduce any matter strictly in pais, unless requested to do so by his employer or the examining counsel.

Where the abstract shows conveyance purporting to have been executed by the heirs at law of one in whom the title is shown to have been vested, and no probate proceedings appear of record, a simple notation of the fact on the abstract immediately after the heirs' deed is sufficient.

A judicial determination in a suit between adverse claimants to the estate of an intestate, or a proceeding in rem to determine the rights and interests of parties before the court, constitute record evidence of descent and every material step in the proceedings should be noted and appropriately exhibited. Likewise, proceedings in probate are evidence of descent if they disclose the jurisdiction of the court, the appointment of an administrator, proof of heirship, and adjudication in final settlement of the estate. In order that the title of the heirs may be cleared of creditors' liens the proceedings must show the filing of an inventory,

[69] Brewer v. State, 59 Ala. 101.
[70] Illinois Land & Loan Co. v. Bonner, 75 Ill. 315.
[71] Guerin v. Bagneries, 18 La. 590.
[72] Clements v. Hunt, 46 N. Car. 400.

payment of claims, and final report and discharge of the administrator in the time and manner prescribed by law. The following example of synopsis of probate proceedings is submitted:

In the Matter of the Estate of James C. Yohn, deceased.	In the Circuit Court of Marion County, Indiana. Estate No. 1127.

James C. Yohn died intestate, August 20, 1888. Letters issued to Eliza S. Yohn, administratrix, August 31, 1888. Order Book 84, page 61. Final report filed and approved, and estate settled and closed April 29, 1895. Order Book 114, page 288. January 16, 1896, certificate of final settlement was filed in the Recorder's office of Marion County, in Land Record 30, page 263, which shows that said decedent left the following named heirs-at-law: His widow, Eliza S. Yohn; his children, Charles G. Yohn, Mary E. Yohn, and Kate Y. Vinnedge; his grandchildren, Albert F. Yohn and Fred C. Yohn, children of his deceased son, Albert B. Yohn, and Addie F. Yohn, widow of said Albert B. Yohn, deceased.

CHAPTER XXXI

PERUSAL OF ABSTRACT AND OPINION OF TITLE

SEC.
745. Precautionary measures against insertion of pages after examination.
746. Perusing abstract.
747. Making memoranda.
748. Examining the muniments of title.
749. Beginning point of examination.
750. Printed copies of abstracts.
751. Government Land Receiver's receipt.
752. Patent from the federal government.
753. Patent from state government.
754. Private deeds.
755. Acknowledgments.
756. Official deeds.
757. Trust deeds and mortgages.
758. Deed of release.
759. Deed executed under power of attorney.
760. Dedications.
761. Sale under foreclosure.
762. Judicial sales.
763. Tax sales.
764. Sales by executors, administrators, and guardians.
765. Wills.
766. Descents.
767. Contract of sale.
768. Judgment liens.
769. Mechanic's liens.
770. Miscellaneous incumbrances.
771. Examination of matters in pais.
772. Examination of abstracter's certificate.
773. Opinion of title.

§ 745. **Precautionary measures against insertion of pages after examination.**—The first duty of counsel upon receipt of the abstract for perusal is to number each page of the abstract, give the date of perusal, and sign his name or initials thereto. A rubber stamp may be provided for this purpose, leaving only the page number and date to be filled in with pen and ink. This is done for counsel's own protection. It sometimes happens that unscrupulous persons remove a sheet of the abstract and insert another in its place after counsel has rendered his opinion of the title. If the inserted page contains matter that would show a defect in the title the fact that each page does not contain counsel's initials, the date of his perusal and the page number relieves him from any liability in connection with the examination.

The page number when consecutively given enables counsel to readily refer to any page that is sought during the examination.

§ 746. **Perusing abstract.**—Counsel should bear in mind that the abstract presented for his perusal does not pretend to indicate what effect an instrument, lien, judicial proceeding or

any item appearing thereon, has upon the title. He is presumed to possess such a knowledge of the law of real property as will enable him to judge of the effect of the various instruments appearing of record and abstracted, and when in doubt, he must consult the statutes and the law applicable to the particular matter in hand.

The method employed in perusing an abstract will be governed largely by the professional habits of the individual and the apparent complexity of the title. It has been said that, "the perusal should, if the length of the abstract will permit it, be finished at one sitting, although any difficult point of law, the whole bearing of which is not ascertained, may properly be reserved for further and separate consideration. It may sometimes be useful to glance over the abstract in the first place, in order to obtain a general view of the title, and experience will rapidly point out when a subsequent part of the abstract may be looked into advantageously before its proper turn; but, speaking generally, an abstract should be perused but once, and that once effectually. The party should never pass on until he thoroughly comprehends what he has already read; the advancing in a difficult title, in order to comprehend what you have passed and do not understand, often leads to insurmountable difficulties."[1]

It would seem that the better plan would be to glance through the abstract first, noting any apparent defects, and then take up each entry in chronological order and examine it carefully.

§ 747. **Making memoranda.**—The practice of making memoranda is indulged in by most attorneys, especially where the title appears to be complicated. They are often found to be an important aid in unraveling a tangled chain of title and in framing an opinion thereon. The practice, however, should never be carried to the extent of distracting attention of counsel from the salient points involved. The scope of their use will always be governed by the length of the abstract and the apparent complexity of the title. A great diversity of methods of note making have been suggested, some of which are not without merit, but each individual attorney will be governed in the matter by his own tastes and habits of thought. Each item or entry on the abstract should be numbered, and the memorandum in

[1] Sugd. on Vendors, 10.

respect thereto should be given a corresponding number as well as the page number of the abstract so that the entry may be quickly referred to. As the examination progresses, if it is discovered that the matter giving rise to a memorandum has been subsequently cleared up, the memorandum should be canceled in order to reduce the volume of the memoranda as much as possible. No attempt will be made here to suggest what matters are and what are not of sufficient importance to be noted during the examination, but every matter which counsel deems too important to be trusted to his memory should be noted. When the examination is completed the memoranda taken should be carefully preserved for future reference should occasion require it. Items and liens remaining as a cloud when the examination is completed serve as a skeleton from which the opinion may be prepared.

§ 748. **Examining the muniments of title.**—Counsel bases his opinion of the title on the items of the abstract. The abstract merely sets out these items from the records, and their legal effect can only be determined from a careful examination of the various muniments of title in the chain.

Counsel should carefully note the date of the execution as well as the date of the record of each instrument, and in comparing such dates, see that they harmonize with the facts. He should carefully read and examine every will appearing in the chain of title, especially every part of the will pertaining to the transfer of title to the real estate in question. Every judicial proceeding affecting the title should be carefully examined, and especially when pleadings are set out in full. Where the title depends upon a decree of court, such decree should be analyzed to determine whether it is binding. Where a a proceeding, as in probate, must conform to statutory requirements, it must be seen to that all such requirements have been complied with.

Many of the defects that will appear from an inspection of the original instruments through which title is claimed will be shown also from the records of those instruments, provided the records are true copies of the originals. But there are matters that may affect the title which can be discovered only by an examination of the original instruments themselves. In most cases

persons intending to purchase land rely rather on copies or abstracts of them than on the original instruments, but it is not entirely safe to do so, and wherever it is possible all original instruments in the chain of a vendor's title should be read by counsel of the proposing purchaser.

An examination of the original instruments, or of true copies thereof, may disclose insufficient operative words, or words of conveyance; or an insufficient description which may be so defective as to make the conveyance void, or so defective as to make the record ineffectual as notice. The title may be incomplete or incumbered by reason of covenants running with the land, or restrictions of various kinds by way of condition, or covenant, or reservation appearing in instruments directly in the chain of title, or there may be insufficient recitals when full recitals are required by statute, and there may be insufficient signing, sealing, attestation or acknowledgment.

§ 749. Beginning point of examination.—The examination should begin at the original source of the title, unless counsel has been directed to begin from a particular subdivision or from a given date. The original source of title is generally from the government, or one of the sovereign states, and the proper evidence of a good title from the government is a deed called a patent. The right to a patent from the government, however, may be evidenced by a receipt which has been duly issued by the proper official, called a "receiver."

It will be assumed that the original source of the title to the land abstracted is from the government, and in the absence of any specific directions to commence the examination at a different point or date the examination should cover the entire period from the time the title passed from the government until it vested in the present owner.

It is a mistake to presume that because a mortgage or trust deed appears in the chain of title the abstract must have been carefully examined before, and therefore, it is not necessary to examine beyond the date of such instrument. Many attorneys have later come to grief because of such presumption.

§ 750. Printed copies of abstracts.—In subdividing large tracts of land into lots for the purpose of sale to various persons, that part of the abstract covering the entire tract before such sub-

division is usually put in print to be used in connection with a continuation for each particular lot sold. This practice saves much labor and expense, and if the printing is an exact copy of the original it is much more reliable than a written copy made from the original. Some attorneys, however, refuse to render an opinion on the title until the original copy is produced for comparison, and some require the certificate of a reliable abstracter to be appended to the printed part showing that the abstracter has compared the printed abstract with the original, and found them to be exact duplicates.

Where an abstracter is employed to make an abstract of title to certain lands and to certify to a certain number of printed copies, in the absence of a special contract, he is entitled, as compensation for certifying to the copies, merely to the reasonable value of his services, and not to the value of all the copies regarding them as originals and not according to their value to his employer.[2]

§ 751. Government land receiver's receipt.—Where a patent from the government has been issued and recorded according to law, it carries with it the presumption that all the prerequisites of the law have been complied with, and little or no attention need be given to the receiver's receipt, although it be noted in the abstract together with the patent. But in many cases a patent is never called for or delivered, the receipt being relied upon as sufficient evidence of title in the claimant. Where such is the case it is important to inquire into every detail concerning its issue or any subsequent transfer thereof. For the purpose of identification the receipt should contain a number, and the number of the document where it may be found should appear. See that the grantee is properly named, identified or described, and that the land is also described with certainty. Ascertain the amount paid for the land, and the balance due, if any. See that the instrument is properly dated, signed, and recorded.

While the receiver's receipt is prima facie that the law has been complied with, and operates to convey the entire beneficial interest in the land, it can not be set up at law to defeat the legal title by patent.[3] Where no patent appears in the abstract, and

[2] Kenyon v. Charlevoix Improvement Co., 135 Mich. 103, 97 N. W. 407.

[3] Hooper v. Scheimer, 23 How. (U. S.) 235, 16 L. ed. 452.

is not obtainable from the records of the county where the land lies, an office copy can and should be procured from the general land office at Washington upon filing there the affidavit of the owner, stating his ownership and occupation of the land, and the purpose for which the copy is wanted.

§ 752. Patent from the federal government.—We have said that the most common source of title to real estate is from the government of the United States, and that the instrument of transfer is usually a formal grant called a patent. This instrument must be issued in the name of the United States, signed by the President, or in his name by his secretary or executive clerk, countersigned by the recorder of the general land office, sealed by the government seal, and recorded in the general land office books kept for that purpose.

The formal execution of patents or grants from the government must conform to the law in force at the time of issue, and the rules applying to defects appearing on the face of the instrument are the same as those which apply to a deed executed by an individual. Hence it is important in examining a patent to look closely to the description of the land, the description and identification of the grantor and grantee, and the signatures and execution. The words of conveyance should be analyzed to see if they constitute a grant in praesenti. Patents of the United States should be recorded in the county where the property is situated. But title is transferred without delivery of the patent. Title to the land passes to the grantee by the record.[4]

The statute of limitations does not run against the government; therefore, a patent must issue to divest it of legal title and vest it in the person entitled thereto.

§ 753. Patent from state government.—Where the source of title is from the state the instrument of grant is sometimes called a patent. These grants are authorized by legislative enactment setting forth the purpose of the grant and prescribing the formalities of execution. Hence, if the source of title is from the state, care should be exercised in examining the legislative act under which the grant was issued in order to determine if all the conditions have been complied with. However, this is necessary only where a very technical examination is required.

[4] United States v. Schurz, 102 U. S. 378, 26 L. ed. 167.

The instrument of conveyance from the state should recite or contain the date of passage of the act authorizing the grant, the purpose for which the grant is made, the name of the grantor and grantee, and should be signed by the officer authorized by the act to sign, and sealed with the official state seal.

It should be borne in mind that every purchaser under a patent or grant from the state is charged with notice of any defect apparent upon its face, there being no difference in that respect between patents and deeds of individuals.[5]

§ 754. **Private deeds.**—Where the muniment of title consists of a deed executed by a private person the abstract usually states that it was executed and acknowledged, etc., setting out the bare facts without further comment, unless some defect is shown on the face of the instrument. When the bare facts are noted in the abstract it will be presumed that the deed contains all the necessary requirements prescribed by law, together with the usual terms and conditions. It is only when a deed, or some part thereof, is set out in full for the purpose of calling attention to some unusual provision or defect that the examiner is required to give his attention in order to determine the effect of the particular part noted.

Particular attention must be given to restrictive clauses in a deed, and if cured, complied with, or subsequently waived, no further attention need be paid to them. The same is true with regard to dedications and trusts.

In examining the synopsis of a private deed counsel should give close attention to the description of the land attempted to be conveyed to see that it harmonizes with the particular land involved. He should see that both the grantor and grantee are properly described or identified. Particular attention should be given to the words of the grant to determine their sufficiency and effect. All limitations, restrictions, conditions, exceptions, and reservations, should be carefully examined. Particular attention should be paid to all covenants in the deed. Counsel should notice what the consideration was for the conveyance. He should note the date of execution, and compare all dates to see that they harmonize with the history of the title in question. He should see that the deed was signed and acknowledged by the person

[5] Bell v. Duncan, 11 Ohio 192.

named therein as grantor, and if the grantor be married at the time, the signature and acknowledgment of the husband or wife should be inquired into. If attesting witnesses are required, inquiry should be made relative to this matter.

Counsel should give particular attention to the formal execution, certificate, and recitals of the acknowledgment, and should see that the officer's signature, his seal, and the fact of the expiration of his commission appears. If a revenue stamp is required, it should not be overlooked.

The delivery of the deed is presumed from the fact that the abstract states that it has been recorded. The date of the record should always appear. Deeds of assignment for the benefit of creditors must be made in accordance with statutory requirements, and the examiner should see that the requirements in this respect have been complied with. He should note carefully the terms and conditions under which the property was conveyed to the assignee, and should see that such conditions have been complied with.

§ 755. Acknowledgments. — The statutory requirements as to the form and substance of an acknowledgment must be literally complied with, and great care must be exercised to determine if every essential has been included in the certificate of the officer taking same. The most important of these are: (1) The venue or place where the acknowledgment was taken; (2) the name, official title and jurisdiction of the officer; (3) the name of the grantor; (4) description of grantor with reference to whether married or single; (5) if grantor be a corporation, a showing that the acknowledgment is the act of the corporation and not of the person signing it; (6) if deed was by an attorney in fact, a statement that it was the act and deed of the principal; (7) statement that grantor was personally known to officer; (8) statement that the acknowledgment was made by the grantor voluntarily; and (9) where the statute requires the wife to be examined separate and apart from her husband, the certificate must state that this was done, that the contents of the instrument was explained to her, and that she made the acknowledgment of her own free will.

The certificate of acknowledgment must also be dated, signed by the officer, his official title designated, sealed by the officer's seal, and attached to the deed.

§ 756. **Official deeds.**—In examining official deeds such as sheriff's guardians', assignees, and trustees' deeds in bankruptcy, the records of the court proceedings or instruments authorizing the deed should be carefully analyzed, and it will be incumbent upon counsel from such examination to determine whether or not all legal and statutory requirements were complied with and a good and sufficient title was obtained through such source.

A trustee's deed should contain a recital of the trust under which the trustee was appointed, and the examiner should determine if there has been a compliance with the terms of the trust.

The deed of an executor or administrator under order of court should be made in compliance with the court's order, and to ascertain this an analysis of the court proceedings should be made.

A master's deed should contain a recital of execution in accordance with the decree and sale by court proceedings, and such proceedings must be examined for irregularities.

Sheriff's deeds must contain a recital of authority to make them, and in order to ascertain if such authority existed the court proceedings must be examined for irregularities. The deed must be made to the person named in the certificate of sale or to his assignee. There must have been a valid judgment, execution issued thereon, levy and sale.

§ 757. **Trust deeds and mortgages.**—A trust deed, or a deed in the nature of a mortgage to secure the payment of a debt, should contain recitals of the number, the amount due, date and description of the notes. It should also recite the rate of interest, when principal and interest due, and how payable. It should recite the document number, book and page where recorded. The name of the trustee and successor in trust should be given in a trust deed.

§ 758. **Deed of release.**—A deed of release should describe the mortgage or trust deed released with sufficient clearness to identify the particular instrument released. A careful comparison of all data abstracted in relation to the release should be made. The document number of the mortgage or trust deed, the record book number and number of page thereof help out in this respect, but are not always conclusive.

§ 759. **Deed executed under power of attorney.**—Where

the muniment of title consists of a deed executed under a power of attorney, the power must be analyzed as to the scope of the power delegated, unless the principal has subsequently made a conveyance of the property, in which case the subsequent conveyance nullifies the power. If a power of attorney is set out in full in the abstract, this is notice to examine it for defects.

In order that a valid conveyance may be made under a power of attorney, the instrument purporting to confer power should be made with the same solemnity as the conveyance itself. It must be made under the seal of the principal or owner. It must contain words of authority delegated and limited. The date of execution and recording must appear. The property as well as the owner thereof must be sufficiently described or identified. The date, signature, jurisdiction and seal of the officer taking the acknowledgment must be given. If attesting witnesses are required, their signatures must appear.

Care must be exercised to see that the power was not revoked at the time the conveyance was made. Such revocation may occur by death of the principal, prior conveyance by the principal, prior conveyance by the act of a second attorney, bankruptcy or assignment for the benefit of creditors by the principal, by marriage, or by operation of law.

§ 760. Dedications.—It is incumbent upon counsel to determine from the recitals indicative of a dedication whether there has been in fact a dedication to public uses, or simply an adjustment of a dispute relative to a common right of way in connection with the property. Dedications are usually made by map or plat, and where such map or plat does not appear in the abstract, examination should be made of the map or plat as shown in the public records. Sometimes the map is omitted because it is followed by a vacation. In connection with the examination of the map the examiner should note the execution and acknowledgment, the date of recording, the surveyor's certificate, the approval by examiner of subdivisions, and any other act required to constitute a valid dedication under the statute.

§ 761. Sale under foreclosure.—Where title is based on a deed made in pursuance to a foreclosure and sale under a mortgage, all the proceedings had in connection therewith must be carefully examined. Care must be exercised to see that process

was served on all parties having an interest in or lien against the property, and that the court had jurisdiction of the parties and the subject-matter. The pleadings should be examined to determine the issues joined by the parties, and in case any failed to plead, see that they were properly defaulted. The decree and order of sale should receive due attention, and the sale should be made in strict conformity therewith. Where confirmation of the sale is required this matter should not be overlooked. In fact all statutory requirements pertaining to the foreclosure and sale should be carefully examined and compared with the record. Also, inquire if the equity of redemption has expired.

§ 762. **Judicial sales.**—In all judicial sales of real property the doctrine of caveat emptor applies, except in cases where the court had no jurisdiction or the officer making the sale made false or fraudulent statements regarding the title. Objection must be made to such title before the sale is confirmed. The sale is not completed until the officer making it has reported the sale to the court and confirmation thereof has been made.

The most common objections to a title by judicial sale are: (1) Want of jurisdiction of the court as to the subject-matter or parties, (2) errors or irregularities in the proceedings, and (3) want of title. Care must be exercised to see that the interest or property sought to be sold has been reduced to the control of the court.

§ 763. **Tax sales.**—Title claimed through a sale for nonpayment of taxes must be carefully scrutinized. Their validity depends entirely upon a strict compliance with the statute of the particular state where the land is situated, and all the proceedings should be carefully examined to see if the statutory provisions have been complied with.

If a tax deed appears in the chain of title, it is of vital importance to inquire: (1) Whether the tax or assessment was authorized by law; (2) whether the tax or assessment was laid or imposed in accordance with the law, and (3) whether all the requirements of the law preliminary to the sale and execution of the deed have been complied with.

§ 764. **Sales by executors, administrators, and guardians.**—Sales by executors, administrators, or guardians are made

either under a power of sale in a will or in pursuance of an order of court. In either case a strict compliance with the formalities of the statute must appear. In sales under power given in a will, the admission of the will to probate is usually sufficient authority to sell without the order or confirmation of the court, while in a sale ordered by the court, the court must ratify and confirm the sale.

Sales of property of persons under legal disability, such as infants, drunkards, spendthrifts, or persons of unsound mind, must be made strictly in accordance with the statute. Unless the statute is complied with the court is without jurisdiction and an order of sale is void.

§ 765. **Wills.**—Where a will appears in the chain of title, its terms must be compared with the proceedings had in the probate court with reference to the real estate involved. The terms of the will should be carefully examined to see that it contains no legacy, annuity or the like that is charged on the land in the hands of the devisees. The incompetency of the testator may often be determined from foolish or unnatural provisions. The devise may also be invalid because of some patent ambiguity in respect to the person whom it was intended should take under the will, or in respect to the subject-matter of the devise; or, because the will is too vague, uncertain and indefinite in its provisions or because its provisions are unintelligible, or in any respect unlawful, as where they create a perpetuity. The intention of the testator must sometimes be extracted from a number of seemingly repugnant or inconsistent provisions. Hence, the question of what interest or estate the devisee takes is often a matter of great nicety and difficulty. Wherever possible, the original will should always be inspected, as there may be indications upon its face that it is a forgery. It seems that an ex parte admission of a will to probate is not always conclusive upon persons in interest, and the will is liable to be avoided upon an issue devisavit vel non. The examiner should, therefore, satisfy himself by an inspection of the instrument that, for anything that appears on its face, it has been properly admitted to probate.

Counsel should satisfy himself that the time for filing suit to contest the will has expired, and that all claims have either been paid or barred.

§ 766. **Descents.**—Where the owner of real estate dies intestate, and probate of his estate has been had, the abstract usually sets out the probate proceedings in full. These should be carefully examined to determine if all the requirements of the law have been complied with. When title runs through probate, it involves an analysis of the entire proceedings.

Counsel must ascertain if there has been proper proof of death and heirship. He must inquire if there was a widow's award, or children's award, and if so, were they satisfied. The question of dower or curtesy, and their relinquishment must receive attention. It must be seen to that all debts and claims have been either paid or barred, and that there are no taxes, inheritance or otherwise, remaining unpaid. Also that the estate has been finally settled and the administrator discharged.

§ 767. **Contract of sale.**—Where the abstract contains a full copy of a contract for the sale of the land in question, the terms, conditions and reservations of such sale must be analyzed. If such contract has been recorded, it is notice to subsequent purchasers of the interest held by the prospective vendee, and some record, either by subsequent conveyance or by cancellation, should appear in the abstract. A deed given to the vendee named in the contract and executed by the vendor will suffice to cancel the contract. Sometimes an assignment of the contract will be noted; this will call attention to the change of name of the party to whom the deed should subsequently be made. A subsequent deed may show that a contract of record was considered forfeited by a failure to comply with its terms, nevertheless it is a cloud on the title until canceled or relinquished. In such case it is well to object to such condition and require the seller to procure a release of the rights of the person under such contract.

§ 768. **Judgment liens.**—Unsatisfied judgments appearing in the abstract constitute a valid objection to the title, and should be noted in the opinion. Demand should be made that the judgment be satisfied of record, or some other satisfactory evidence should be required in order to clear up the title. Care should be exercised to see that the lien has not been continued in favor of a surety who has discharged the judgment and who is entitled to be subrogated to the benefit of the lien. This privilege has

been accorded to the surety in some of the states, even as against a purchaser without notice.

§ 769. **Mechanics' liens.**—Where the abstract discloses an unsatisfied mechanic's lien, counsel should insist upon its release, unless the record shows that the statute has not been complied with in attempting to create the lien, or unless the statute of limitations has run against the date of filing the statement of the claim or of bringing a suit to foreclose. Where there is any doubt in the mind of the examiner as to the validity of the lien he should require the record cleared of the cloud. In determining the validity of such lien, counsel should look to the description and identity of the property in question, the description and identity of the owner, and the amount due thereon.

Even where the abstract does not show a record of such lien, inquiry in pais respecting possible liens should always be made, and the attention of prospective purchasers directed thereto.

§ 770. **Miscellaneous incumbrances.**—Aside from the specific incumbrances mentioned in prior sections of this chapter, there often appears such defects as easements, servitudes, rights of way, reservations of minerals, building restrictions, restrictions as to uses, charges upon property for the support of particular persons, inchoate rights of dower, outstanding life interests, leasehold interests and the like, all of which are important, and must be taken into account in making up the opinion. Some of the above incumbrances can only be discovered by an actual inspection of the premises, while many of them will be embodied in instruments set out in the chain. The effect of any such incumbrances on the title should be made clear to the person for whom the title is being examined.

§ 771. **Examination of matters in pais.**—Where the owner of the land in question has the actual legal title thereto the examiner is not concerned to inquire whether any equities exist in favor of third parties by which the title may be defeated or impaired, unless his client has knowledge of facts which should lead him to make inquiry.

Among the matters that are not apt to appear on the records, and about which it might be well for the examiner to make inquiry, may be mentioned: (1) Adverse occupancy of the prem-

ises, (2) incompetency of parties to deeds or wills, (3) non-performance of conditions antecedent and subsequent, and the happening or non-happening of contingencies upon which an estate depends, (4) the occurrence of marriages, births and deaths, wherever they would affect the title, (5) forgeries of deeds or wills, and fraudulent alterations or insertions therein, (6) dower and curtesy rights, (7) latent ambiguities in the description of the property or persons, (8) insufficiency of the evidence to establish title by inheritance, (9) insufficiency of evidence to establish title by adverse possession, (10) want of jurisdiction of the person in judicial proceedings, (11) the existence of physical encumbrances upon the premises, (12) want of possession under the several deeds in the chain of title, (13) want of delivery of deeds, and (14) the existence of an unrecorded deed within the period during which such a deed may be allowed by statute to relate back and bind subsequent purchasers from the time of acknowledgment.

§ 772. **Examination of abstracter's certificate.**—The abstracter's certificate should show that he has examined the indexes to, and records of conveyances, judgments, tax sales, and confirmed special assessments in the county where the land is situated, and that there are no conveyances, judgments, liens, tax sales, forfeitures, confirmed special assessments for the period covered by the examination except as noted in the abstract. The certificate should also show the number of pages of the abstract, should be dated and signed by the abstracter. Care should be exercised to see that the abstracter has not attempted to limit his liability by a vague and obscure certificate.

§ 773. **Opinion of title.**—Reports which are given by lawyers who have examined the title presented in the abstract are called opinions. These are rendered only after a thorough examination has been made, the inquiries answered, and the requisitions satisfactorily supplied. No particular form of opinion is required; it only being necessary to state in a concise manner the result of the investigation, embodying all the defects and irregularities which counsel may deem worthy of notice as affecting the title.

In the performance of his duty counsel undertakes to act with reasonable care and ordinary skill. Good faith and honest serv-

ice must be given, but questions of the presence or absence of reasonable care and ordinary skill must be determined by the facts in each case,[6] a mere error of judgment on a doubtful question of law is not to be regarded as evidence of want of competent knowledge or skill, or of negligence, but a disregard of a plain statute is so to be regarded.[7]

Counsel must carefully examine each instrument noted in the abstract affecting the title,[8] and it is not negligence in him to omit looking into matters outside the abstract, where his client has expressed himself as being satisfied that there is nothing outside the record that in any way would affect the title. But it has been held that where an attorney, employed to examine the title to land, knew that a building was being built on the premises, it was his duty to ascertain whether there were liens for materials and labor furnished, and where his failure to do so resulted in damages to his client, a breach of his contract of employment was declared.[9]

In framing opinions of title some attorneys simply annex to the abstract a written statement of the condition of the title based upon the examination of the abstract, while others base their statements upon their personal examination of the original records, placing the title in some individual named subject to such defects as appear from the records. The latter method is sometimes termed "certifying the title." The certificates thus issued are to the same effect as certificates issued by title companies, and are governed by the same rules of law.[10]

[6] Caverly v. McOwen, 123 Mass. 574.

[7] Caverly v. McOwen, 123 Mass. 574.

[8] Keuthan v. St. Louis Trust Co., 101 Mo. App. 1, 73 S. W. 334.

[9] Humboldt Bldg. Assn. v. Ducker, 26 Ky. L. 931, 82 S. W. 969.

[10] Ehmer v. Title Guarantee & Trust Co., 156 N. Y. 10, 50 N. E. 420.

CHAPTER XXXII

DIGEST OF STATUTES PERTAINING TO EXECUTION AND ACKNOWLEDGMENT OF DEEDS

SEC.
780. Alabama.
781. Alaska.
782. Arizona.
783. Arkansas.
784. California.
785. Colorado.
786. Connecticut.
787. Delaware.
788. District of Columbia.
789. Florida.
790. Georgia.
791. Hawaii.
792. Idaho.
793. Illinois.
794. Indiana.
795. Iowa.
796. Kansas.
797. Kentucky.
798. Louisiana.
799. Maine.
800. Maryland.
801. Massachusetts.
802. Michigan.
803. Minnesota.
804. Mississippi.
805. Missouri.
SEC.
806. Montana.
807. Nebraska.
808. Nevada.
809. New Hampshire.
810. New Jersey.
811. New Mexico.
812. New York.
813. North Carolina.
814. North Dakota.
815. Ohio.
816. Oklahoma.
817. Oregon.
818. Pennsylvania.
819. Rhode Island.
820. South Carolina.
821. South Dakota.
822. Tennessee.
823. Texas.
824. Utah.
825. Vermont.
826. Virginia.
827. Washington.
828. West Virginia.
829. Wisconsin.
830. Wyoming.

§ 780. **Alabama.**—Every deed must be in writing or printed, and on parchment or paper.

Acknowledgments may be taken within the state by Supreme and circuit court judges or their clerks, by chancellors, registers in chancery, probate court judges, justices of the peace, and notaries public.[1] Without the state and within the United States acknowledgments may be taken by judges and clerks of federal courts, judges and clerks of any court of record in any state, notaries public, and commissioners appointed by the governor of this state.[2] Without the United States acknowledgments may be taken by the judges of any court of record, by mayor or chief magistrate of any city, town, borough, or county, by notaries

[1] 2 Civ. Code 1907, § 3358.

[2] 2 Civ. Code 1907, § 3359.

public, or by diplomatic consular, or commercial agent of the United States.[3]

Conveyances by married women must be acknowledged or signed by two witnesses and the husband must join.[4] No other witnessing to an acknowledged instrument is required. But where instrument is not acknowledged one witness is required, and if the grantor is unable to write two are required.[5] A wife over eighteen years of age may release her dower by joining with her husband in conveyance or power of attorney, or by separate instrument executed by her alone. In either case her signature must be witnessed or acknowledged in the manner prescribed for other conveyances.[6] In conveyance of homestead husband and wife must join in deed, and wife must make separate acknowledgment. The certificate of the officer taking the acknowledgment must accompany the conveyance.[7]

Seals are not required. If the deed purports on its face to be a sealed instrument, it will have such force.[8]

The husband must join in a conveyance by his wife unless he is mentally incapable, or is a nonresident, or has abandoned her, or is serving a sentence of two years or more for crime.[9]

The registration of deeds filed later than the prescribed time or lacking proper acknowledgment or probate is legalized by statute.[10]

§ 781. Alaska.—Acknowledgments within the district may be taken before any judge, clerk of the district court, notary public, or commissioner within the district. The officer taking the same shall indorse thereon a certificate of the acknowledgment thereof and the true date of making same under his hand.[11]

Within any state, district, or territory of the United States deeds may be executed according to laws of such state, district, or territory, and acknowledgments made before any judge of a court of record, justice of the peace, notary public, or other officer authorized by laws of such state, district or territory to take acknowledgments of deeds therein, or before any commissioner

[3] 2 Civ. Code 1907, § 3359.
[4] 2 Civ. Code 1907, §§ 3355, 3357, 4494.
[5] 2 Civ. Code 1907, §§ 3355, 3357, 3375.
[6] 2 Civ. Code 1907, § 3818.
[7] 2 Civ. Code 1907, § 4161.
[8] 2 Civ. Code 1907, §§ 3356, 3363.
[9] 2 Civ. Code 1907, § 4494.
[10] Alabama Stat. 1903, No. 380.
[11] Annot. Codes 1900, Part V, ch. 11, § 82.

appointed for such purposes.[12] Deeds may be executed in foreign countries according to the laws of such countries, and acknowledgments may be made before any notary public therein, minister plenipotentiary, minister extraordinary, minister resident, chargé d'affaires, commissioner, or consul of the United States appointed to reside therein, which acknowledgment shall be certified thereon by the officer taking the same under his hand; and if taken before a notary public, his seal of office shall be affixed to such certificate.[13]

The officer taking the acknowledgment must know the grantor or have satisfactory evidence of his identity.[14] For deeds executed without Alaska and within the United States, unless the acknowledgment be taken before a commissioner appointed for that purpose, or before a notary public certified under his notarial seal, or before the clerk of a court of record under the seal of the court, such deed shall have attached thereto a certificate of the clerk or other proper certifying officer of a court of record of the county or district within which acknowledgment was taken, under his official seal, certifying to the official character of the officer taking the acknowledgment, the authenticity of his signature, and his compliance with the laws of such state, district, or territory.[15] When a resident wife joins with her husband in conveying realty situated within this district, she shall acknowledge that she executed such deed freely and voluntarily.[16] When a nonresident married woman joins with her husband in conveying realty situated within this district, the conveyance shall have the same effect as if she were sole, and the acknowledgment or proof of the execution thereof may be the same as if she were sole.[17]

Two subscribing witnesses are required for deeds executed within the district.[18]

Private seals are abolished.[19]

§ 782. **Arizona.**—Acknowledgments may be taken within Arizona by clerk of court having seal, notary public, county

[12] Annot. Codes 1900, Part V, ch. 11, § 83.
[13] Annot. Codes 1900, Part V, ch. 11, § 85.
[14] Annot. Codes 1900, Part V, ch. 11, § 88.
[15] Annot. Codes 1900, Part V, ch. 11, § 82.
[16] Annot. Codes 1900, Part V, ch. 11, § 86.
[17] Annot. Codes 1900, Part V, ch. 11, § 82.
[18] Annot. Codes 1900, Part V, ch. 11, § 82.
[19] Annot. Codes 1900, Part IV, ch. 101, § 1041.

recorder, or justice of the peace.[20] Without Arizona and within the United States acknowledgments may be taken by clerk of court of record having seal, by commissioner of deeds appointed under Arizona law, or by notary public.[21] Without the United States, acknowledgments may be taken by minister, commissioner, or chargé d'affaires resident and accredited in county; consul general, consul, vice consul, commercial agent, vice commercial agent, deputy consul, or consular agent of the United States, resident in country where the proof or acknowledgment is made; or notary public.[22] No acknowledgment shall be taken unless the officer knows or has satisfactory evidence on the oath or affirmation of a credible witness, which shall be noted in his certificate, that person acknowledging is one who executed instrument.[23] By act of 1903, all defective acknowledgments already made and recorded are declared valid, provided they were valid according to laws of place where executed.[24]

Officer taking acknowledgment must affix his official seal and state when his commission expires.[25]

Property acquired during marriage, except by gift, devise, or descent is common property of both husband and wife, and both must join in conveyance.[26] Married women of eighteen years or upwards may make conveyances of their separate property as though sole.[27] A married woman's acknowledgment may be taken without an examination apart from her husband.[28]

Homestead shall not be conveyed without consent of wife of owner, if married. Such consent shall be evidenced by wife joining in conveyance and signing her name thereto; and also by her separate acknowledgment thereof, taken and certified to before a proper officer.[29]

§ 783. **Arkansas.**—Acknowledgments may be taken within the state of Arkansas before Supreme or circuit court, either of the judges thereof, clerk of any court of record, justice of the peace, or notary public.[30] Without the state and within the United States, acknowledgments may be taken before any court of the United States, or of any state, territory, Indian territory,

[20] Rev. Stats. 1913, par. 2070, p. 716.
[21] Rev. Stats. 1913, par. 2071, p. 716.
[22] Rev. Stats. 1913, par. 2072, p. 716.
[23] Rev. Stats. 1913, par. 2074, p. 717.
[24] Rev. Stats. 1913, par. 2077, p. 718.
[25] Rev. Stats. 1913, par. 2075, p. 717.
[26] Rev. Stats. 1913, par. 2061, p. 714.
[27] Rev. Stats. 1913, par. 2058, p. 714.
[28] Rev. Stats. 1913, par. 2069, p. 716.
[29] Rev. Stats. 1913, par. 2060, p. 714.
[30] Dig. of Stats. 1904, § 743; Act May 6, 1905.

colony, possession, or dependency having a seal, or the clerk thereof, mayor of incorporated city or town, chief officer of town or city having a seal, notary public, or commissioner appointed by the governor of this state.[31] Without the United States acknowledgments may be taken before any United States consul, any court having a seal, mayor or chief officer of city or town having an official seal, or before any officer of any foreign country authorized by its laws to take probate of conveyance of real estate of his own country, if he have an official seal.[32]

The instrument of conveyance must be subscribed to by two witnesses.[33] When witnesses do not subscribe the deed or instrument in writing at the time of the execution thereof, date of their subscribing must be stated with their signatures.[34]

No authentication of authority of the officer is required. The certificate of acknowledgment must be under officer's seal, if he has one; otherwise, under his official signature.[35] Court or officer taking proof or acknowledgment of married woman in conveyance of husband's realty, must grant and have certificate indorsed on conveyance, which certificate must be signed by clerk of court if probate is taken in court, or by officer taking same, if he have an official seal.[36]

A married woman may make conveyances as though feme sole.[37]

A married woman may relinquish dower by joining with husband in deed, and making separate acknowledgment.[38] Right of curtesy exists upon the death of wife, but during her life husband has no marital rights in wife's private property, which she may dispose of as if she were a feme sole.[39] Husband whose wife has been adjudged permanently insane may have life estate set apart for her in lieu of dower.[40] No conveyance, mortgage, or other instrument affecting homestead of married man shall be valid except for taxes, laborers' and mechanics' liens, and purchase-money, unless his wife joins in execution of such instrument and acknowledges same.[41]

[31] Dig. of Stats. 1904, § 743.
[32] Dig. of Stats. 1904, § 743.
[33] Dig. of Stats. 1904, § 742.
[34] Dig. of Stats. 1904, § 742.
[35] Dig. of Stats. 1904, § 744.
[36] Dig. of Stats. 1904, § 746.
[37] Dig. of Stats. 1904, § 740.
[38] Dig. of Stats. 1904, §§ 741, 751.
[39] Dig. of Stats. 1904, § 5213e.
[40] Act May 23, 1907.
[41] Dig. of Stats. 1904, § 3901.

§ 784. **California.** — Acknowledgments may be taken within the state of California by a justice or clerk of the Supreme Court, or judge of superior court at any place within the state, within the city, county, city and county district, or township for which the officer was elected or appointed, before a clerk of a court of record, court commissioner, county recorder, notary public, or justice of the peace.[42] Without the state but within the United States, and within jurisdiction of officer, acknowledgments may be taken by a justice, judge, or clerk of a court of record of the United States or courts of record of any state, a notary public, commissioner appointed by the governor of this state, or by any officer authorized by law of the state in which acknowledgment is taken.[43] Without the United States acknowledgments may be taken by a minister, commissioner, or chargé d'affaires of the United States, resident and accredited in the country where the proof or acknowledgment is made, a consul, vice consul, or consular agent of the United States, resident in the country where the proof or acknowledgment is made, a judge of a court of record of the country where proof or acknowledgment is made, a commissioner appointed for such purposes by the governor of this state, or a notary public.[44] When any of the officers mentioned in the preceding paragraphs are authorized by law to appoint a deputy, the acknowledgment or proof may be taken by such deputy in the name of his principal.[45]

A subscribing witness may prove an unacknowledged deed.[46]

When an acknowledgment is taken outside of this state, in accordance with laws of place where taken, the certificate of a clerk of a court of record of the county or district where such acknowledgment is taken, that the officer certifying to the same is authorized by law so to do, and that the signature of said officer to such certificate is genuine, and that such acknowledgment is taken in accordance with the laws of the place where made, shall be prima facie evidence of the facts stated in the certificate of said clerk.[47]

All distinctions between sealed and unsealed instruments abolished.[48]

[42] Civ. Code 1906, §§ 1180, 1181, as amended by Stats. and Amends. to Codes 1911, ch. 247.
[43] Civ. Code 1906, § 1182.
[44] Civ. Code 1906, § 1183.
[45] Civ. Code 1906, § 1184.
[46] Civ. Code 1906, § 1195.
[47] Civ. Code 1906, § 1189.
[48] Civ. Code 1906, § 1629.

Property owned by husband or wife before marriage and that afterwards acquired by gift, bequest, devise, or descent is the separate property of the husband or wife who owned or so acquired it. All property acquired after marriage by either or both is community property.[49]

Married woman's conveyance has same effect as if she were unmarried, and may be acknowledged in the same manner.[50]

The wife may, without the consent of her husband, convey her separate property.[51]

Homestead can not be conveyed or incumbered, unless instrument is executed and acknowledged by both husband and wife.[52] The homestead consists of the dwelling-house in which the claimant resides, and the land on which the same is situated.[53]

§ 785. **Colorado.**—Acknowledgments may be taken within the state of Colorado by any judge, clerk, or deputy clerk of any court of record under seal of such court, by clerk, recorder, or deputy clerk of any court, such clerk or deputy clerk certifying under seal of county, by notary public under his seal, or a justice of the peace within his county. When the land conveyed is outside the county, county clerk and recorder must certify, under his hand and seal, to the official capacity of a justice of the peace and to the authenticity of his signature.[54] Without the state and within the United States acknowledgments may be taken by the secretary of state or territory, under seal of state or territory; by clerk of any court of record or such state or territory, or of United States within such state or territory, having a seal, such clerk acknowledging under seal of court; by a notary public under his seal; by a commissioner of deeds appointed under the laws of this state, he certifying such acknowledgment under his hand and official seal; by any officer legally authorized to take and certify such acknowledgment, provided there shall be affixed to his certificate a certificate under seal by a clerk of a court of record of the county, city, or district wherein such officer lives, stating that officer is the person he assumes to be, that he is legally authorized to take such acknowledgment, and that his signature thereto is genuine.[55] Without the United States, acknowl-

[49] Civ. Code 1906, §§ 162-164.
[50] Civ. Code 1906, § 1187.
[51] Civ. Code 1906, § 162.
[52] Civ. Code 1906, § 1242.
[53] Civ. Code 1906, § 1237.
[54] Mills Ann. Stats. 1912, § 825.
[55] Mills Ann. Stats. 1912, § 825.

edgments may be taken before any court of record of any foreign republic, kingdom, empire, state, principality, or province having a seal, the acknowledgment being certified by the judge or justice of such court to have been made before such court, and such certificate to be attested by the seal of such court; before the mayor, or other chief officer, of any city or town having a seal, such mayor or other chief officer certifying such acknowledgment under such seal; before any consul of the United States within such foreign country, under his consulate seal.[56] By law of 1903, all acknowledgments which had then been taken by notaries holding commissions under laws of Kansas or Colorado, or by any judge or justice of any organized court within the limits of the state were validated, provided they were otherwise correct.[57]

One subscribing witness may prove unacknowledged deed.[58]

A married woman may convey her land without separate acknowledgment.[59] No mortgage or conveyance of a homestead is binding against the wife unless she freely and voluntarily, separate and apart from her husband, signs and acknowledges the same and the officer taking the acknowledgment informs her of her rights and the effect of signing the mortgage or conveyance. If the wife owns the homestead, no mortgage or other conveyance shall be binding against the husband unless he sign and acknowledge said mortgage or other conveyance.[60] To entitle any person to the benefit of the homestead exemption law, he shall cause the word "homestead" to be entered in the margin of his record title to homestead, which entry shall be signed by owner and attested by the clerk and recorder of county where lands lie, together with the date and time of day, on which said entry is made. Either husband or wife may cause such entry to be made.[61]

§ 786. **Connecticut.** — Acknowledgments may be taken within the state of Connecticut before judge of court of record of this state or United States; clerk of superior court, court of common pleas, or district court; justice of the peace; commissioner of school fund; commissioner of superior court; notary

[56] Mills Ann. Stats. 1912, § 825.
[57] Rev. Supp. 1905, § 3285.
[58] Mills Ann. Stats. 1912, § 835.
[59] Mills Ann. Stats. 1912, § 4748.
[60] Mills Ann. Stats. 1912, § 3383.
[61] Mills Ann. Stats. 1912, §§ 3378, 3379.

public, either with or without his official seal; town clerk, or assistant town clerk.[62] Without the state and within the United States acknowledgments may be taken before commissioner appointed by the governor of this state, and residing therein or before any officer authorized to take acknowledgments of deeds in such state or territory.[63] Without the United States acknowledgments may be taken before any ambassador, minister, chargé d'affaires, consul, vice consul, deputy consul, consul general, vice consul general, deputy consul general, consular agent, vice consular agent, commercial agent, or vice commercial agent of the United States representing or acting as agent of the United States in such foreign country, or before any notary public, or justice of the peace, in such foreign country; but no officer shall have power to take such acknowledgment except within territorial limits in which he may perform proper duties of his office.[64] Conveyances of real estate situated in this state, executed and acknowledged in any other state or territory in conformity with its laws, are valid.[65] By Act of June 19, 1903, the following deeds heretofore made were declared valid; deeds acknowledged without the state before a magistrate using form of acknowledgment of this state instead of form of state where same was executed, and attested by number of witnesses required in such state, although number be less than that required by laws of this state; where acknowledgments were taken outside Connecticut before magistrate who did not affix his official seal or certificate of his official character, or where they had but one witness, or were acknowledged within this state before clerk of probate court, or notary public commissioned, but not qualified until afterwards; deeds of which acknowledgments were taken by husband or wife of the grantor or grantee where such husband or wife was an attesting witness; deeds acknowledged by magistrate who was a minor; deeds acknowledged by proper officer whose term of office had expired at time of acknowledgment; where grantor was acting in any fiduciary capacity and signed and acknowledged deed individually; conveyances of real estate made by married woman directly to husband, or by husband directly to her; conveyances of realty made by married woman without joinder of husband; and deeds

[62] Gen. Stat. Rev. 1902, § 4029.
[63] Gen. Stat. Rev. 1902, § 4029.
[64] Gen. Stat. Rev. 1902, § 4029, as amended by Pub. Stats. 1905, ch. 63.
[65] Gen. Stat. Rev. 1902, § 4031.

executed by executor of will of nonresident, or by trustee of such will, by virtue of power of sale in such will contained, intending to convey lands in this state, in case said will has not at time of execution of such deed been proved in this state, if afterwards such will shall have been duly proved and established in this state and administration had thereon.[66] By the Act of August 1, 1907, the following deeds heretofore made were declared valid; those otherwise valid but attested by one or no witness; acknowledged by interested party; acknowledged by proper officer but outside of territory in which he was authorized to act; any person authorized by appointment, election, or commission to act but who qualified afterwards; where the grantor was acting as duly authorized agent and signed or acknowledged individually; where acknowledgment was taken without this state by proper person, using acknowledgment form prescribed by laws of state where executed, and attested by the number of witnesses required by law in such states although number be less at that time than that required in this state. Deeds heretofore made to convey Connecticut realty and otherwise valid except that the acknowledgment was not signed by magistrate of this state or any state or territory within United States or foreign country authorized to take acknowledgments, but where acknowledged by an ambassador, minister, chargé d'affaires, consul, vice consul, deputy consul, consul general, vice consul general, deputy consul general, consular agent, vice consular agent, commercial agent, or vice commercial agent of the United States, who was not then qualified to take such acknowledgment, but has since been qualified by statute, but which acknowledgment is complete in every other respect; where acknowledgment is otherwise legal except that it was taken before a vice consul of British empire located in Jamaica; where acknowledgment is signed by proper magistrate, but there has been unintentionally omitted names of grantors, date and place of acknowledgment, or words "personally appeared before me," but which acknowledgment is complete in every other particular; where corporation has conveyed Connecticut realty and the deed thereof was not, through mistake, signed by officer duly authorized to sign such deeds, are hereby declared valid.[67]

[66] Acts of June 19, 1903, §§ 6, 9, 10. same section concerning trustees' and
[67] Act of Aug. 1, 1907, § 4. See administrators' deeds.

Two are required.[68] Certificate of proper authority showing magistrate's official capacity should be annexed if acknowledgment is taken by justice of the peace or officer without a seal. The official seal is required to be annexed.[69] By Act of July 19, 1905, unsealed deeds made before that time are validated.[70]

In case of marriages on or after April 20, 1877, neither husband nor wife shall acquire, by force of marriage, any right to or interest in any property of the other, except as to survivor's share.[71] All conveyances of real estate of wives married prior to April 20, 1877, executed by them jointly with their husbands, and duly acknowledged and recorded, shall be valid and effectual to transfer such estate; and all conveyances, by husband alone, or real estate of such wife, shall be ineffectual to convey her interest therein; but no joinder by husband shall be required in case of wife married on or after said date.[72] Wife married prior to April 20, 1877, may make separate conveyance when husband has abandoned her, or is insane, and the probate court has authorized sale.[73] There is no dower or curtesy under marriages contracted since april 20, 1877. Under marriages contracted before that date, husband and wife must join to release dower. On the death of husband or wife married on or since that date survivor is entitled to use for life of one-third decedent's property, after debts are paid. The right to such third can not be defeated by will. Where there is no will, survivor takes such third absolutely.[74]

Husband and wife must join in releasing homestead.[75]

§ 787. **Delaware.**—Acknowledgments may be taken within the state of Delaware in superior court, before chancellor, or any judge, notary public, or before two justices of the peace for same county. Such deed may also be acknowledged in said superior court by attorney, by virtue of power contained therein or separate from it, power being first proved in said court.[76] Without the state acknowledgments may be taken by any consul general, consul, vice consul, consular agent, or commercial agent of the United States duly appointed in any foreign country, at places of their official residences; any judge of district court of

[68] Gen. Stat. Rev. 1902, § 4029.
[69] Gen. Stat. Rev. 1902, § 4029.
[70] Act of July 9, 1905, § 6.
[71] Gen. Stat. Rev. 1902, § 4545.
[72] Gen. Stat. Rev. 1902, § 4035.
[73] Gen. Stat. Rev. 1902, §§ 246, 247.
[74] Gen. Stat. Rev. 1902, §§ 386, 391.
[75] Gen. Stat. Rev. 1902, § 4065.
[76] Rev. Code 1915, § 3199.

the United States; chancellor, or judge of any court of record of any state, territory, or country; mayor or chief officer of any city or borough, and certified under the hand of such chancellor, judge, mayor or officer, and the seal of his office, court, city, or borough by certificate indorsed upon or annexed to deed; or before any such court, and certified under hand of clerk, or other officer of said court, and seal of said court, in like manner. In case of such certificate by a judge, the seal of his court may be affixed to his certificate, or to a certificate of attestation of the clerk, or keeper of the seal. Acknowledgments may also be taken out of this state by any commissioner of deeds, appointed by the governor in any of the states, or territories of the United States, in the District of Columbia, or in the possessions of the United States, or in foreign countries, the same to be certified under commissioner's hand and seal.[77] By Act of April 28, 1898, records of deeds prior to January 1, 1895, duly signed and sealed by the grantors, notwithstanding said deed had not been properly acknowledged, or private examination of any married woman party thereto had not been taken or certified in conformity with requirements of laws of this state in force at time of its execution, shall be validated. By act of March 26, 1903, deeds for lands within this state which were acknowledged before any consular agent and attested under seal of such consular agent before January 1, 1903, are deemed properly acknowledged.[78] One witness necessary for acknowledged deed.[79]

The deed of a wife shall be as valid and effectual as if she were sole, if she, upon private examination, apart from her husband, shall acknowledge that she executed said deed willingly, without compulsion, or threats, or fear of her husband's displeasure. Such conveyances by her shall not divest, abrogate, or in any manner interfere with the husband's estate by the curtesy should such estate attach.[80] Wife of an insane husband, who wishes to convey her own property, may join with a trustee for husband in a deed or mortgage, and such deed shall be valid to bar his estate by the curtesy if he survives her.[81] Abandoned married woman, on proving fact before chancellor, chief justice, or resi-

[77] Rev. Code 1893, ch. 83, § 10, as amended by Laws 1901-1903, ch. 82.
[78] Act of April 28, 1898, § 3.
[79] Rev. Code 1915, § 3199.
[80] Rev. Code 1915, § 3200.
[81] Laws 1901-1903, ch. 444.

dent judge of county, may convey her own real estate without husband's joining.[82]

§ 788. **District of Columbia.**—Acknowledgments may be taken within the District of Columbia before any judge of courts of district, clerk of Supreme Court, justice of the peace, notary public, or recorder of deeds.[83] Without the District and within the United States acknowledgments may be taken before any judge of court of record and of law, chancellor of a state, any judge or justice of the Supreme, circuit, or territorial courts of the United States, any justice of the peace, or notary public. When taken out of District by officer without seal, there must be certificate of register, clerk, or other public officer, that at that time officer was what he professed to be.[84] Without the United States acknowledgments may be taken before any judge, notary public, any secretary of legation, consular officer, or acting consular officer of the United States. When made before any other than a secretary of legation, consular officer, or acting consular officer, the official character of the officer must be properly certified.[85] Deeds affecting land situate in the District of Columbia or any territory of the United States may be acknowledged in the islands of Guam and Samoa or in the Canal Zone before any notary public or judge, appointed therein by proper authority, or by any officer therein who has ex officio the powers of a notary public: provided, that the certificate by such notary in Guam, Samoa, or the Canal Zone, shall be accompanied by certificate of governor or acting governor of such place to the effect that the notary taking such acknowledgment was in fact the officer he purported to be.[86]

No separate examination for conveyances by husband and wife made since April 10, 1869.[87] Married woman over twenty-one may dispose of property as though unmarried.[88] Wife over eighteen years of age may release dower by joining in same deed with her husband, or by separate deed, wherever executed, signed, sealed, acknowledged, and certified in the same manner as other deeds.[89]

[82] Rev. Code 1915, § 3200.
[83] Garges Code 1905, § 493.
[84] Garges Code 1905, § 495.
[85] Garges Code 1905, §§ 495, 496.
[86] United States Statutes at Large 1905-1907, Vol. 34, Part I, § 3585.
[87] Garges Code 1905, §§ 515, 516.
[88] Garges Code 1905, § 1154.
[89] Garges Code 1905, § 494.

§ 789. **Florida.**—Acknowledgments may be taken within the state of Florida before any judge, clerk, or deputy clerk of any court of record, United States commissioner, notary public, or justice of the peace of this state. The certificate of acknowledgment or proof shall be under the seal of the court or of officer.[90] Without the state and within the United States acknowledgments may be taken by commissioner of deeds appointed by the governor of this state, judge or clerk of any court of the United States, or of any state, district, or territory having seal, notary public, or justice of the peace of such state, territory, or district having an official seal. Certificate of acknowledgment or proof shall be under seal of court or officer.[91] Without the United States acknowledgments may be taken before commissioner of deeds appointed by the governor of this state to reside in such county, notary public of such foreign country having official seal, minister, chargé d'affaires, consul general, consul, vice consul, commercial agent, or vice commercial agent of the United States appointed to reside in such country. Certificate of acknowledgment or proof shall be under seal of officer.[92] The certificate shall set forth substantially matter required to be done or proved to make such acknowledgment or proof effectual.[93] No officer may take acknowledgment without knowledge or satisfactory proof that person acknowledging is person who executed instrument, or that person offering to make proof is a subscribing witness.[94] A conveyance by corporation must be signed by president or chief executive officer of corporation and must bear its common seal.[95] Two witnesses are required to an instrument of conveyance.[96] A scrawl or scroll, printed or written, is effectual as a seal.[97]

Husband must join wife in conveying her property.[98] Married woman may convey her property as if unmarried, providing husband join and she make separate acknowledgment that the execution was voluntary. The officer's certificate must set forth foregoing requirements.[99] Married woman may relinquish dower by joining in conveyance or mortgage of real property, or by separate deed executed as other conveyances.[1] Relinquishment of

[90] Gen. Stat. 1906, § 2481.
[91] Gen. Stat. 1906, § 2481.
[92] Gen. Stat. 1906, § 2481.
[93] Gen. Stat. 1906, § 2481.
[94] Gen. Stat. 1906, § 2486.
[95] Gen. Stat. 1906, § 2459.
[96] Gen. Stat. 1906, § 2448.
[97] Gen. Stat. 1906, §§ 2484, 2485.
[98] Gen. Stat. 1906, § 2460.
[99] Gen. Stat. 1906, §§ 2460, 2462.
[1] Gen. Stat. 1906, § 2461.

dower executed and acknowledged by wife shall be valid notwithstanding her minority at the time of such execution and acknowledgment.[2]

Husband and wife must join in conveyance of homestead.[3]

§ 790. Georgia.—To authorize record of deed within the state of Georgia, it must be attested by a judge of court of record of this state, justice of the peace, notary public, or clerk of the superior court in county in which three last-mentioned officers hold their appointments. If, subsequent to execution, deed is acknowledged in presence of these officers, that fact, certified by him on deed, shall entitle it to be recorded.[4] To authorize record of deed executed without the state, deed must be attested by or acknowledged before commissioner of deeds for Georgia, consul or vice consul of the United States (the certificate of these officers under their seal being evidence of the fact), judge of court of record in state where executed, with certificate of clerk under seal of such court of the genuineness of such clerk of court of record under seal of court, or by notary public of state and county where executed, with his seal of office attached, and if he has no seal, then his official character shall be certified by clerk of any court of record in county of his residence.[5]

Two required, one of whom may be officer taking acknowledgment.[6] If deed is neither attested by, nor acknowledged before, either of officers aforesaid, it may be admitted to record upon affidavit of subscribing witness, before either of above-named officers, testifying to execution of deed and its attestation according to law. A substantial compliance with this requisition shall be held sufficient in absence of all suspicion of fraud.[7]

Seal includes impressions on paper itself, or on wax or wafers; a scrawl also answers for seal.[8]

To convey lands in which wife has interest, she must join with husband in conveyance, sign and seal before proper officer, and make prescribed declarations, which shall be indorsed upon deed and signed by officer.[9]

Dower may be barred by wife's deed with her husband to lands where title came through her.[10]

[2] Gen. Stat. 1906, § 2463.
[3] Const., art. 9, § 1.
[4] 1 Code 1911, § 4202.
[5] Code 1911, § 4203.
[6] Code 1911, § 4203.
[7] Code 1911, § 4205.
[8] 1 Code 1895, § 5; 1 Code 1911, § 261.
[9] 1 Code 1911, § 4204.
[10] 1 Code 1911, § 5249.

The homestead right is released for reinvestment by husband and wife joining in the conveyance with sanction of superior court of county where debtor resides or land is situated, proceeds to be reinvested upon same uses.[11]

§ 791. **Hawaii.**—Acknowledgments may be taken within the territory before the registrar of conveyances, his agent, judge of court of record, or notary public.[12] Without the territory acknowledgments may be taken before some notary public, judge of court of record, minister, commissioner, or consul of Hawaii.[13] Person offering to make acknowledgment must be personally known to officer making same to be person whose name is subscribed to such instrument as a party thereto, or shall be proved so by oath or affirmation of credible witness known to officer.[14]

One witness is required if deed is not acknowledged.[15] An unacknowledged deed may be entered for record on proof of its execution by subscribing witness thereto, before any judge of court of record of Hawaii. If all subscribing witnesses be dead or out of the country, conveyance may be proved before any court of record in this territory by proving handwriting of grantor and any subscribing witness.[16]

The deed must be stamped with a seal as a condition to record.[17]

A wife, unless divorced, must join in conveyance to release dower or make separate release, and must make separate acknowledgment that she voluntarily signed the release.[18]

Married woman may receive, hold, and dispose of property, real and personal, as though she were sole; provided, however, that no deed or mortgage of her real estate shall be valid without written consent of her husband.[19]

Wife may bar her right of dower, in estate conveyed by husband, by joining in his conveyance thereof, and thereby releasing her claim to dower, or by separate deed, made at time of husband's conveyance, or subsequently, or she may delegate to attorney in fact other than husband, power to execute such release, either by general or special power of attorney, and her execution and acknowledgment of the power of attorney may be in the same manner as if she were sole.[20]

[11] Const. 1877, art. 9, § 3; 1 Code 1911, § 3397.
[12] Rev. Laws 1905, § 2361.
[13] Rev. Laws 1905, § 2361.
[14] Rev. Laws 1905, § 2362.
[15] Rev. Laws 1905, § 2361.
[16] Rev. Laws 1905, § 2361.
[17] Rev. Laws 1905, § 2360.
[18] Rev. Laws 1905, § 2367.
[19] Rev. Laws 1905, § 2251.
[20] Rev. Laws 1905, § 2280.

§ 792. **Idaho.**—Acknowledgments may be taken within the state of Idaho by a justice or clerk of Supreme Court, and within the city, county, or district for which officer was elected or appointed, before judge or clerk of court of record, county recorder, notary public, or justice of the peace.[21] Without the state and within the United States acknowledgments may be taken by justice, judge, or clerk of any court of record of the United States or any state or territory, commissioner appointed by the governor of this state for that purpose, notary public, or any officer of the state or territory where the acknowledgment is made, authorized by its laws to take such proof or acknowledgment.[22] Without the United States acknowledgments may be taken by a minister, commissioner, or chargé d'affaires of the United States, resident and accredited in the country where acknowledgment is made; a consul or vice consul of the United States resident in country where acknowledgment is made; a judge of court of record of the country; commissioners appointed for such purpose by the governor of this state pursuant to statute; a notary public.[23] When any of the officers in the preceding sections are authorized by law to appoint a deputy, the acknowledgment or proof may be taken by such deputy, in principal's name.[24] Officer taking acknowledgment must know that person making it is person described in instrument, or he must have satisfactory evidence on the oath or affirmation of a credible witness.[25]

Without acknowledgment, proof may be made by the parties executing instrument, or either of them, or a subscribing witness. The identity of such a witness must be known or proved.[26]

Officers taking or certifying acknowledgments or proof of instruments must authenticate their certificates by affixing their signatures, followed by names of offices; also their official seals, if by law of state, territory, or country where acknowledgment is taken, or by authority of which they are acting, they are required to have official seals.[27] A justice of the peace, acting in county other than that of his residence, must have a certificate under the hand and seal of the recorder of county of his residence, setting forth that justice had authority to take acknowledgments and that his signature is genuine.[28]

[21] Rev. Code 1908, §§ 3123, 3124.
[22] Rev. Code 1908, § 3125.
[23] Rev. Code 1908, § 3126.
[24] Rev. Code 1908, § 3127.
[25] Rev. Code 1908, § 3128.
[26] Rev. Code 1908, § §3136, 3137.
[27] Rev. Code 1908, § 3134.
[28] Rev. Code 1908, § 3135.

Distinction between sealed and unsealed instruments abolished, except corporate or official seal.[29]

All property of the husband or wife owned by him or her before marriage, or acquired afterwards by gift, bequest, or descent, shall be his or her separate property.[30] All property acquired after marriage by either husband or wife, including rents and profits of separate estates, is community property, unless instrument specially provides that rents and profits acquired by wife be applied to her separate use; in which case the wife has management and disposal of same. Otherwise, husband has absolute power of disposition other than testamentary. This excludes that part of common property used by husband and wife as a residence.[31] A married woman, during marriage, may convey her separate estate in the same manner as a married man can convey his estate, provided, that the husband shall be bound by such contracts to no greater extent or effect than his wife under similar circumstances would be bound by his contracts.[32] The acknowledgment of a married woman shall be taken and certified as that of a single person.[33]

Husband and wife must join to convey or encumber homestead and wife must acknowledge in the same manner as a single person.[34] The homestead in which claimant resides, and the land on which it is situated, will be exempt from execution or forced sale except for judgments or attachments levied before declaration of homestead was filed for record; mechanics', laborers', or vendors' liens; debts secured by mortgages executed by husband and wife or by an unmarried claimant; or debts secured by mortgages, executed and recorded before filing of declaration of homestead.[35]

§ 793. **Illinois.**—Acknowledgments may be taken within the state of Illinois before a master in chancery, notary public, United States commissioner, county clerk, justice of the peace (the official character of the latter, if he be without the county where the lands lie, to be certified by the county clerk), or any court of record having a seal, or any judge, justice, clerk or

[29] Rev. Code 1908, §§ 3318, 3319.
[30] Rev. Code 1908, §§ 2676, 2679.
[31] Rev. Code 1908, §§ 2680, 2686.
[32] Rev. Code 1908, § 2677.
[33] Rev. Code 1908, § 2129.
[34] Rev. Code 1908, §§ 3106, 3129, 3178.
[35] Rev. Code 1908, §§ 3173, 3176, 3177.

deputy clerk of any such court, the seal to be affixed when taken before a court, clerk, or deputy clerk of such court. If taken before a notary public or United States commissioner, acknowledgment must be attested by official seal.[36] Without the state and within the United States or its dependencies acknowledgments may be taken before a justice of the peace (his official character to be certified as above), notary public under his seal, master in chancery (to be certified as justice of the peace), United States commissioner and commissioner of deeds under their respective seals, mayor of city under city seal, clerk of the county under his official seal, any judge, justice, clerk, or deputy clerk of Supreme, circuit, or district court of the United States, or any judge, justice, clerk, deputy clerk, prothonotary, surrogate, or registrar of the Supreme, circuit, superior, district, county, common pleas, probate, orphans', or surrogate's court of any state, territory, or dependency of the United States, under seal of court if before five last-mentioned officers. Acknowledgments may be made in conformity with the laws of the state where made, in which case a certificate of conformity from the clerk of a court of record should be annexed. In any dependency of the United States acknowledgments or proof may be made before any commissioned officer in the military service of the United States.[37] Without the United States acknowledgments may be taken before any court of any republic, dominion, state, kingdom, empire, colony, territory, or dependency having a seal, or before any judge, justice, or clerk thereof, any mayor or chief officer of any city or town having a seal, a notary public or commissioner of deeds, an ambassador, minister, secretary of legation, or consul of the United States, vice consul, deputy consul, commercial agent, or consular agent of the United States in any foreign republic, dominion, state, kingdom, empire, colony, territory, or dependency attested by his official seal, or before any officer authorized by the laws of the place of acknowledgment to take same or to administer oaths in proof of executions of conveyances of real estate. Such acknowledgments to be attested by the official seal, if any, of such court or officer, and where court or officer has no seal, a certificate shall be added by some ambassador, minister, secretary of legation, consul, vice consul, deputy consul, commercial agent, or consular agent of the United

[36] Rev. Stat. 1908, ch. 30, § 20.

[37] Rev. Stat. 1908, ch. 30, § 20.

States, residing therein, under his official seal, showing that such court or officer was duly elected, appointed, or created and acting at the time acknowledgment or proof was made.[38]

None required if deed is acknowledged. An unacknowledged deed may be proved by evidence of the handwriting of the grantor, and at least one subscribing witness, which evidence must consist of the testimony of two or more disinterested persons swearing to each signature.[39]

When conveyances are executed by a justice of the peace of a county other than the one in which the lands lie, but which are recorded in county where lands lie, they shall be regarded as legally executed and recorded, notwithstanding there is no certificate attached thereto certifying the official character of the justice of the peace, provided that the record or certified transcript of such record shall not be read in evidence, unless the certificate of the proper county clerk, under his official seal, or other competent evidence introduced, certifies to the official character of the justice of the peace.[40]

Seal is required, but scroll is sufficient.[41] Unsealed conveyances made without state in a state or country where seal or scroll is not required at time of execution are hereby declared valid. The certificate of the secretary of state, under his seal of office, or that of any court of record, certified to under the seal of the court, or that of any judge of any court of record (his official character being certified to), of the country or other place, outside of this state, where instrument was executed, setting forth that according to usage or law of the land a scroll or seal was not necessary, shall be deemed prima facie evidence thereof, provided that any other legal mode of proving seal unnecessary may be resorted to in any place or court of this state where the question may arise.[42]

A married woman above the age of eighteen years may join with her husband to convey her lands.[43] Married women may acknowledge as feme sole.[44]

Dower exists. Wife's acknowledgment to release dower may be made as if she were feme sole.[45] Wife should join in deed

[38] Rev. Stat. 1908, ch. 30, § 20.
[39] Rev. Stat. 1908, ch. 30, § 25.
[40] Rev. Stat. 1908, ch. 30, § 21.
[41] Rev. Stat. 1908, ch. 29, § 1.
[42] Laws 1909, p. 145.
[43] Rev. Stat. 1908, ch. 30, § 18.
[44] Rev. Stat. 1908, ch. 30, § 19.
[45] Rev. Stat. 1908, ch. 30, § 19.

of husband to release dower.[46] The estate of curtesy does not exist, but the surviving husband has the same estate as the dower estate.[47]

Every householder having a family has a homestead exemption to the value of one thousand dollars in the farm or lot of land owned or possessed and occupied by him or her.[48] No deed or other instrument shall be construed as releasing or waiving the right of homestead, unless the same shall contain a clause expressly releasing or waiving such right. In such case the certificate of acknowledgment shall contain a clause substantially as follows:—"including the release and waiver of the right of homestead," or other words which shall expressly show that the parties executing the deed or other instrument intended to release such right.[49] No release or waiver of the right of homestead by the husband shall bind the wife unless she join in such release or waiver.[50]

§ 794. **Indiana.**—To entitle deeds and mortgages to be recorded within the state of Indiana, they must be acknowledged by the grantor or proved before a judge or clerk of some court of record, justice of the peace, auditor, recorder, notary public, member of the general assembly under seal, a mayor of a city in this or any other state, a commissioner appointed by governor of this state residing in another state, or before a minister, chargé d'affaires, or consul of the United States in a foreign country. When any conveyance, mortgage, or instrument required to be recorded is acknowledged in any county in this state other than the one in which the same is required to be recorded, the acknowledgment shall be certified by the clerk of the circuit court of the county in which such officer resides, and attested by seal of said court; but an acknowledgment before an officer having an official seal, if attested by such seal, shall be sufficient without such certificate.[51] By Act Approved March 6, 1911, acknowledgments of notaries who are officers, stockholders, or employes in corporations which were parties to the instrument are legalized. All acknowledgments of deeds by notaries within or without Indiana, admitted to record in any Indiana recorder's office, and the record

[46] Rev. Stat. 1908, ch. 30, § 17.
[47] Rev. Stat. 1908, ch. 41, § 1.
[48] Rev. Stat. 1908, ch. 52, § 1.
[49] Rev. Stat. 1908, ch. 30, § 27.
[50] Rev. Stat. 1908, ch. 30, § 27.
[51] Burns' Rev. Stat. 1914, §§ 3965, 9464, 9544, 9535, 9522, 3966, 3967, 3970.

failing to show whether official seal has been attached, shall be deemed sealed. All acts of notaries done in good faith after the expiration of their commissions or while they held any other lucrative office under the law, or which were done in good faith and are invalid from any cause, are legalized. This act not to apply or affect any pending litigation.[52] Without this state and within the United States, acknowledged conveyances, to be entitled to record, must be certified by the clerk of a court of record of the county in which the officer receiving the acknowledgment resides, and attested by the seal of said court; but an acknowledgment before an officer having an official seal, attested by his official seal, shall be sufficient without such certificate.[53] Without the United States, conveyances shall be acknowledged by the grantor or person executing the same, or proved before any minister, chargé d'affaires, or consul of the United States in such foreign country, or before any officer of such country who, by the laws thereof, is authorized to take acknowledgment or proof of conveyances; and if such acknowledgment or proof is in the English language, and attested by the official seal of such officer, it shall be sufficient to admit such instrument to record; but if in some other language or not attested by such official seal, then such instrument must be accompanied by a certificate of an officer of the United States, as aforesaid, to the effect that it is duly executed according to the laws of such foreign country; that the officer certifying to the acknowledgment or proof had legal authority so to do, and the meaning of his certificate, if the same is made in a foreign language.[54] No witnesses are required to the instrument.[55]

Where the certificate of the clerk of the proper county is required to accompany the acknowledgment, this certificate shall declare the official character of the officer taking acknowledgment, and the genuineness of his signature.[56] The certificate of acknowledgment, under hand and seal of officer taking same, must be written on or attached to deed.[57]

The joint deed of husband and wife is sufficient to convey the lands of the husband.[58] Their joint deed is sufficient to convey

[52] Acts 1911, ch. 248.
[53] Burns' Rev. Stat. 1914, § 3967.
[54] Burns' Rev. Stat. 1914, § 3970.
[55] Burns' Rev. Stat. 1914, § 3947.
[56] Burns' Rev. Stat. 1914, §§ 3982, 3985.
[57] Burns' Rev. Stat. 1914, § 3985.
[58] Burns' Rev. Stat. 1914, § 3976.

and pass the lands of the wife.[59] A married woman acknowledges in the same manner as an unmarried woman.[60] A married woman over eighteen and under twenty-one years of age may convey her right in land of her husband, previously sold and conveyed by him, by executing and acknowledging such conveyance, if her father (or, if none, then the mother) shall declare before the officer taking the acknowledgment that he or she believes that such conveyance is for the benefit of such married woman, and that it would be prejudicial to her and her husband to be prevented from disposing of the land; which declaration, with parent's name, shall be a part of the officer's certificate.[61] Any such wife, having no parent living, may join with her husband in a conveyance of his real estate with the consent of the judge of the circuit court of the judicial circuit where such husband and wife reside.[62] A married woman under the age of twenty-one years, the husband being of age, may convey or mortgage her separate real estate, or any interest therein, with the consent of the judge of the circuit court of the judicial circuit where they reside, provided the husband joins in such conveyance or mortgage.[63]

§ 795. **Iowa.**—Acknowledgments may be taken within the state of Iowa before a court having a seal, or some judge or clerk thereof, a county auditor or his deputy, a justice of the peace within the county, or a notary public within his county or the adjoining county, provided he has filed with the clerk a certificate of his appointment.[64] Acknowledgments to deeds executed by corporations by notary who was at time of acknowledgment a stockholder or officer of corporation, and which have been recorded in office of any Iowa recorder, are declared valid. This does not affect rights of parties in pending litigation.[65] Without the state and within the United States acknowledgments may be taken before a judge of some court of record, or officer holding the seal thereof, a commissioner of deeds appointed by the governor of this state, a notary public, or a justice of the peace.[66] Without the United States acknowledgments may be taken before any ambassador, minister, secretary of legation, consul, vice con-

[59] Burns' Rev. Stat. 1914, § 3952.
[60] Burns' Rev. Stat. 1914, § 3971.
[61] Burns' Rev. Stat. 1914, § 3972.
[62] Burns' Rev. Stat. 1914, § 3973.
[63] Burns' Rev. Stat. 1914, § 3977.
[64] Code Supp. 1907, § 2942.
[65] Laws 1911, ch. 151.
[66] Code Supp. 1907, § 2943.

sul, chargé d'affaires, consular agent, or any other United States officer in any foreign country who is authorized to issue certificates under the seal of the United States, or before any officer of a foreign county who is authorized by the laws thereof to certify to the acknowledgments of written documents.[67] When acknowledgments are made outside the state and within the United States before a judge or justice of the peace, a certificate under the official seal of clerk or other proper certifying officer of a court of record of the county or district, or of the secretary of state or territory within which the acknowledgment was taken, under his official seal, of the official character of such judge or justice and of the genuineness of his signature, shall accompany said certificate of acknowledgment. When a notary attests by his official seal, no certificate is required.[68] When acknowledgments are taken outside the United States, the certificate of a foreign officer must be authenticated by one of the above-named officers of the United States, whose certificate is sufficient evidence of the qualification of the officer and the genuineness of his signature.[69] Seal not required except in case of corporations.[70]

Every conveyance by a husband and wife passes all right of either, unless the contrary appears on the face of the conveyance.[71] A married woman may encumber or convey her real estate in the same manner as other persons.[72] A married woman's acknowledgment is taken in the same form as if she were sole, and without any separate examination.[73]

Dower, by the Code of 1873, is abolished, but the survivor has a fee simple title to one-third of all estate possessed by the other during the marriage.[74]

No conveyance or incumbrance of or contract to convey or encumber the homestead is valid unless the husband and wife join in executing the instrument.[75] The homestead of every family, whether owned by the husband or wife, is exempt from judicial sale, where there is no special declaration of statute to the contrary.[76]

[67] Code Annot. 1897, § 2947.
[68] Code Supp. 1907, § 2943.
[69] Code Annot. 1897, § 2947.
[70] Code Supp. 1907, § 3068.
[71] Code Annot. 1897, § 2920.
[72] Code Annot. 1897, § 2919; Code Supp. 1907, § 2919.
[73] Code Annot. 1897, § 2960.
[74] Code Annot. 1897, § 3366.
[75] Code Annot. 1897, § 2974; Code Supp. 1907, § 2974.
[76] Code Annot. 1897, § 2972.

§ 796. **Kansas.**—Acknowledgments may be taken within the state of Kansas before a court having a seal, a judge, justice, or clerk thereof, justice of the peace, notary public, county clerk, register of deeds, or mayor or clerk of an incorporated city.[77] Without the state acknowledgments may be taken before a court of record, or clerk or officer holding the seal thereof, a commissioner appointed for the purpose by the governor of this state, a notary public, justice of the peace, or a consul of the United States resident in any foreign port or country.[78] Deeds executed, acknowledged, or proved in any other state, territory, or country, in conformity with the laws thereof, or the laws of this state, shall be valid.[79] Court or officer taking acknowledgment must indorse upon the deed a certificate, showing title of court or officer before whom taken; that person making acknowledgment was personally known to court or officer to be the one who executed instrument; and that such person duly acknowledged the same.[80]

An acknowledgment taken before a justice of the peace out of the state must be accompanied by a certificate of his official character under the hand of the clerk of some court of record and seal thereof.[81]

Use of seals is abolished, except for corporations.[82]

A married woman, while the marriage relation subsists, may convey her real estate just as a married man may convey his property.[83]

Husband and wife must join to convey or encumber homestead.[84]

§ 797. **Kentucky.** — Acknowledgments may be taken within the state of Kentucky before the clerk of the county court or a notary public.[85] Without the state and within the United States acknowledgments may be taken before a judge under seal of his court, clerk of court or his deputy, notary public, mayor of a city, secretary of state, or commissioner of deeds, all under official seals.[86] Without the United States acknowledgments may

[77] Gen. Stat. 1909, § 1660.
[78] Gen. Stat. 1909, § 1661.
[79] Gen. Stat. 1909, § 1676.
[80] Gen. Stat. 1909, § 1662.
[81] Gen. Stat. 1909, § 1661.
[82] Gen. Stat. 1909, § 1643.
[83] Gen. Stat. 1909, § 4873.
[84] Const., § 235; Gen. Stat. 1905, 2522.
[85] Carroll's Stats. 1915, § 501.
[86] Carroll's Stats. 1915, § 502.

be taken before any foreign minister or consul, secretary of legation of the United States, secretary of foreign affairs under his official seal, or judge of a superior court of the nation where the deed is executed.[87] If acknowledged, no witnesses are required; otherwise, two subscribing witnesses may prove deed, or one subscribing witness may prove the attestation of the other.[88]

Officer taking the acknowledgment should certify it under his seal of office.[89]

The conveyance of a married woman's separate estate may be by the joint deed of husband and wife, or by separate instrument. In the latter case, the husband must first convey, or have theretofore conveyed. The deed as to both husband and wife may be acknowledged or proved and recorded, as heretofore, or by this act, provided.[90]

Any married woman, resident or nonresident, may, by agent, convey any interest she may have in personal or real estate, situated in Kentucky, and which she could lawfully convey in person. But such conveyance must be made in virtue of a power of attorney, executed and acknowledged or proved, as their deeds are by law required to be.[91]

Husband and wife must join to release dower.[92] Curtesy does not exist in name; but the husband has the same interest in the wife's real estate that the wife has in that of the husband.[93]

No mortgage, release, or waiver of homestead is valid unless executed by husband and wife, and acknowledged as provided.[94] Homestead exemption embraces dwelling-house and appurtenances not exceeding one thousand dollars in value. Homestead is not exempt from mortgage foreclosure, for purchase-money therefor, or sales under execution, attachment, or judgment, if debt or liability existed prior to purchase of land or erection of improvements thereon.[95]

§ 798. **Louisiana.** — Acknowledgments may be taken within the state of Louisiana before a notary public, parish recorder, or clerk of the Supreme Court or his deputy.[96] Without

[87] Carroll's Stats. 1915, § 503.
[88] Carroll's Stats. 1915, § 501.
[89] Carroll's Stats. 1915, §§ 502, 503.
[90] Carroll's Stats. 1915, § 506.
[91] Carroll's Stats. 1915, § 508.
[92] Carroll's Stats. 1915, § 2136.
[93] Carroll's Stats. 1915, § 2148.
[94] Carroll's Stats. 1915, § 1706.
[95] Carroll's Stats. 1915, § 1702.
[96] Rev. Laws 1904, §§ 1926 (p. 921), 2492, 3066.

the state and within the United States acknowledgments may be taken before any Louisiana commissioner residing in the state or territory in which person taking acknowledgment lives, and before any notary public duly appointed in such state, territory, or district.[97] Without the United States acknowledgments may be made before ambassadors, ministers, chargés d'affaires, secretaries of legations, consuls general, consuls, vice consuls, and commercial agents.[98]

Two witnesses are required, and if the grantor be blind, three.[99] Notary executing an authentic act within this state shall be assisted by two witnesses.[1] All acts passed before commissioner and two witnesses shall have the force of notarial acts within Louisiana.[2]

The official character and signature of the person before whom an acknowledgment is made in conformity to the laws of another state must be properly verified before a commissioner of the state. Acknowledgments out of the state and within any other state or territory, taken before a notary public, are to be certified under his hand and official seal. The above-named officers in foreign countries use their respective seals of office. An acknowledgment taken by them, when duly certified, has the force and effect of an authentic act executed in this state.[3]

All acts may be executed under private signature, except such as positive laws have ordained to be passed in presence of notary.[4]

The wife, even when she is separated in her estate from her husband, can not alienate, grant, mortgage, acquire, either by gratuitous or encumbered title, unless her husband concurs in the act or yields his consent in writing.[5]

A married woman above the age of twenty-one years may, by and with the authorization of her husband and with the sanction of the judge, borrow money and contract debts for her separate advantage and benefit, and to secure the same, grant mortgages or other securities affecting her separate estate, paraphernal, or dotal.[6] Married women above the age of twenty-one years may,

[97] Acts of 1896, p. 219.
[98] Rev. Laws 1904, § 602.
[99] Rev. Civ. Code 1900, art. 2234, as amended by Acts 1908, p. 82.
[1] Rev. Laws 1904, § 603.
[2] Rev. Laws 1904, § 603.
[3] Rev. Laws 1904, § 598; Acts 1896, p. 219; Rev. Laws 1904, §§ 602, 603.
[4] Rev. Civ. Code 1900, art. 2240.
[5] Rev. Civ. Code 1900, art. 122.
[6] Rev. Civ. Code 1900, art. 126.

with the consent of their husbands, by act passed before a notary public, renounce in favor of third persons their matrimonial, dotal, paraphernal, and other rights. But the notary, before receiving her signature, shall detail in the act, and explain verbally to said married woman, out of the presence of her husband, the nature of her rights and of the contract she agrees to.[7]

There is a homestead exemption of land not exceeding one hundred and sixty acres, buildings, and appurtenances, rural or urban, of every head of a family, not exceeding two thousand dollars in value. This exemption may be claimed by the surviving spouse, or minor child or children, of a deceased beneficiary.[8] Any person entitled to a homestead may waive the same, by signing with his wife, if she be not separated a mensa et thoro, and having recorded in the office of the recorder of mortgages of his parish, a written waiver of the same, in whole or in part.[9]

§ 799. Maine.—Acknowledgments may be taken within the state of Maine by a justice of the peace, notary public having an official seal, or woman appointed by the governor for the purpose.[10] Without the state and within the United States acknowledgments may be taken by a clerk of a court of record having a seal, notary public, justice of the peace or commissioner appointed by the governor of Maine for the purpose.[11] Without the United States acknowledgments may be taken by a United States minister or consul, notary public, or commissioner appointed by governor.[12]

A subscribing witness is necessary to prove the execution of an unacknowledged deed before a court of record in the state.[13]

Seal of such court, or the seal of such notary, if he have one, shall be affixed to the certificate of acknowledgment, but if such acknowledgment is taken outside the state of Maine before a justice of the peace, or a notary public not having a seal, a certificate under seal from the secretary of state, or clerk of a court of record in the county where the officer resides or took the acknowledgment, authenticating the authority of the officer taking such acknowledgment and the genuineness of his signature, must be annexed thereto.[14] A commissioner of deeds must use his offi-

[7] Rev. Civ. Code 1900, art. 129.
[8] Const., art. 244.
[9] Const., art. 246.
[10] Rev. Stats. 1916, ch. 78, § 23.
[11] Rev. Stats. 1916, ch. 78, § 23.
[12] Rev. Stats. 1916, ch. 78, § 23.
[13] Rev. Stats. 1916, ch. 78, § 28.
[14] Rev. Stats. 1916, ch. 78, § 23.

cial seal.[15] The seal of a court or a notary taking acknowledgments must be affixed.[16]

A married woman may own in her own right realty and personalty acquired by descent, gift, or purchase, and may convey the same without joinder or assent of husband; but such conveyance shall not bar his right and interest by descent in the estate so conveyed.[17] Real estate directly conveyed to her by her husband can not be conveyed by her without the joinder of her husband, except real estate conveyed to her as security or in payment of a bona fide debt actually due to her from her husband.[18] Married women are not required to be examined apart from their husband.[19] If married since April 21, 1844, a woman does not lose, and a husband does not acquire, rights to her property by marriage.[20]

Dower and curtesy are abolished. But this act does not affect, modify, enlarge, or limit the rights and interests which a widower or widow married before May 1, 1895, has in the estate of a wife or husband deceased prior to January 1, 1897.[21] A husband or wife may bar his or her right and interest by descent, in an estate conveyed by the other, by joining in the same, or a subsequent deed, or with the guardian of the other, or by sole deed; but he or she shall not be deprived of such right and interest by levy or sale of the real estate on execution, but may, after the right of redemption has expired, release such right and interest by sole deed.[22] A woman may be barred of her right and interest by descent in her husband's lands by a jointure settled on her with her consent before marriage.[23]

§ 800. **Maryland.** — Acknowledgments may be taken within the state of Maryland, in the county or city within which the real estate or any part of it lies, before a justice of the peace for said county or city, a judge of the orphans' court for said county or city, a judge of the circuit court for the county, a judge of the supreme bench of Baltimore city, or a notary public in any county or city.[24] Within the state, but out of the

[15] Rev. Stats. 1916, ch. 78, § 25.
[16] Rev. Stats. 1916, ch. 78, § 23.
[17] Rev. Stats. 1916, ch. 66, § 1.
[18] Rev. Stats. 1916, ch. 66, § 1.
[19] Rev. Stats. 1916, ch. 78, § 23.
[20] Rev. Stats. 1916, ch. 66, § 2.
[21] Rev. Stats. 1916, ch. 80, § 8.
[22] Rev. Stats. 1916, ch. 80, § 9.
[23] Rev. Stats. 1916, ch. 80, § 10.
[24] Pub. Gen. Laws 1904, art. 21, § 2; Laws 1906, ch. 398

county or city wherein the real estate or any part of it lies, acknowledgments may be made before a notary public, a judge of the circuit court for the circuit in which the grantor may be, a judge of the orphans' court for the county in which the grantor may be, a judge of the supreme bench of Baltimore city or of the orphans' court of said city, justice of the peace for the county or city where the grantor may acknowledge, the official character of the justice being certified to by the clerk of the circuit or superior court under his official seal.[25] Without the state and within the United States, acknowledgments may be taken before a notary public, a judge of any United States court or of any state or territory having a seal, or a commissioner of deeds of this state.[26] Without the United States acknowledgments may be made before any minister, consul general, deputy consul, vice consul, consular agent, consular officer of the United States, notary public, or commissioner of deeds of this state.[27] A corporation may acknowledge instrument by attorney appointed under its seal (such appointment to be embodied therein), or by its president or vice president without such appointment.[28]

Conveyances must be attested by at least one witness.[29]

If taken without the state before a judge of a court having a seal, seal of such court must be affixed.[30] Commissioners of deeds and notaries public are required to have official seals.[31]

Every deed conveying real estate shall be signed and sealed by the grantor or bargainor.[32]

Married women shall hold all their property of every description for their separate use, as fully as if they were unmarried, and shall have all the power to dispose of by deed, mortgage, lease, will, or any other instruments that husbands have to dispose of their property, and no more; provided, that no disposition of her real or personal property, or any portion thereof, by deed, mortgage, bill of sale, or other conveyance, shall be valid if made by a married woman under eighteen years of age, unless her husband shall unite therein.[33] A married woman's acknowledgment is taken without separate examination.[34] A

[25] Pub. Gen. Laws 1904, art. 21, § 3.
[26] Pub. Gen. Laws 1904, art. 21, § 4.
[27] Pub. Gen. Laws 1904, art. 21, § 5.
[28] Laws 1908, art. 23, § 74.
[29] Pub. Gen. Laws 1904, art. 21, § 10.
[30] Pub. Gen. Laws 1904, art 21, § 7.
[31] Pub. Gen. Laws 1904, art. 18, §§ 1, 3, art. 68, § 7.
[32] Pub. Gen. Laws 1904, art. 21, § 10.
[33] Pub. Gen. Laws 1904, art. 45, § 4.
[34] Pub. Gen. Laws 1904, art. 21, § 67, art. 45, §§ 4, 12.

married woman may relinquish her dower in any real estate by joint deed of herself and husband, by separate deed, or by power of attorney executed jointly with her husband or by herself without the joinder of her husband. And in like manner any husband may relinquish his interest in the real estate of his wife by joint or separate deed, or by power of attorney executed jointly with his wife or by himself without the joinder of his wife.[35]

§ 801. **Massachusetts.**—Acknowledgments may be taken within the state of Massachusetts before a justice of the peace, special commissioner, or notary public.[36] Without the state, and within the United States, acknowledgments may be taken by any justice of the peace, magistrate, notary public, or commissioner appointed for that purpose by the governor of this state, or officer of any state or territory who is authorized by the laws thereof to take acknowledgments.[37] Without the United States acknowledgments may be taken by a justice, notary, magistrate, or commissioner, an ambassador, minister, consul, vice consul, chargé d'affaires, or consular agent of the United States, resident in any foreign country or port, certified under his official seal.[38]

One subscribing witness is required to prove an unacknowledged deed.[39]

Instruments made without the state must be accompanied by a certificate of the secretary of state in which officer resides, under seal of such state, or of the clerk of a court of record of the county in which said officer resides or in which he took acknowledgment, under the seal of the court, stating that such officer was, at the time of taking such proof or acknowledgment, duly authorized thereto in said state, and that said secretary of state or clerk of court is well acquainted with his handwriting and verily believes that the signature affixed to such certificate or proof or acknowledment is genuine.[40]

A seal is necessary, but several may use same seal.[41]

A wife may convey her separate property as if she were sole.

[35] Pub. Gen. Laws 1904, art. 45, § 12.

[36] Rev. Laws 1902, ch. 127, § 8. as amended by Supp. Rev. Laws 1908, ch. 127, § 1.

[37] Rev. Laws 1902, ch. 127, §§ 8, 19.

[38] Rev. Laws 1902, ch. 127, §§ 8, 22.

[39] Rev. Laws 1902, ch. 127, §§ 10-15.

[40] Rev. Laws 1902, ch. 127, § 20.

[41] Proprietors of Mill Dam Foundry v. Hovey, 38 Mass. (21 Pick.) 417; Tasker v. Bartlett, 59 Mass. (5 Cush.) 359.

But no conveyance of realty by a married woman shall extinguish or impair her husband's tenancy by the curtesy unless he joins in the conveyance or otherwise releases his rights, unless the court having jurisdiction has entered a decree that she has been deserted by her husband or is living apart from him for justifiable cause. In the latter case she may convey as if sole.[42] If the wife deserts her husband or he is living apart from her for justifiable cause, he may likewise convey his property as if he were sole.[43]

The acknowledgment by a married woman may be taken in the same form as if she were sole, and without any separate examination.[44]

A wife may bar her right of dower by joining in her husband's conveyance, or by subsequent deed executed either separately or jointly with her husband.[45] A woman may also be barred of dower in all the land of her husband by a jointure settled on her with her assent before her marriage.[46] A pecuniary provision, made for the benefit of an intended wife and in lieu of dower, shall if assented to as above provided bar her dower in all the land of her husband.[47]

Homestead may be released by the wife's joining in the deed of husband in the manner in which she may release her dower.[48]

§ 802. **Michigan.** — Acknowledgments may be made within the state of Michigan before a judge, clerk, or commissioner of a court of record, notary public (he must give date of expiration of commission), justice of the peace, or master in chancery within the state, the officer indorsing a certificate on the deed.[49] Deeds acknowledged before a county clerk or clerk of circuit court before September 18, 1903, are legalized.[50] A notary public may take acknowledgment of instrument executed by a corporation of which he is a stockholder, director, officer, or employé, provided he is not a party thereto, either individually or in a representative capacity.[51] Executions are according to the laws of the state, territory, or district in which they are

[42] Rev. Laws 1902, ch. 153, §§ 1, 36.
[43] Supp. Rev. Laws 1908, ch. 153, § 1, p. 1301.
[44] Rev. Laws 1902, ch. 127, § 9.
[45] Rev. Laws 1902, ch. 132, § 5.
[46] Rev. Laws 1902, ch. 127, § 21.
[47] Rev. Laws 1902, ch. 132, § 6.
[48] Rev. Laws 1902, ch. 131, § 7.
[49] 3 Comp. Laws 1897, § 8962 as amended by Pub. Acts 1903, pp. 23, 137.
[50] Pub. Acts 1905, p. 151.
[51] Pub. Acts 1909, p. 24.

made. Without the United States executions are according to the laws of that country, and acknowledgments may be made before a notary public, a minister plenipotentiary, minister extraordinary, minister resident, chargé d'affaires, commissioner or consul of the United States appointed to reside therein. The acknowledgment must be certified by the officer under his hand, and, if taken before a notary public, his seal of office must be affixed thereto.[52] A deed so executed in a foreign country must be executed in the presence of two subscribing witnesses.[53] Without the state and within the United States acknowledgments may be made before any judge of a court of record, notary public, justice of the peace, master in chancery, any other officer these authorized to take acknowledgments of deeds, or commissioner appointed by the governor of this state for such purpose.[54]

Deeds must be executed in the presence of two witnesses.[55]

Unless the acknowledgment of deeds made elsewhere in the United States be taken before a commissioner appointed by the governor, the officer taking acknowledgment shall attach his official seal, and if taken before a justice of the peace or officer having no seal, such instrument shall have attached thereto a certificate of the clerk or other proper certifying officer of a court of record of the county or district, or of the secretary of state of the state or territory within which such acknowledgment was taken under the seal of his office, that the person whose name is subscribed to the certificate of acknowledgment was, at the date thereof, such officer as he is therein represented to be, and that he believes the signature of such person to such certificate of acknowledgment to be genuine, and that the deed is executed and acknowledged according to the laws of such state, territory, or district.[56]

A scroll or device answers for a seal, but lack of seal shall not invalidate any conveyance.[57]

A married woman acknowledges an instrument affecting real property as if she were sole.[58] When any married woman, not residing in the state, shall join with her husband in any conveyance of realty situated within this state, the conveyance shall

[52] 3 Comp. Laws 1897, § 8965.
[53] 3 Comp. Laws 1897, § 8965.
[54] 3 Comp. Laws 1897, § 8963.
[55] 3 Comp. Laws 1897, § 8962; Pub. Acts 1903, p. 137.
[56] 3 Comp. Laws 1897, § 8964.
[57] 3 Comp. Laws 1897, §§ 8956, 9005, 10417.
[58] 3 Comp. Laws 1897, § 8966.

have the same effect as if she were sole, and her acknowledgment or proof may be the same as if she were sole.[59]

A married woman of eighteen years may bar her right of dower by joining in the deed with her husband and acknowledging the same, or by joining him in a subsequent deed acknowledged in like manner, or by separate deed to one who holds the husband's title, expressing the intent to bar her right of dower.[60] A woman may also be barred of dower by a jointure settled on her with her assent before the marriage.[61]

A mortgage or other alienation of a homestead is not valid without wife's signature, unless it be a purchase-money mortgage.[62]

§ 803. Minnesota. — Acknowledgments may be taken within the state of Minnesota before judges, clerks, and deputy clerks of all courts of record, residing within the state, including those of circuit and district courts of the United States, and resident United States commissioners, notaries public, justices of the peace, and clerks or recorders of towns, villages, boroughs, and cities; court commissioners, registers of deeds, county auditors and their deputies, and county commissioners, all within their respective counties; or before a member of the legislature as long as he remains such and continues to reside in the district from which he was elected, but he shall receive no fee, and his signature shall be: "A B, Representative (or Senator) —— District, Minnesota. My term expires January 1, 19—."[63] Without the state and within the United States acknowledgments may be taken by any judge or justice of the Supreme, circuit, or district court of the United States, a court of record of any state, territory, or district therein; the clerk and deputy clerk of any of said courts; any notary public or justice of the peace, or any commissioner appointed by the governor of this state for that purpose. But no acknowledgment so certified shall be valid unless taken within the place or territory for which such officer was chosen or to which the jurisdiction of the court of which he is an officer shall extend. An acknowledgment may be made according to laws of other state, territory, or district, and so certified by secretary of

[59] 3 Comp. Laws 1897, § 8968.
[60] 3 Comp. Laws 1897, § 8930; Pub. Acts 1899, p. 284.
[61] 3 Comp. Laws 1897, § 8931.
[62] 3 Comp. Laws 1897, § 10363.
[63] Rev. Laws 1905, § 2687.

state under his official seal, clerk or other proper certifying officer of a court of record of the county or district within which acknowledgment was taken.[64] Without the United States acknowledgments may be made before a notary public, minister, chargé d'affaires, commissioner, consul, commercial agent, or other consular or diplomatic officer of the United States appointed to reside in such country, including all deputies of such officers authorized to perform their duties. Acknowledgments may also be executed according to the laws of such country, if proved by a proper certifying officer of the United States, under his seal of office.[65] Any person authorized to take acknowledgments, who is an officer, director, or stockholder of a corporation, may acknowledge instruments wherein corporation is interested.[66] All instruments conveying lands or affecting title to, interest in, or lien upon any lands in this state, heretofore executed anywhere in the United States and recorded in proper county, in which any of the following defects of execution or acknowledgment exist, either in instrument or record thereof, viz.: When no seal is affixed to signature of person or persons executing same; where there is no subscribing witness; where there is but one subscribing witness; where instrument has been acknowledged before notary public or other officer required to keep official seal, to whose signature his official seal has not been affixed; all such instruments and the records thereof are hereby legalized.[67]

All conveyances made within the state of any interest in lands therein shall be executed in the presence of two witnesses, who shall subscribe their names as such. Out of the state, conveyances may be executed as above provided, or according to the laws of the place of execution.[68]

If a certificate made in another state be signed by a commissioner appointed by the governor of this state, or by a notary public, clerk of court, or other officer having a seal of office, an impression whereof is affixed, no other authentication is required. If by officer appointed by governor of such other state or territory, and having no official seal, it shall be accompanied by a declaration of the secretary of said state or territory, or

[64] Rev. Laws 1905, §§ 2688, 2691.
[65] Rev. Laws 1905, §§ 2690, 2691.
[66] Laws 1907, ch. 406.
[67] Laws 1911, ch. 277.
[68] Rev. Laws 1905, § 3346.

his assistant or deputy, under the seal thereof, of the official character of the person certifying. Or the clerk or other certifying officer of a court of record of the county or district in which the acknowledgment was taken, under seal of said court, may declare the official character of person taking acknowledgment, that he knows his handwriting, and believes signature to be genuine. This declaration shall be attached to the certificate.[69]

Notaries within state shall affix date of expiration of commission.[70]

Private seals are abolished.[71]

A husband and wife may convey real estate of either by making a joint deed. Either may, by separate deed, convey his or her realty, except the homestead, subject to rights of spouse therein; either may, by separate conveyance, relinquish rights in realty conveyed by other; either may separately appoint an attorney to convey his or her realty, or join in conveyance made by other. Minority of wife shall not invalidate her conveyance.[72]

No separate acknowledgment by a married woman is required.[73]

Wife may, by separate instrument, release dower in lands of a former deceased husband.[74] Where husband or wife conveyed real estate on or prior to January 1, 1896, no action for recovery by any person having any estate in dower or by the curtesy, or in lieu thereof, may be commenced after October 1, 1911.[75] When a husband or wife purchases land during coverture, and mortgages his or her estate in such land to secure the payment of the purchase-price or any portion thereof, the surviving spouse shall not be entitled to any inchoate or contingent right in such land as against the mortgagee or those claiming under the mortgage, although such survivor did not join in such mortgage.[76]

No mortgage, sale, or other alienation of homestead shall be valid without the signature of both husband and wife.[77]

§ 804. Mississippi. — Acknowledgments may be taken within the state of Mississippi before any judge of a United

[69] Rev. Laws 1905, § 2689.
[70] Rev. Laws 1905, ch. 48.
[71] Rev. Laws 1905, § 2652.
[72] Rev. Laws 1905, § 3335, as amended by Laws 1907, ch. 123.
[73] Rev. Laws 1905, § 2686.
[74] Rev. Laws 1905, § 3335.
[75] Laws 1911, ch. 328.
[76] Gen. Laws 1909, ch. 465.
[77] Rev. Laws 1905, §§ 3335, 3456.

States court, judge of the Supreme or circuit court, chancellor or clerk of a court of record, his deputy where statute authorizes him to perform duties of principal, notary public under his official seal, justice of the peace, police justice, mayor of any city, town, or village, or member of the board of supervisors, whether the property conveyed be within his county or not.[78] Without the state and within the United States acknowledgments may be made before the chief justice of the United States, associate justice of the Supreme Court of the United States, judge of any United States court, any judge or justice of the Supreme or superior court of any state or territory of the United States, justice of the peace of such state or territory whose official character shall be certified under the seal of some court of record in his county, commissioner residing in such state or territory who is appointed by the governor of this state for such purpose, notary public, or clerk of a court of record having a seal of office.[79] Without the United States acknowledgments may be taken before any court of record, mayor or chief magistrate of any city, borough, or corporation of such foreign country in which the party or witness resides or may be; any commissioner residing in such country who may be appointed by the governor; any ambassador, foreign minister, secretary of legation, or consul of the United States to the foreign country in which the party or witness may reside or be; but the certificate must show that the party, or the party and witness, were identified before the officer, that the party acknowledged the execution of the instrument, or that witness proved execution, and it shall be as good and effectual as if made and certified by a competent officer of this state.[80]

No witnesses are necessary if acknowledged; otherwise, one or more subscribing witnesses must prove deed.[81]

No seal is required, except for corporations.[82]

A married woman may convey her property as if she were unmarried.[83] No separate examination of wife is required.[84]

A conveyance or mortgage of the homestead is not valid unless signed by both husband and wife, regardless of which owns it provided they are living together.[85]

[78] Code 1906, § 2798.
[79] Code 1906, § 2800.
[80] Code 1906, § 2801.
[81] Code 1906, §§ 2762, 2784.
[82] Code 1906, § 4631.
[83] Code 1906, § 2517.
[84] Code 1906, § 2799.
[85] Code 1906, §§ 2159-2161.

§ 805. **Missouri.**—Acknowledgments may be taken within the state of Missouri before a court having a seal, or some judge, justice, or clerk thereof, notary public, or justice of the peace of the county where the estate lies.[86] Without the state and within the United States acknowledgments may be taken by any notary public, any court of the United States, or of any state or territory having a seal, the clerk of any such court, or commissioner of deeds appointed by the governor.[87] Without the United States acknowledgments may be taken before any court of any state, kingdom, or empire having a seal, the mayor or chief officer of any city or town having an official seal, a minister or a consular officer of the United States, or a notary public having a seal.[88]

A subscribing witness is necessary to prove a deed.[89]

Officer having seal must affix it.[90]

Use of seals by grantors, except for corporations, is abolished.[91]

Husband and wife may join to convey her real estate.[92] No separate examination of wife is required.[93] A wife may relinquish her dower by joint deed with husband, acknowledged and certified, or by power of attorney authorizing its conveyance, executed and acknowledged by her jointly with her husband.[94]

A husband and wife may jointly convey, mortgage, alienate, and in other manner dispose of a homestead or any part thereof.[95]

§ 806. **Montana.**—Acknowledgments may be taken at any place within the state of Montana by justice or clerk of the Supreme Court or a judge of the district court. They may be taken in this state within the city, county, or district for which the officer was elected or appointed, before a clerk of a court of record, county clerk, notary public, or justice of the peace.[96] Without the state and within the United States acknowledgments may be made

[86] 1 Annot. Stat. 1906, § 908; 1 Rev. Stat. 1909, § 2794.

[87] 1 Annot. Stat. 1906, § 908; 1 Rev. Stat. 1909, § 2794.

[88] 1 Annot. Stat. 1906, § 908; 1 Rev. Stat. 1909, § 2794.

[89] 1 Annot. Stat. 1906, § 914, et seq.; 1 Rev. Stat. 1909, § 2800, et seq.

[90] Code 1899, § 911; 1 Annot. Stat. 1906, § 911; 1 Rev. Stat. 1909, § 2797.

[91] 1 Annot. Stat. 1906, § 893; 1 Rev. Stat. 1909, § 2773.

[92] 1 Annot. Stat. 1906, §§ 901, 902; 1 Rev. Stat. 1909, §§ 2788, 2789.

[93] 1 Annot. Stat. 1906, § 913; 1 Rev. Stat. 1909, § 2799.

[94] 1 Annot. Stat. 1906, §§ 111, 901, 902; 2 Annot. Stat. 1906, § 4373; 1 Rev. Stat. 1909, §§ 2788, 2789.

[95] 2 Annot. Stat. 1906, § 3616; 2 Rev. Stat. 1909, § 6704.

[96] 1 Code Annot, 1895 (Civ.), §§ 1600, 1601.

by a justice, judge, or clerk of any court of record of the United States; a justice, judge, or clerk of any court of record of any state or territory; a commissioner appointed by the governor of this state for that purpose; a notary public; or any other officer of the state or territory where the acknowledgment is made who is authorized by its laws to take such proof or acknowledgment.[97] Without the United States acknowledgments may be taken by a minister, commissioner, or chargé d'affaires of the United States, resident and accredited in the country where the proof or acknowledgment is made; a consul, vice consul, or consular agent of the United States resident in the country where the proof or acknowledgment is made; a judge of a court of record of the country where the proof or acknowledgment is made; commissioners appointed for such purposes by the governor of the state, pursuant to special statutes; or a notary public.[98] A notary public may take acknowledgments to written instruments executed to or by a bank or corporation of which he is a stockholder, director, officer, or employé, provided he is not a party to the instrument nor interested therein.[99]

A subscribing witness may prove an unacknowledged deed.[1]

Officers taking acknowledgments or proofs must affix their signatures, followed by the names of their offices; also, their seals of office, if they are required to have them.[2] The certificate or proof of acknowledgment, if made before a justice of the peace when used in any county other than that in which he resides, must be accompanied by a certificate under the hand and seal of the clerk of the county in which the justice resides, setting forth that such justice, at the time of making such proof or acknowledgment, was authorized to take the same, and that the clerk is acquainted with his handwriting, and believes that the signature to the original certificate is genuine.[3] A notary must authenticate with his official seal all his official acts. He must add to his signature the words, Notary public for the state of Montana, residing at —— (stating the name of his postoffice), and must indorse upon the instrument the date of the expiration

[97] 1 Code Annot. 1895 (Civ.), § 1602.
[98] 1 Code Annot. 1895 (Civ.), § 1603.
[99] Laws 1909, ch. 77.
[1] 1 Code Annot. 1895 (Civ.), §§ 1573, 1615.
[2] 1 Code Annot. 1895 (Civ.), § 1613.
[3] 1 Code Annot. 1895 (Civ.), § 1614.

of his commission.[4] No seal by grantor is required, except in case of corporations.[5]

A husband and wife may hold real or personal property together, jointly, or in common.[6] A married woman's acknowledgment is taken in the same manner as that of any other person.[7] A wife may, without the consent of her husband, convey her separate property or execute a power of attorney for the conveyance thereof.[8] Husband and wife must join to release dower, and she will acknowledge in the manner required to pass her estate.[9]

Both husband and wife must execute and acknowledge an instrument to convey or encumber the homestead.[10]

§ 807. **Nebraska.** — Acknowledgments may be taken within the state of Nebraska by judge or clerk of any court, justice of the peace, or notary public, but the officer can not act out of his jurisdiction.[11] Without the state and within the United States deeds may be acknowledged or proved either according to the laws of such state, territory, or district, or in accordance with the laws of this state, and if acknowledged out of this state, it must be before some court of record or clerk or officer holding the seal thereof, or before some commissioner of deeds, appointed by the governor of this state, or before some notary public, or justice of the peace. If taken before a justice of the peace, it must be accompanied by certificate of his official character under the hand of the clerk of some court of record, to which the seal of said court shall be affixed.[12] Without the United States acknowledgments may be made according to laws of such country, before any notary public therein, minister plenipotentiary, minister extraordinary, minister resident, chargé d'affaires, commissioner, commercial agent, or consul of the United States, appointed to reside therein. Officer shall certify same under his hand and notary public shall affix his seal.[13]

One subscribing witness required.[14]

[4] Laws 1909, ch. 103, § 6.
[5] 1 Code Annot. 1895 (Civ.), § 2191.
[6] 1 Code Annot. 1895 (Civ.), § 217.
[7] 1 Code Annot. 1895 (Civ.), § 1606.
[8] Code Annot. 1895 (Civ.), § 220.
[9] 1 Code Annot. 1895 (Civ.), §§ 228, 243.
[10] 1 Code Annot. 1895 (Civ.), § 1675.
[11] 2 Annot. Stat. 1903, § 10202.
[12] 2 Annot. Stat. 1907, § 10803, as amended by Laws 1909.
[13] 2 Annot. Stat. 1903, § 10206.
[14] 2 Annot. Stat. 1903, § 10200.

When acknowledgments are made without the state by officer having a seal, no other proof of his capacity is needed. But any other person must have a certificate under seal of a clerk of a court of record, or other proper certifying officer, showing the official capacity of the person taking the acknowledgment, his compliance with law of such state, territory, or district, and the genuineness of his signature.[15] If taken without the United States before a notary public, he must use his seal.[16]

Private seals are abolished.[17]

Covenant in joint deed of husband and wife does not bind wife.[18] No separate examination of wife is required.[19]

The right to inherit a part or all the realty of spouse may be barred by a conveyance executed by both husband and wife if both reside in this state.[20]

Husband and wife must join to encumber or convey homestead.[21]

§ 808. Nevada.—Acknowledgments may be taken within the state of Nevada by judge or clerk of court having seal, notary public anywhere within state, or justices of the peace.[22] Without the state and within the United States acknowledgments may be taken by judges or clerks of United States, state, or territorial courts, having a seal, commissioner of deeds for this state, or by justice of the peace of any county, accompanied with certificate of clerk of court of record.[23] Without the United States acknowledgments may be taken before a judge or clerk of court of any state, kingdom, or empire having a seal; notary public therein, minister, commissioner or consul of the United States appointed to reside therein.[24]

A subscribing witness may prove the execution of conveyance.[25] If grantor can not write, he shall make his mark, his name shall be written near it, and it shall be witnessed by a person who writes his own name as witness.[26]

If acknowledgment is made by a justice of the peace in a county other than the one where the realty is situated, it shall

[15] 2 Annot. Stat. 1903, § 10205.
[16] 2 Annot. Stat. 1903, § 10206.
[17] 2 Annot. Stat. 1903, § 11350.
[18] 2 Annot. Stat. 1903, § 10251.
[19] 2 Annot. Stat. 1903, § 5318.
[20] Laws 1907, p. 197.
[21] 2 Annot. Stat. 1903, § 6203.
[22] Comp. Laws 1900, § 2642, as amended by Act February 26, 1907.
[23] Comp. Laws 1900, § 2642.
[24] Comp. Laws 1900, § 2642.
[25] Comp. Laws 1900, § 2649.
[26] Comp. Laws 1900, § 2734.

be accompanied by a certificate of the clerk of district court of the county setting forth official character and genuineness of the signature of said justice. The same applies where justices make acknowledgments in other states and territories.[27] Officers having seals must use them on certificates.[28] A private seal is unnecessary.[29]

A conveyance by a married woman has the same effect as if she were unmarried and may be acknowledged in the same manner.[30] Husband controls community property.[31]

No conveyance or mortgage of homestead is valid unless both husband and wife execute and acknowledge the same as provided by law for conveyance of real estate.[32]

§ 809. **New Hampshire.** — Acknowledgments may be taken within the United States by a justice, notary public, or commissioner.[33] Without the United States acknowledgments may be taken by ministers and consuls of the United States.[34]

Two witnesses are necessary.[35]

Grantor is required to affix his seal.[36]

Realty may be conveyed directly by husband to wife, or wife to husband, whenever it might lawfully be done through intervention of third person.[37]

A married woman controls her own separate property.[38] She has same rights and remedies and is subject to same liabilities in relation to her own property, as if she were unmarried, provided, that no conveyance by her, as surety or guarantor for her husband, nor any undertaking by her for him or in his behalf, shall be binding on her, except mortgage releasing dower and homestead.[39]

Husband and wife may join with each other to release dower or curtesy.[40]

Husband and wife may bar homestead right by joining in deed.[41]

§ 810. **New Jersey.**—Acknowledgments may be made

[27] Comp. Laws 1900, § 2642.
[28] Comp. Laws 1900, § 2644.
[29] Comp. Laws 1900, § 2735.
[30] Laws 1909, ch. 195, § 2.
[31] Comp. Laws 1900, § 515.
[32] Comp. Laws 1900, § 515.
[33] Pub. Stat. 1901, ch. 137, § 3.
[34] Pub. Stat. 1901, ch. 137, § 3.
[35] Pub. Stat. 1901, ch. 137, § 3.
[36] Pub. Stat. 1901, ch. 137, § 3.
[37] Pub. Stat. 1901, ch. 176, § 3.
[38] Pub. Stat. 1901, ch. 176, § 1.
[39] Pub. Stat. 1901, ch. 176, § 2.
[40] Pub. Stat. 1901, ch. 176, § 3.
[41] Pub. Stat. 1901, ch. 138, § 4.

within the state of New Jersey before the chancellor, a justice of Supreme Court, master in chancery in this state, attorney at law of this state, judge of any court of common pleas of any county in this state, commissioner of deeds appointed for any county in this state, clerk of court of common pleas of any county, deputy county clerk, surrogate or deputy surrogate of any county, or register of deeds of any county of this state, whether he was appointed for or is in county where lands lie or acknowledgment is taken. Deed shall be accompanied by officer's acknowledgment.[42] Without the state and within the United States acknowledgments may be taken before the chief justice of the United States, any associate justice of Supreme Court of the United States, a master in chancery of this state, attorney at law of this state, circuit or district judge of United States, judge or justice of Supreme or superior courts, chancellor of any state, territory, or district in the union, any foreign commissioner of deeds for New Jersey duly certified under his official seal, mayor or chief magistrate of city, borough, or corporation, certified under seal of such city, borough, or corporation. Circuit or district judges, judges or justices of Supreme or superior courts, chancellors, foreign commissioners of deeds, mayors or chief magistrates, judges of courts of common pleas or officers of other states shall act within the limits of their jurisdiction.[43] Without the United States acknowledgments may be taken by a master in chancery of New Jersey, any public ambassador, minister, consul, vice consul, consular agent, chargé d'affaires, or other representative of the United States in any foreign kingdom, state, nation, or colony, any court of law of such kingdom, state, nation, or colony, notary public, mayor or chief magistrate of city, borough, or corporation in which party or witnesses happen to be.[44] All deeds duly signed, delivered, and recorded, the signing thereof being certified to by an officer of any foreign kingdom, state, or nation, after lapse of ten years from date of signing, notwithstanding certificate of official fails to show or certify deed to have been acknowledged by person signing same, shall be held good and effectual in law.[45] The foregoing applies to conveyances of

[42] Laws 1898, ch. 232, § 22, as amended by Laws 1906, ch. 247, § 22.
[43] Laws 1898, ch. 232, § 23, as amended by Laws 1906, ch. 250, § 23.
[44] Laws 1898, ch. 232, § 24.
[45] Laws 1911, ch. 16, § 1.

married woman, and her deed so executed shall be sufficient to convey her estate in lands therein described, although not acknowledged according to law, provided every deed in this act described shall have been recorded ten years.[46]

One or more subscribing witnesses necessary.[47]

If acknowledged without the state and within the United States before circuit or district judge, judge or justice of Supreme or superior court, chancellor of other state, foreign commissioner of deeds, mayor or chief magistrate, or judge of court of common pleas, the certificate of acknowledgment shall be accompanied by certificate under great seal of state, territory, or district, or seal of some court of record of county wherein made, attesting official character of officer taking acknowledgment.[48] If acknowledged without the United States by a court of law, notary public, mayor, or chief magistrate, it shall be certified in the manner in which such acts are usually authenticated by them.[49]

Seal necessary, but scroll will answer.[50] Failure to seal conveyance does not invalidate instrument, provided attestation clause and acknowledgment or proof shall recite that same was signed and sealed by makers thereof.[51] Seal necessary for corporation. But an unsealed deed by corporation shall be valid provided the attestation clause and the proof or acknowledgment shall recite that deed was sealed by grantor.[52] If the certificate of acknowledgment or proof of a deed omits the word "sealed," it shall be sufficient in law, provided such deeds have been recorded more than one year before adoption of this act.[53]

Husband and wife must join in conveyance of her realty.[54] Where husband and wife own realty in this state, but have lived apart for seven years, chancellor may authorize husband or wife to convey his or her property or interest as if unmarried, excepting property which came to him or her by gift through or from the other.[55] Husband may join with wife to convey her lands by power of attorney.[56]

A wife must be examined apart from the husband in order to

[46] Laws 1911, ch. 16, § 2.
[47] Laws 1898, ch. 232, § 22.
[48] Laws 1906, ch. 250, § 23.
[49] Laws 1898, ch. 232, § 24.
[50] Laws 1898, ch. 232, § 20.
[51] Laws 1897, ch. 84; Laws 1904, ch. 89.
[52] Laws 1904, ch. 89; Laws 1910, ch. 19.
[53] Laws 1909, Act of April 16, 1909.
[54] 2 Gen. Stat. 1895, p. 2015, § 14.
[55] Laws 1896, ch. 83.
[56] Laws 1901, ch. 100.

convey her separate estate.[57] The court of chancery may, if it sees fit, by order or decree with her consent, bind her interest in any property, or authorize her or her trustees to assign or convey the same.[58] Married woman acting as trustee, administratrix, executrix, or guardian may convey without the joining of her husband.[59] Married woman may convey life estate without her husband joining.[60] A married woman whose husband has been a fugitive from justice for more than three years, may convey any interest, estate, or right she may have in realty as if she were sole.[61]

Husband and wife may join to bar dower.[62] If a woman marries after becoming entitled to dower or life estate in lieu thereof, she may release such dower without her husband joining.[63] Whenever a chancellor is satisfied that a person having an estate in dower assigned, whether in possession or not, is incapacitated by mental infirmity or disease from executing a valid release or relinquishment of same, and that it is to the interests of owners and remaindermen to sell same, he may direct that release or relinquishment be made by master of court of chancery, whose deed shall bar all her rights and interests.[64]

Husband and wife must join to alienate homestead.[65]

§ 811. **New Mexico.** — Acknowledgments may be taken within New Mexico by clerk of a district court, judge or clerk of probate court using the probate seal, notary public, or justice of the peace.[66] In other states and territories of the United States acknowledgments may be taken by clerk of any court of record having a seal, commissioner of deeds duly appointed under laws of New Mexico, or notary public having a seal.[67] Without the United States acknowledgments may be taken by a minister, commissioner, or chargé d'affaires of the United States, resident and accredited in the country where the acknowledgment is made; consul general, consul, vice consul, deputy consul, consul, or agent of the United States, resident in the country where the acknowledgment is made, having a seal; or a notary public having

[57] 1 Gen. Stat. 1895, p. 854, § 9.
[58] Laws 1898, ch. 158.
[59] Laws 1901, ch. 69; Laws 1901, ch. 165; Laws 1904, ch. 21.
[60] Laws 1901, ch. 183.
[61] Laws 1910, ch. 197.
[62] 2 Gen. Stat. 1895, p. 1277, § 10.
[63] Laws 1902, ch. 74.
[64] Laws 1911, ch. 91, § 1.
[65] 3 Gen. Stat. 1895, p. 2998, § 69.
[66] Laws 1901, ch. 62, § 14.
[67] Laws 1901, ch. 62, § 15.

a seal.[68] Acknowledgment of written instrument not necessary to its execution unless expressly so provided by statute.[69]

All seals, except for corporations, are abolished.[70] All instruments heretofore duly executed except for want of a seal, which was required at time of execution, shall have the same force as if sealed at time of execution.[71] All instruments or documents heretofore made in good faith and sealed with a scroll, are hereby made as valid as if seal had been waxen impression.[72]

Neither husband nor wife shall convey, mortgage, encumber, or dispose of any realty, or legal or equitable interest therein acquired during coverture by onerous title, unless both join in the execution thereof.[73] It shall not be necessary for husband or wife to join when either executes a power of attorney for himself or herself.[74]

No separate examination of married woman required, and she shall be described in the acknowledgment as the wife of ———.[75]

No sale of real estate made under a mortgage which is not executed by wife of debtor, if he has a wife, shall affect her right to have a homestead set off.[76]

§ 812. New York. — Acknowledgments may be taken within the state of New York before a justice of the Supreme Court anywhere within the state; or within the district where such officer is authorized to act, before a judge, clerk, deputy clerk, or special deputy clerk of a court, a notary public, the mayor or recorder of a city, a justice of the peace, surrogate, special surrogate, special county judge, or commissioner of deeds.[77] Without the state and within the United States acknowledgments may be taken before the following officers acting within their jurisdiction, or the court to which they belong: judges of Supreme, circuit court of appeals, circuit court, or of the district court of the United States; judges of the Supreme, superior, or circuit court of any state, mayors of cities; commissioners appointed by the governor of this state; any officer of a state or territory authorized by its laws to take the acknowledgment or proof of deeds to be recorded therein; any officer of

[68] Laws 1901, ch. 62, § 16.
[69] Laws 1901, ch. 62, § 17.
[70] Laws 1901, ch. 62, § 11.
[71] Laws 1901, ch. 62, § 13.
[72] Comp. Laws 1897, § 3933.
[73] Laws 1901, ch. 62, § 6.
[74] Laws 1901, ch. 62, § 20.
[75] Comp. Laws 1897, § 3946.
[76] Comp. Laws 1897, § 1754.
[77] 4 Birdseye's C. and G. Cons. Laws 1909 Annot., R. P. L., § 298.

the District of Columbia authorized by the laws of the United States to take the acknowledgment or proof of deeds to be recorded in said district.[78] Without the United States acknowledgments may be taken before an ambassador, minister plenipotentiary, minister extraordinary, minister resident, or chargé d'affaires of the United States residing in and accredited to the country; consul general, vice consul general, deputy consul general, consul, vice consul, deputy consul, consular or vice consular agent, commercial or vice commercial agent of the United States residing within the country, or a secretary of legation at post, port, place, or within limits of legation; a commissioner appointed for the purpose by the governor of the state of New York acting within his own jurisdiction; a person specially authorized by a commission issued under the seal of the Supreme Court; in the Dominion of Canada, also before any judge of a court of record, or before any officer of a province or territory of such Dominion authorized by its laws to take the acknowledgment or proof of deeds to be recorded therein; in United Kingdom of Great Britain and Ireland and its dominions, also before the mayor, provost, or other chief magistrate of a city or town therein, under his hand and the seal of such city of town; in the Empire of Germany also before a judge of a court of record under the seal of such court, or before a notary public under the seal of his office and the seal of the city or town in which the notary resides.[79] Acknowledgments in Porto Rico, Philippine Islands, or Cuba, or any other place over which the United States at the time exercises sovereignty, control, or a protectorate, may be taken by the following officers acting within their jurisdiction: judge or clerk of a court of record; mayor or other chief officer of a city acting in such city; commissioner appointed for the purpose by governor of this state; an officer of the United States regular army or volunteer service of rank of captain or higher, or of United States navy of rank of lieutenant or higher, while on duty at place where party or parties are or reside.[80] When a certificate of acknowledgment or proof is made by a commissioner appointed by the governor, or by the mayor or other chief magistrate of a city or town without the United States, or by an ambassador, minister,

[78] 4 Birdseye's C. and G. Cons. Laws 1909 Annot., R. P. L., § 299.

[79] 4 Birdseye's C. and G. Cons. Laws 1909 Annot., R. P. L., § 301.

[80] 4 Birdseye's C. and G. Cons. Laws 1909, Annot., R. P. L., § 300.

chargé d'affaires, consul general, vice consul general, deputy consul general, consul, vice consul, or deputy consul, consular or vice consular agent, commercial or vice commercial agent, a secretary of legation, of the United States, it must be under his seal of office, or the seal of the consulate or legation to which he is attached. All acknowledgments or proofs of deeds, mortgages, or other instruments relating to real property, the certificates of which were made in the form required by the laws of this state, by a consul general, vice consul general, deputy consul general, consul, vice consul, deputy consul, consular agent, vice consular agent, commercial agent, vice commercial agent, or a secretary of legation of the United States prior to April 29, 1904, are confirmed, but nothing herein contained shall affect any action or proceeding now pending in any court.[81] Official acts of notaries public or commissioner of deeds within the state of New York which were performed since January 1, 1885, are legalized, notwithstanding certain irregularities and omissions.[82]

One witness is necessary to prove unacknowledged conveyance.[83]

Certificate of acknowledgment or proof, made within the state, by a commissioner of deeds, justice of the peace, or, except as otherwise provided by law, by a notary public, does not entitle the conveyance to be read in evidence or recorded, except within the county in which the officer resides at the time of making such certificate, unless authenticated by a certificate of the clerk of the same county; provided, however, that all certificates of acknowledgment or proof, made by or before a commissioner of deeds of the city of New York residing in any part therein, shall be authenticated by the city clerk of said city, that the said commissioner of deeds was duly appointed and qualified as such, and no other certificate shall be required from any other officer to entitle said conveyance to be read in evidence or recorded in any county or part of a county, situated within the limits, confines, or boundaries, of the city of New York. But this section does not apply to conveyance executed by an agent for the Holland Land Company, or of the Pulteney estate, lawfully authorized to convey real property.[84] In the following cases a certificate of acknowl-

[81] 4 Birdseye's C. and G. Cons. Laws 1909 Annot., R. P. L., § 308.

[82] Laws 1910, ch. 117.

[83] 4 Birdseye's C. and G. Cons. Laws 1909 Annot., R. P. L., §§ 243, 304.

[84] 4 Birdseye's C. and G. Cons. Laws 1909 Annot., R. P. L., § 310.

edgment or proof is not entitled to be read in evidence or recorded unless authenticated by the following officers respectively: (1) Where original certificate is made by commissioner appointed by the governor, by the secretary of state. (2) Where made by a judge of court of record in Canada, by the clerk of the court. (3) Where made by an officer of a state of the United States, or of any province or territory of the Dominion of Canada, authorized by the laws thereof to take acknowledgment or proof of deeds to be recorded therein, by the secretary of state of the state, the provincial secretary, deputy provincial secretary, or assistant provincial secretary of the province, or commissioner of the territory of the Dominion of Canada, or the clerk, register, recorder, or prothonotary of the county, city, or parish in which the officer making the original certificate resided, when the certificate was made, or in which such acknowledgment or proof was taken, or by the clerk of any court in or of that county, city, or parish, having by law a seal. The word county shall be deemed to apply to and include the District of Columbia for the purpose of this section. All acknowledgments or proofs of deeds, mortgages, or other instruments relating to real property authenticated prior to April 16, 1908, by any of the officers above referred to are confirmed, saving, however, the rights of purchasers in good faith and for a valuable consideration whose conveyance shall have been duly recorded prior to said date; this subdivision shall not affect any action or legal proceeding pending on said date. (4) All acts of the secretary of state of any state or territory of the United States in authenticating a certificate of acknowledgment or proof of a conveyance of real property within the state, performed before October 1, 1896, are hereby confirmed, provided that the said certificate of authentication is in the form required by the laws of this state.[85] An officer authenticating a certificate of acknowledgment or proof must subjoin or attach to the original certificate a certificate under his hand, and if he has, pursuant to law, an official seal, under such seal. Except when original certificate is made by judge of court of record in Canada, such certificate of authentication must specify that, at the time of taking the acknowledgment or proof, the officer taking it was duly authorized to take the same; that the authenticating officer is ac-

[85] 4 Birdseye's C. and G. Cons. Laws 1909 Annot., R. P. L., § 311.

quainted with the former's handwriting, or has compared the signature to the original certificate with that deposited in his office by such officer, and that he verily believes the signature to the original certificate is genuine; and if the original certificate is required to be under seal, he must also certify that he has compared the impression of the seal affixed thereto with the impression of the seal of the officer who took the acknowledgment or proof deposited in his office, and that he verily believes the impression of the seal upon the original certificate is genuine. A clerk's certificate authenticating a certificate of acknowledgment or proof taken before a judge of a court of record in Canada, must specify that there is such a court; that the judge taking the acknowledgment or proof was, when it was taken, a judge thereof; that such court has a seal; that the writer authenticating is clerk thereof; that he is well acquainted with the handwriting of such judge, and verily believes his signature is genuine.[86] The certificate of acknowledgment taken before a judge, clerk, mayor, chief officer, or commissioner in Porto Rico, Philippine Islands, Cuba, or any place controlled by the United States, shall have attached thereto the seal of the court or officer if he have a seal, and if such officer have no seal, then a statement to that effect. If taken before officer of army or navy, he shall state his rank, the name of the city, or other political division where taken, and the fact that he is on duty there, and it shall be authenticated by the secretary of war or secretary of the navy, as the case may be, of the United States.[87]

Seal required. Private seal to consist of wafer, wax, or other similar adhesive substance, or of paper or other similar substance affixed thereto, or of the word "seal," or letters "L. S.," opposite the signature.[88]

Husband and wife may convey or transfer realty directly, the one to the other, without the intervention of a third person.[89]

The acknowledgment or proof of a conveyance of realty, within the state, or any other written instrument, may be made by a married woman the same as if unmarried.[90] A married

[86] 4 Birdseye's C. and G. Cons. Laws 1909 Annot., R. P. L., § 312.
[87] 4 Birdseye's C. and G. Cons. Laws 1909 Annot., R. P. L., § 300.
[88] 2 Birdseye's C. and G. Cons. Laws 1909 Annot., G. C. L., § 44.
[89] 1 Birdseye's C. and G. Cons. Laws 1909 Annot., D. R. L., § 56.
[90] 4 Birdseye's C. and G. Cons. Laws 1909 Annot., R. P. L., § 302.

woman's separate property is not subject to husband's control or disposal.[91] A married woman has all the rights in respect to property, and the acquisition, use, enjoyment, and disposition thereof, as if she were unmarried.[92]

A married woman of full age may release her inchoate right of dower in real property by attorney in fact in any case where she can personally release the same.[93] A jointure may bar the right of dower if the wife, being of full age, evidences her assent by becoming a party to the conveyance by which it is settled, or if she be a minor, by her joining with her father or guardian in that conveyance.[94] An act, deed, or conveyance, executed or performed by the husband without the assent of his wife, evidenced by her acknowledgment thereof, in the manner required by law to pass the contingent right of dower of a married woman, does not prejudice the right of his wife to her dower or jointure, or preclude her from the recovery thereof.[95] If so expressed in an instrument making partition or division of any real property held by husband and wife as tenants in common, joint tenants, or tenants by the entireties, such instrument bars the wife's right to dower in such property, and also, if so expressed, the husband's tenancy by curtesy.[96]

§ 813. **North Carolina.**—The execution of all deeds of conveyance may be proved or acknowledged within the state of North Carolina before justices of the Supreme Court, judges of superior court, commissioners of affidavits appointed by the governor of this state, clerk of Supreme Court, clerks of superior court, deputy clerks of superior courts, clerks of criminal courts, notaries public, and justices of the peace.[97] Execution of instruments may be proved or acknowledged before any one of the following officials of the United States, of the District of Columbia, of the several states and territories of the United States, countries under the dominion of the United States, and of foreign countries: any judge or clerk of a court of record, notary public, mayor or chief magistrate of an incorporated town or city, am-

[91] 1 Birdseye's C. and G. Cons. Laws 1909 Annot., D. R. L., § 50.
[92] 1 Birdseye's C. and G. Cons. Laws 1909 Annot., D. R. L., § 51.
[93] 4 Brdseye's C. and G. Cons. Laws 1909 Annot., R. P. L., § 207.
[94] 4 Birdseye's C. and G. Cons. Laws 1909 Annot., R. P. L., § 197.
[95] 4 Birdseye's C. and G. Cons. Laws 1909 Annot., R. P. L., § 203.
[96] 1 Birdseye's C. and G. Cons. Laws 1909 Annot., D. R. L., § 56.
[97] 1 Revisal of 1905, § 989.

bassador, minister, consul, vice consul, vice consul general, or commercial agent of the United States. Execution of such instruments may be proved or acknowledged before any justice of the peace of any state or territory of the United States, but if taken by a justice of the peace of any state other than North Carolina, or of any territory of the United States, his certificate shall be accompanied by a certificate of the clerk of some court of record of county in which such justice of the peace resides, under hand and seal of said clerk, certifying official character of justice of the peace and the genuineness of his signature.[98] No notary public shall take an acknowledgment or private examination of a feme covert to any paper in which he is interested as attorney, counsel, or otherwise.[99]

Unacknowledged deed may be proved by one or more subscribing witnesses.[1]

Where acknowledgment is by a justice of the peace of any county other than that in which instrument is offered for registration, his certificate of acknowledgment shall be accompanied by a certificate of clerk of superior court of county in which said justice of the peace resides, certifying official character and genuineness of signature of said justice of the peace. Clerk's certificate shall be under his hand and official seal. By an amendment of February 1, 1907, certificates of justices of the peace which have been registered prior to January 1, 1907, in county in which lands lie, without the proper certificate from the clerk of superior court of county or without his order of registration, are validated, provided that such acknowledgment, etc., shall be valid against creditors or purchasers from donor only from date of ratification of this act.[2] Any official authorized by law to take acknowledgments shall use his official seal, and if he have none, he shall certify under his hand. If instrument is proved or acknowledged before clerk or deputy clerk of the superior court of the county in which the instrument is to be registered, the official seal shall not be necessary.[3] When the clerks of superior court are parties to or are interested in instruments, they may be acknowledged before any justice of the peace of county of said clerk, the latter, under his hand and official seal, certifying to the

[98] 1 Revisal of 1905, § 990.
[99] Act March 11, 1907.
[1] 1 Revisal of 1905, §§ 979, 996.
[2] 1 Revisal of 1905, § 992.
[3] 1 Revisal of 1905, § 993.

genuineness thereof, or before a judge of the superior court or justices of the Supreme Court, and said instrument probated and ordered to be registered by such judge or justice as provided by law for probates by clerks of superior court in other cases. By act of March 11, 1907, when acknowledgments or proofs of any conveyance have been taken before a clerk of superior court, justice of the peace, or notary public, who was at that time a stockholder or officer in any corporation, bank, or other institution which was a party to such instrument, certificates of such clerk of superior court, justice of the peace, or notary public, shall be held valid, and are so declared.[4] Where proof or acknowledgment of execution of an instrument is taken by any other than the clerk or deputy clerk of the superior court of county in which instrument is offered for registration, said clerk or deputy clerk shall examine certificates of proof or acknowledgment and if instrument appears to have been duly acknowledged, it shall be registered, unless clerk is a party to or interested in such instrument.[5]

Seal includes impression of official seal made upon the paper alone, as well as an impression made by means of a wafer or of wax affixed thereto.[6]

Every conveyance, power of attorney, or other instrument affecting the estate, right, or title of any married woman in lands must be executed by such married woman and her husband.[7]

Separate examination of the wife is required.[8] Officials authorized by law to take proofs and acknowledgments may take the private examination of any married woman.[9] A wife may alienate her right of dower by joining with her husband in a deed, and having private examination.[10] A mortgage or trust deed by husband to secure the purchase-money, or any part thereof, of land bought by him, shall, without the wife executing the deed, be effectual to bar dower.[11]

Husband and wife must join to convey homestead, and she must have private examination.[12]

§ 814. **North Dakota.**—Acknowledgments may be taken within the state of North Dakota, at any place, before a justice

[4] 1 Revisal of 1905, § 995.
[5] 1 Revisal of 1905, § 999.
[6] 1 Revisal of 1905, § 2831, (8).
[7] 1 Revisal of 1905, § 952.
[8] 1 Revisal of 1905, §§ 952, 954.
[9] 1 Revisal of 1905, § 955.
[10] 1 Revisal of 1905, § 3086.
[11] 1 Revisal of 1905, § 3085.
[12] Const., art. 10, § 8.

or clerk of the Supreme Court or a notary public; within the judicial district, county, subdivision, or city, for which the officer was elected or appointed, before a judge or clerk of court of record, mayor of a city, register of deeds, justice of the peace, United States circuit or district court commissioner, or county auditor.[13] Without the state and within the United States acknowledgments may be made before a justice, judge, or clerk of any court of record of the United States, or of any state or territory; a notary public, or any other officer of the state or territory where the acknowledgment is made, authorized by its laws to take acknowledgments or proofs; or a commissioner appointed by the governor of this state for the purpose. These officers to act within their several jurisdictions.[14] Without the United States acknowledgments may be made before either a minister, commissioner, or chargé d'affaires of the United States, resident and accredited in the country where the proof or acknowledgment is made; a secretary of legation, consul, vice consul, or consular agent of the United States, resident in the country where the proof or acknowledgment is made; a judge, clerk, register, or commissioner of a court of record of the country where the proof or acknowledgment is made; or a notary public of such country, or an officer authorized by the laws of the country where the proof or acknowledgment is taken to take proof or acknowledgment. When any of these officers are authorized to appoint a deputy, the acknowledgment or proof may be taken by such deputy in the name of his principal.[15] By act of March 15, 1909, acts of all notaries public or other officers, done in good faith in taking or certifying to acknowledgments of instruments made prior to January 1, 1909, whether such officers were qualified or authorized by law at the time to do so or not, are hereby declared legal and valid for all purposes.

If unacknowledged, one subscribing witness may prove deed.[16]

Officers taking and certifying acknowledgments or proof of instruments for record must authenticate their certificates by affixing thereto their signatures, followed by the names of their officers; also their seals of office, if by the laws of the state, territory, or county where the acknowledgment or proof is taken, or by authority of which they are acting, they are required to

[13] Rev. Codes 1905, §§ 5011, 5012.
[14] Rev. Codes 1905, § 5013.
[15] Rev. Codes 1905, § 5014.
[16] Rev. Codes 1905, § 4973.

have official seals. Judges and clerks of courts of record must authenticate their certificates as aforesaid, by affixing thereto the seal of their proper court, and mayors of cities by the seal thereof. Notaries public must write or stamp the date of expiration of their commissions after their signatures. The certificate of a justice of the peace, when used out of the county where he resides, must be authenticated by the certificate under the hand and seal of the clerk of the district court, or of any other county court of record in his county, attesting official character of justice and genuineness of signature.[17] Judgments affecting the title to or the possession of real property, authenticated by the certificate of the clerk of court in which such judgments were rendered, may be recorded without acknowledgment or further proof.[18]

A private seal is not required.[19]

Either husband or wife may enter into any engagement or transaction with the other, or with any other person, respecting property, which either might if unmarried.[20] Conveyance of a married woman has same effect as though she were unmarried, and she acknowledges in same manner.[21]

Husband and wife must join to convey or encumber the homestead. Wife acknowledges as if she were sole.[22] By Act of March 6, 1905, in all cases where a husband has heretofore conveyed homestead by deed duly signed and acknowledged, but not signed by wife, and she has either before or afterwards conveyed same by deed duly signed and acknowledged, but not signed by her husband, to husband's grantee or a subsequent grantee from him, the conveyance by such separate deeds shall be valid and effectual to pass title.

§ 815. Ohio.—Acknowledgments may be taken within the state of Ohio by a judge or clerk of court of record, county auditor, county surveyor, notary public, mayor, or justice of the peace. The certificate of acknowledgment must be on the same sheet on which the instrument is written or printed.[23] Without the state acknowledgments may be made before a commissioner appointed by the governor of this state for that purpose, a consul, consul general, vice consul general, commercial agent, consular

[17] Rev. Codes 1905, §§ 548, 5028, 5029.
[18] Laws 1905, ch. 159, § 2.
[19] Rev. Codes 1905, §§ 4973, 5338.
[20] Rev. Codes 1905, § 4079.
[21] Rev. Codes 1905, § 5016.
[22] Rev. Codes 1905, §§ 5016, 5052.
[23] 2 Gen. Code 1910, § 8510.

agent, deputy consul general, vice consul, deputy consul of the United States, resident in any foreign country. All conveyances executed, acknowledged, or proved in any other state, territory, or country, in conformity with the laws of that state, territory, or district shall be as valid as if executed in this state.[24] The authority of a person taking an acknowledgment is not confined to his territorial jurisdiction. A federal judge may take an acknowledgment anywhere within the United States, and a judge of common pleas court may take acknowledgments without his district.[25]

Deeds must be signed in the presence of two witnesses.[26]

A private seal is not required except for a corporation.[27]

A married person may take, hold, and dispose of property, real or personal, the same as if unmarried.[28] No separate examination of a married woman is required.[29]

Curtesy does not exist, but the husband receives one-third of his deceased wife's property for a life estate.[30]

Wife must execute deed in order to bar homestead rights.[31]

§ 816. **Oklahoma.**—Acknowledgments may be taken within the state of Oklahoma by a justice of the peace of county where land is situated, or any notary public, county clerk, clerk of district court, or county judge.[32] Without the state and within the United States they may be taken before any notary public, clerk of court of record, commissioner of deeds duly appointed by the governor of the state for the county, state, or territory where same is taken.[33] Without the United States acknowledgments may be made before any court of record or clerk thereof, or before any United States consul.[34] Every acknowledgment, except when taken by a justice of the peace must be under seal of officer taking same.[35] Where heretofore any county judge, register of deeds, United States commissioner or United States court commissioner has taken acknowledgments of conveyances of realty in their respective counties, the same are hereby validated.[36]

[24] 2 Gen. Code 1910, §§ 8515, 8516.
[25] 1 Ohio 1, (14); 11 Ohio 475, (480).
[26] 2 Gen. Code 1910, § 8510.
[27] 1 Gen. Code 1910, § 32.
[28] 2 Gen. Code 1910, § 8001.
[29] 2 Gen. Code 1910, § 8511.
[30] 2 Gen. Code 1910, §§ 8606, 8614.
[31] 3 Gen. Code 1910, § 11739.
[32] Comp. Laws 1909, § 1222.
[33] Comp. Laws 1909, § 1222.
[34] Comp. Laws 1909, § 1222.
[35] Comp. Laws 1909, § 1222.
[36] Act approved March 16, 1903.

No subscribing witness is required.[37]

No authentication of authority of officer is required other than his official seal. Private seals are not required except for corporations.[38]

Husband or wife may convey or encumber real estate belonging to him or her, except the homestead, without the other joining.[39] Married women retain the same legal existence and legal personality after marriage as before marriage. No separate acknowledgment required.[40]

No deed, mortgage, or contract, relating to exempted homestead, except lease for no longer than a year, shall be valid unless signed by both husband and wife where they are not divorced.[41] Where homestead title is in husband, and wife voluntarily abandons him for one year or takes up her residence out of the state, he may convey, mortgage, or contract relating thereto without being joined by her; likewise wife under same circumstances may convey alone.[42]

§ 817. **Oregon.**—Acknowledgments may be taken within the state of Oregon by any judge of the Supreme Court, county judge, justice of the peace, or notary public.[43] Without the state and within the United States acknowledgments may be made according to laws of such state or of Oregon before any judge of court of record, justice of the peace, notary public, or other officer authorized by the laws of such state, territory, or district, or commissioner of deeds appointed by the governor of this state for that purpose.[44] Without the United States acknowledgments may be taken by a notary public therein, minister plenipotentiary, minister extraordinary, minister resident, chargé d'affaires, commissioner, consul, vice consul, or consul general of the United States appointed to reside therein and acknowledgment shall be certified by officer taking same, under his hand, and if taken before a notary public, his seal of office shall be affixed to such certificate. Executions may be made according to the laws of Oregon or laws of such foreign country, and it shall not be necessary to state in such certificate that the deed or instrument is exe-

[37] Comp. Laws 1909, § 1185.
[38] Comp. Laws 1909, §§ 1093, 1094.
[39] Comp. Laws 1909, § 1193.
[40] Comp. Laws 1909, § 3655.
[41] Comp. Laws 1909, § 1187.
[42] Comp. Laws 1909, § 1189.
[43] 2 Annot. Codes and Stat. 1901, § 5342.
[44] 2 Annot. Codes and Stat. 1901, § 5343, as amended by Gen. Laws 1907, ch. 169.

cuted according to the laws of such country.[45] Deeds affecting realty heretofore executed anywhere which have been signed by the grantor, shall be effective according to the terms of such instrument without sealing or other execution, acknowledgment or witnesses thereto whatever, and all such instruments which shall have been acknowledged or attempted in good faith to be acknowledged before an officer having a seal or an officer without a seal, whose official character shall be proved by certificate of clerk of court of record in such state, shall be entitled to record.[46]

Two subscribing witnesses are required for deeds within the state.[47]

When acknowledgments are taken outside of this state and within the United States, unless taken by a commissioner appointed by the governor of this state for such purposes, or before a notary public certified under his notarial seal, or before a clerk of a court of record, certified under the seal of the court, such deed shall have attached thereto a certificate of the clerk or other proper certifying officer of a court of record of the county or district within which the acknowledgment was taken, under his seal of office, that the person whose name is subscribed to the certificate of acknowledgment, was at the date thereof such officer as therein represented to be, and that he believes the signature of such person to be genuine, and that the deed is executed and acknowledged according to the laws of such state, territory, or district.[48]

Public seal is stamp or impression made upon wax, wafer, paper, or any other like substance upon which a visible and permanent impression may be made. A private seal may be made in the same manner, or without an impression by wafer or wax attached to instrument, or by paper attached to it by an adhesive substance, or by a scroll or other sign made with a pen or printed upon the paper, and any printed seal or scroll on instrument at time of signing will be presumed to have been adopted by person signing his name before it. A scroll or other sign made elsewhere in the United States, or in a foreign country, and there recognized as a seal, shall be so regarded in this state, and any unsealed instrument valid in state where executed shall be valid

[45] 2 Annot. Codes and Stat. 1901, § 5345, as amended by act approved February 25, 1907.

[46] Gen. Laws 1907, ch. 174.

[47] 2 Annot. Codes and Stat. 1901, § 5342.

[48] 2 Annot. Codes and Stat. 1901, § 5344.

in this state.[49] There is no difference between sealed and unsealed writings, except as to the time of commencing actions or suits thereon.[50]

Husband and wife may convey her real estate by joint deed, as she might do by separate deed if unmarried, but any covenant in such deed shall not bind her.[51] All acknowledgments of married women to conveyances of realty in this state shall be taken in the same manner as if sole.[52] When nonresident wife joins with husband to convey realty situated in this state, conveyance has same effect as if she were sole, and her acknowledgment or proof may be as if sole.[53]

A married woman may bar dower in estate conveyed by husband, or his guardian if he be a minor, by joining in the deed of conveyance thereto with, or by executing a deed separately from, her husband or such guardian, with or without mentioning the barring of dower therein; provided, that such separate deed, if barring an inchoate right of dower, shall not be executed to a stranger to the title, but shall be executed to the grantee of said husband or to such grantee's heirs or assigns.[54] A woman may also be barred of her dower in husband's lands by a jointure settled on her with her assent before marriage.[55] Dower and curtesy consist of one-half of lands of decedent, and estates by curtesy may be barred as dower is barred, and, as far as possible, all other laws of the state applicable to dower shall be applicable to estates by curtesy.[56] A husband or wife may constitute the other his or her attorney in fact to control, sell and convey, mortgage, or bar dower or curtesy in his or her property for their mutual benefit, and may revoke the same to the same extent and manner as other persons.[57] Conveyances heretofore executed in this state, or elsewhere in the United States or in foreign countries, whether sealed or not, by a married woman, which shall have been signed by her, shall be sufficient in law to convey her

[49] 1 Codes and Stat. 1901, § 764, as amended by Gen. Laws 1907, ch. 173.
[50] 1 Annot. Codes and Stat. 1901, § 765.
[51] 2 Annot. Codes and Stat. 1901, § 5334.
[52] 2 Annot. Codes and Stat. 1901, § 5346.
[53] 2 Annot. Codes and Stat. 1901, § 5348.
[54] 2 Annot. Codes and Stat. 1901, § 5527, as amended by Gen. Laws 1907, ch. 170.
[55] 2 Annot. Codes and Stat. 1901, § 5528.
[56] 2 Annot. Codes and Stat. 1901, § 5515, as amended by Gen. Laws 1907, ch. 87.
[57] 2 Annot. Codes and Stat. 1901, § 5237, as amended by Gen. Laws 1907, ch. 170.

legal title to premises described therein to grantee named therein, as well as to bar her dower therein, without any other execution or witness thereto; provided, the same shall have been properly acknowledged; and also provided, her husband shall have executed a deed to said real property, and such deed or conveyance shall suffice to convey her title or bar dower therein, even if executed without her husband joining therein, and shall suffice to bar dower even, if barring of dower is not mentioned therein. This shall not apply to a barring or relinquishment of an inchoate right to a stranger to the title by deed or conveyance separate from her husband, but to grantee of her husband, or such grantee's heirs or assigns.[58] Conveyances of or mortgages upon real property, heretofore executed under power of attorney from wife to her husband or any other person, which power of attorney shall have authorized the attorney in fact named therein to convey or mortgage realty, and shall not have limited same to said wife's realty, shall suffice to bar wife's dower in said realty, notwithstanding fact that dower was not mentioned in such power of attorney.[59]

§ 818. Pennsylvania.—Acknowledgments may be made within the state of Pennsylvania by judges of Supreme Court; justices of the court of common pleas of county where lands lie; presidents of common pleas for lands in any part of the state; assistant or associate judges of courts of common pleas of any county within this state; notary public for lands in any part of this state; mayor and recorder of city of Philadelphia in any part of the commonwealth; justices of the peace of this commonwealth, acting within his county; aldermen of city of Philadelphia; justices of the peace of this commonwealth for lands in any part of this state; recorders of deeds for lands in county for which they were appointed; mayor of the Northern Liberties; mayor, recorder, and alderman of Pittsburgh; mayor and aldermen of Allegheny; mayor, recorder, and aldermen of Carbondale; mayor, recorder, and aldermen of Scranton; mayor and recorder of Williamsport; and the mayor and aldermen of Lock Haven.[60] Without the state and within the United States acknowledgments may be taken by an officer or magistrate of state,

[58] Gen. Laws 1907, ch. 170, § 3.
[59] Gen. Laws 1907, ch. 170, § 4.
[60] 1 Purdon's Dig. 1903, pp. 1156, 1157, §§ 44-49, notes thereto, p. 1158, § 56, p. 1164, § 86.

territory, or District of Columbia, wherein such deed is executed, authorized by laws of that state, territory, or District of Columbia, to take acknowledgments; before one of the judges of the Supreme Court of the United States; judge of United States district court; judge or justice of Supreme or superior court or courts of common pleas of any state or territory within the United States; judge or justice of a court of probate, or judge of any court of record; notary public according to laws of this state, duly certified under his seal of office; person holding rank of major or higher rank in military service of the United States commissioned by governor, for persons actually in such service; or commissioners of deeds appointed by the governor.[61] Without the United States acknowledgments may be taken by ambassadors, ministers plenipotentiary, chargé d'affaires, or other persons exercising public ministerial functions, appointed by the United States; consul or vice consul of United States appointed for and exercising consular functions in state, kingdom, country, or place where conveyance was executed and certified under his official seal; deputy consul, commercial agents, vice and deputy commercial agents, or consular agents of United States appointed for and exercising functions of office at place where acknowledgment is taken and certified under their official seals; notary public according to laws of this state, certified under his seal of office; person holding rank of major or higher for any person actually in military service of the United States; commissioner in chancery according to laws of this state and certified under his seal of office; or commissioner of deeds appointed by governor of this state.[62] Acknowledgments may be made in Cuba, Porto Rico, Philippine Islands, or other possessions of the United States before any person holding the rank of major or any higher rank in the military service of the United States, whether in regular or volunteer service, or before any civil officer in the service of the United States.[63] Commissioners appointed by courts of this commonwealth, in cities of the first class, shall have full power and au-

[61] 1 Purdon's Dig. 1903, p. 1153, § 30, p. 1155, § 36, p. 1157, § 50, p. 1158, §§ 53, 54, 57, p. 1159, § 58, p. 1160, § 63.

[62] 1 Purdon's Dig. 1903, p. 1153, § 31, p. 1154, § 32, p. 1157, § 51, p. 1158, §§ 53, 54, p. 1159, § 61, p. 1161, § 71.

[63] 1 Purdon's Dig. 1903, p. 1159, § 62.

thority to take acknowledgments of deeds and all other instruments to be recorded within the commonwealth.[64]

One witness is sufficient to prove deed.[65] Only one witness is necessary when acknowledged out of state.[66] Two subscribing witnesses necessary for execution.[67]

Judges of United States Supreme Court, judges of United States district courts, judges or justices of Supreme or superior court or courts of common pleas of any state or territory within the United States, or judge or justices of any court of probate, or court of record, shall certify acknowledgments which they make under their hands and the seals of their respective courts or by clerk's certificate, under seal of court, of judge's official character.[68] Officers or magistrates of other states taking acknowledgments shall prove their authority by a certificate of the clerk or prothonotary of any court of record in such state.[69] Commissioners appointed by courts of this commonwealth in cities of the first class shall use a seal of office.[70] Commissioners in chancery in foreign countries shall certify under their seals of office.[71] The proof of official character of military or civil officer taking acknowledgments in Cuba, Porto Rico, Philippines, or any possession of the United States shall be his official seal, if he have one; if not, a certificate under seal of any officer of the United States who has an official seal, in any of said places.[72] Seal of officer is prima facie evidence of acknowledgment.[73]

Husband and wife may join to mortgage or convey her real property.[74] Conveyances executed by non-resident husband and wife and brought hither to be recorded where lands lie, shall have been acknowledged before any mayor, chief magistrate, or officer of cities, towns, or places where such conveyances were executed, and certified under the common or public seal of such cities, towns, or places.[75] Acknowledgments by married woman

[64] 1 Purdon's Dig. 1903, p. 1159, § 59.
[65] 1 Purdon's Dig. 1903, p. 1150 (w).
[66] 1 Purdon's Dig. 1903, p. 1151 (e).
[67] 1 Purdon's Dig. 1903, p. 1168, § 101.
[68] 1 Purdon's Dig. 1903, p. 1153, § 30 (w), p. 1155, § 35.
[69] 1 Purdon's Dig. 1903, p. 1157, § 50.
[70] 1 Purdon's Dig. 1903, p. 1159, § 59.
[71] 1 Purdon's Dig. 1903, p. 1159, § 61.
[72] 1 Purdon's Dig. 1903, p. 1160, § 62.
[73] 1 Purdon's Dig. 1903, p. 1154, § 34.
[74] 1 Purdon's Dig. 1903, p. 1151, § 24 (1).
[75] 1 Purdon's Dig. 1903, p. 1152, § 25.

may be taken by any judge, justice of the peace, notary public, or other officer authorized to take acknowledgments, in same manner as if she were feme sole.[78]

Dower is barred by a conveyance in which the wife joins.[77]

§ 819. Rhode Island.—Acknowledgments may be taken within the state of Rhode Island by a state senator, judge, justice of the peace, mayor, notary public, town clerk, or recorder of deeds, acting within their several jurisdictions.[78] Without the state and within the United States acknowledgments may be made before a judge, or justice of a court of record or other court, justice of the peace, mayor, or notary public in the state, territory, or district where the deed is acknowledged, or before a Rhode Island commissioner within their respective jurisdictions. Instrument may be acknowledged according to laws of such state, territory, or district.[79] Without the United States acknowledgments may be made before any ambassador, minister, chargé d'affaires, consul general, vice consul general, consul, vice consul, consular agent, or commercial agent of the United States, or before any qualified Rhode Island commissioner, all within their respective jurisdictions.[80] Acknowledgments may be made within or without state by person actually engaged in military or naval service of the United States, before any colonel, lieutenant-colonel, or major in the army, or before any officer in the navy not below the grade and rank of lieutenant-commander.[81]

Any instrument executed without the United States by any officer legally authorized to take acknowledgments (see above) as grantor, may be executed in presence of two witnesses and certified under the hand and official seal of grantor.[82]

A private seal is not required.[83]

A married woman controls her separate property.[84] A married woman may convey any estate or interest in any real property as if she were unmarried.[85] She acknowledges as if unmarried.[86] A married woman may bar her right of dower by joining with

[76] 1 Purdon's Dig. 1903, p. 1153, § 26.
[77] 1 Purdon's Dig. 1903, p. 1276 (h), 2 Purdon's Dig. 1903, p. 1996, 4, III.
[78] Gen. Laws 1909, pp. 876, 877, §§ 8 (1) and 9.
[79] Gen. Laws 1909, pp. 876, 877, §§ 8 (2) and 9.
[80] Gen. Laws 1909, pp. 876, 877, §§ 8 (3), 9.
[81] Gen. Laws 1909, p. 876, § 8 (4).
[82] Gen. Laws 1909, p. 877, § 10.
[83] Gen. Laws 1909, p. 875, § 4; p. 877, § 12.
[84] Gen. Laws 1909, p. 854, § 1.
[85] Gen. Laws 1909, p. 855, § 4.
[86] Gen. Laws 1909, p. 855, § 5.

husband in his conveyance and therein releasing her claim to dower, or by separate deed, acknowledged as if she were sole.[87]

§ 820. **South Carolina.**—Deeds in South Carolina must be proved by the affidavit, in writing, of a subscribing witness to such instrument, taken before some officer, within the state, competent to administer an oath.[88] Without the state affidavits may be taken before commissioner or commissioners appointed by dedimus issued by clerk of court of common pleas of county in which the instrument is to be recorded; before commissioner of deeds of this state, clerk of court of record certified under his official seal; justice of the peace, who must append to certificate his official seal; a notary public, who shall affix thereto his official seal within state of his appointment, which seal shall be a sufficient authentication of his or her signature, residence, and official character; or before a minister, ambassador, consul general, consul, vice consul, or consular agent, of the United States of America.[89] Where the affidavit of a subscribing witness can not be had by reason of the death, insanity, or absence from the state of such witness then the instrument may be recorded upon proof of such fact, and of the handwriting of the parties who signed the instrument, and of the subscribing witnesses by proper affidavit —the proof in every case to be recorded with instrument.[90]

Two or more credible witnesses are necessary.[91]

If attestation clause shows that parties intended to seal instrument, it shall be regarded as sealed.[92]

The real and personal property of a woman held at the time of her marriage or that which she may thereafter acquire, whether by gift, grant, inheritance, devise, or otherwise, shall be her separate property, and she shall have all the rights incident to the same to which an unmarried woman or man is entitled.[93]

When any feme covert shall relinquish her right of dower in any real estate and acknowledge the same in writing, if she be within this state in open court, or before any judge of the court of common pleas, justice of the Supreme Court, judge of probate, clerk of the court of common pleas, or master, magistrate,

[87] Gen. Laws 1909, p. 855, § 6.
[88] Civ. Code 1902, § 948.
[89] Civ. Code 1902, § 948, as amended by Acts February 24, 1908, and March 1, 1909.
[90] Civ. Code 1902, § 948.
[91] Civ. Code 1902, § 2367.
[92] Civ. Code 1902, § 2367.
[93] Const., art. 17, § 9.

or notary public; or, if she be without this state, before a commissioner of deeds of this state, of before a commissioner duly appointed by dedimus, or before any consul, vice consul, deputy consul, consular agent, commercial agent of the United States, or any other officer appointed by the United States in foreign countries with the power to administer oaths and having an official seal, or clerk of a court of record, or before a notary public, who must append to the certificate the official seal used by him, and such acknowledgment shall be recorded, the same shall be effectual in law to convey and pass away the right of such feme covert, although she has not executed or acknowledged any deed of conveyance for that purpose.[94] The wife of any grantor conveying real estate by deed of release, may, whether she be of lawful age or a minor, release, renounce, and bar herself of her dower in all the premises so conveyed, by acknowledging (as above), upon a private and separate examination, that she did freely and voluntarily, without any compulsion, dread, or fear of any person whomsoever, renounce and release her dower to the grantee, and his heirs and assigns, in the premises mentioned in such deed; such renunciation to be recorded within forty days.[95] A certificate, under the hand of the woman and the hand and seal of officer, shall be endorsed upon such release.[96]

Husband and wife must both execute conveyance in order to waive homestead.[97]

§ 821. **South Dakota**—Acknowledgments may be made at any place within the state of South Dakota before a justice or clerk of the Supreme Court, or notary public.[98] Acknowledgments may be made in this state within judicial circuit, county, subdivision, or city, for which officer was elected or appointed, before judge or clerk of court of record, mayor of city, register of deeds, justice of the peace, United States circuit or district court commissioner, or county auditor.[99] Without the state and within the United States, and within officer's jurisdiction, acknowledgments may be made before a justice, judge, or clerk of a court of record of the United States, or any state or terri-

[94] Civ. Code 1902, § 2383, as amended by Act of March 1, 1909.
[95] Civ. Code 1902, § 2384.
[96] Civ. Code 1902, § 2385.
[97] Civ. Code 1902, § 2630.
[98] Civ. Code 1903, § 970.
[99] Civ. Code 1903, § 971, as amended by Sess. Laws 1907, ch. 3.

tory, notary public, any officer of state where taken, authorized by its laws to take such acknowledgments, or commissioner of deeds appointed by governor of this state.[1] Without the United States acknowledgments may be made before an ambassador, minister, commissioner, chargé d'affaires of the United States resident and accredited in the country where the proof of acknowledgment is made; a consul, vice consul, or consular agent of the United States resident in country where the acknowledgment is made; a judge, clerk, register, or commissioner of a court of record of the country where the proof of acknowledgment is made; a notary public of such country; an officer authorized by the laws of the country where the proof of acknowledgment is taken to take proof or acknowledgments; or a deputy of any of these officers who are authorized to appoint deputies.[2] Indian agents or superintendents are hereby authorized to take acknowledgments of deeds or other instruments in writing, in Indian country, and acknowledgments so taken shall have the same force and effect as if taken before a notary public. Provided, that such Indian agent or superintendent shall file for record in the office of the register of deeds of the county in which he is stationed, or the county to which said county is attached for judicial purposes, a certificate signed by the secretary of the interior of the United States showing his appointment and authority as such Indian agent or superintendent.[3] A notary public may take acknowledgment to an instrument executed by or to banks or other corporations when he is a stockholder, director, officer, or employé thereof, provided he is not a party thereto.[4]

No witnesses are required if the deed is acknowledged; otherwise one is required.[5]

Officers taking and certifying acknowledgments or proof of instruments for record must authenticate their certificates by affixing thereto their signatures, followed by the names of their offices; also their seals of office, if by the laws of the state, territory, or country where the acknowledgment or proof is taken, or by authority of which they are acting, they are required to have official seals. Judges and clerks of courts of record must authenticate their certificates as aforesaid by affixing thereto the

[1] Civ. Code 1903, § 972.
[2] Civ. Code 1903, § 973.
[3] Sess. Laws 1911, ch. 197.
[4] Sess. Laws 1911, ch. 197.
[5] Civ. Code 1903, § 962.

seal of their proper court; and mayors of cities by the seal thereof.[6] The certificate of proof or acknowledgment, if made before a justice of the peace, when used in any county other than that in which he resides, must be accompanied by a certificate under the hand and seal of the clerk of the circuit court, or of any other county court of record of the county in which the justice resides, setting forth that such justice, at the time of taking such proof or acknowledgment, was authorized to take the same and that the clerk is acquainted with his handwriting, and believes that the signature to the original certificate is genuine.[7]

Neither husband nor wife has any interest in the property of the other.[8] A married woman may, without husband's consent, convey her property and acknowledge as though she were unmarried.[9]

Homestead may be incumbered or conveyed by joint instrument of husband and wife, or by execution of separate instrument by each.[10]

§ 822. **Tennessee.**—Acknowledgments may be made within the state of Tennessee by clerk or legally appointed deputy clerk of the county court of some county in the state or notary public under his official seal.[11] Without the state and within the United States acknowledgments may be made before any court of record or its clerk in any of the states of the union, a commissioner for Tennessee, or notary public of any state or territory.[12] Without the United States acknowledgments may be made before a commissioner for Tennessee appointed in the country where the acknowledgment is made, notary public of such country, consul, minister, or ambassador of the United States in such country.[13]

If deed is not acknowledged, two subscribing witnesses are necessary to prove it.[14]

If acknowledgment be before a notary, commissioner of the state, or consul, minister, or ambassador, he shall certify under

[6] Civ. Code 1903, § 981, 4.
[7] Civ. Code 1903, § 981, 5.
[8] Civ. Code 1903, § 97.
[9] Civ. Code 1903, §§ 101, 105, 975.
[10] Pol. Code 1903, §§ 3217, 3219.
[11] Annot. Code 1896, Supp. 1903, §§ 3713, 3714.
[12] Annot. Code 1896, Supp. 1903, § 3715.
[13] Annot. Code 1896, Supp. 1903, § 3716.
[14] Annot. Code 1896, Supp. 1903, §§ 3671, 3712.

his seal of office.[15] If it be made before a judge, he shall make the certificate, under his hand, and thereupon the clerk of his court shall certify, under his seal of office, if there be a seal, or under his private seal, if there be none, as to the official character of the judge; or the official character of the judge may be certified by the governor of the state or territory, under the great seal of the state or territory.[16] If it be made before a court of record, a copy of the entry of the acknowledgment on the record shall be certified by the clerk, under his seal of office, if there be a seal, or if there be none, under his private seal; and the judge, chief justice, or presiding magistrate of the court shall certify as to the official character of the clerk.[17] If the acknowledgment or probate be before a clerk of some court of record of another state of the union, and certified by him under his seal of office, the judge, chief justice, or presiding magistrate of the court shall certify to the official character of the clerk.[18]

Seals, except for corporations, are abolished.[19]

Husband need not join in wife's deed of her separate property.[20] A married woman must have private examination and make separate acknowledgment.[21] Husband and wife may join to release dower.[22]

Homestead may be alienated by the joint consent of husband and wife evidenced by conveyance executed by the wife as provided.[23]

§ 823. **Texas.** — Acknowledgments within the state of Texas may be made before a clerk of the district court, judge or clerk of county court, or notary public.[24] Without the state and within the United States acknowledgments may be taken by a clerk of a court of record having a seal, notary public, or commissioner of deeds duly appointed under the laws of this state.[25] Without the United States acknowledgments may be taken by a notary public, a minister, commissioner, or chargé d'affaires of

[15] Annot. Code 1896, Supp. 1903, § 3718.
[16] Annot. Code 1896, Supp. 1903, § 3719.
[17] Annot. Code 1896, Supp. 1903, § 3720.
[18] Annot. Code 1896, Supp. 1903, § 3721.
[19] Annot. Code 1896, Supp. 1903, § 3213.
[20] Robinson v. Queen, 3 Pickle 445.
[21] Code 1896, Supp. 1903, § 3753.
[22] Annot. Code 1896, Supp. 1903, § 4140, 40, § 3679, 5.
[23] Annot. Code 1896, Supp. 1903, § 3798.
[24] 2 Civ. Stat. 1897, art. 4613.
[25] 2 Civ. Stat. 1897, art. 4614.

the United States resident and accredited in the country where the acknowledgment is taken; or any consul general, consul, vice consul, commercial agent, vice commercial agent, deputy consul, or consular agent of the United States resident in such country.[26]

Where deed is not acknowledged, two credible subscribing witnesses are necessary.[27]

Officer taking acknowledgment shall make a certificate, and sign and seal the same with his seal of office.[28] Private seal is not necessary, except for corporations.[29]

The husband and wife must join in a conveyance of the wife's separate property, and she must make separate acknowledgment.[30] Officer taking acknowledgment of married woman shall examine her privily and apart from her husband and she must acknowledge that she has willingly signed deed before officer certifies same.[31]

The wife must consent to and join in the conveyance of a homestead, and acknowledge as in a conveyance of her separate property.[32]

§ 824. **Utah.**—Acknowledgments may be taken within the state of Utah by a judge or clerk of court having seal, notary public, county clerk, or county recorder.[33] Without the state and within the United States acknowledgments may be taken by a judge or clerk of any court in the United States, or of any state or territory having seal, notary public, or commissioner appointed by governor of this state for that purpose.[34] Without the United States acknowledgments may be made by a judge or clerk of any court of any state, kingdom, or empire having seal, any notary public therein, an ambassador, minister, commissioner, or consul of the United States appointed to reside therein.[35] When any of the officers above mentioned are authorized by law to appoint a deputy, such acknowledgment or proof may be taken by any such deputy in the name of his principal.[36]

[26] 2 Civ. Stat. 1897, art. 4615.
[27] 1 Civ. Stat. 1897, Supp. 1903, art. 630.
[28] 2 Civ. Stat. 1897, Supp. 1903, §§ 4616, 4619.
[29] 2 Civ. Stat. 1897, Supp. 1903, § 4862.
[30] 1 Civ. Stat. 1897, Supp. 1903, art. 635.
[31] 2 Civ. Stat. 1897, art. 4618.
[32] 1 Civ. Stat. 1897, art. 636.
[33] Comp. Laws 1907, § 1985.
[34] Comp. Laws 1907, § 1985.
[35] Comp. Laws 1907, § 1985.
[36] Comp. Laws 1907, § 1986.

A subscribing witness may prove the execution of unacknowledged deed.[37]

When a certificate of acknowledgment is granted by any judge or clerk, he shall certify under his hand and the seal of the court. When granted by any other officer, he shall certify under the hand and official seal of such officer.[38] A notary public shall affix the date of expiration of commission as well as his seal.[39] Private seal is not required.[40]

A conveyance, transfer, or lien executed by either husband or wife, to or in favor of the other, shall be valid to the same extent as between other persons.[41] A married woman may convey her separate estate as if unmarried.[42] One-third of the real property possessed by husband at any time during marriage to which the wife has made no relinquishment of her rights shall be set apart as her property in fee simple if she survive him; provided, she shall not be entitled to any interest in any estate of which the husband has made a conveyance when she, at time of conveyance, is not or never has been a resident of Utah.[43]

Husband and wife must join to incumber or convey homestead.[44]

§ 825. **Vermont.**—Acknowledgments may be taken in the state of Vermont by a justice of the peace, town clerk, notary public without his official seal, master in chancery, county clerk, or judge or register of probate.[45] Without the state and within the United States acknowledgments may be taken before a justice, magistrate, or notary public and they may be certified according to the laws of the state where taken.[46] Without the United States acknowledgments may be made before a commissioner appointed by the governor for that purpose, minister, chargé d'affaires, consul, or vice consul of the United States in a foreign country. Acknowledgments so taken may be certified according to the laws of the state, province, or kingdom where taken.[47]

Two subscribing witnesses are required to prove deed.[48]

[37] Comp. Laws 1907, §§ 1984, 1991.
[38] Comp. Laws 1907, § 1987.
[39] Comp. Laws 1907, §§ 1671, 1672.
[40] Comp. Laws 1907, §§ 1976, 3399.
[41] Comp. Laws 1907, § 1200.
[42] Const., art. 22, § 2; Comp. Laws 1907, § 1198.
[43] Comp. Laws 1907, § 2826.
[44] Comp. Laws 1907, § 1155.
[45] Pub. Stat. 1906, § 2577.
[46] Pub. Stat. 1906, § 2598.
[47] Pub. Stat. 1906, § 2598.
[48] Pub. Stat. 1906, § 2597.

Seal is necessary.[49] Seal of court, public officer, or corporation shall include an impression of official seal upon paper alone, or by means of a wafer or wax affixed thereto.[50] Private seal shall consist of a wafer, wax, or other adhesive substance affixed to writing, or the word "seal," or the letters "L. S." opposite the signature.[51]

A husband and wife may, by their joint deed, convey the real estate of the wife as she might do by her separate deed, if unmarried.[52] No separate acknowledgment of wife is required.[53]

No homestead, nor interest therein, shall be conveyed by married owner, except by way of mortgage for purchase-price, unless wife joins in execution and acknowledgment of such conveyance; but conveyance thereof not so made and acknowledged, or of an interest therein, shall be inoperative so far only as relates to the homestead provided for in this chapter.[54]

§ 826. Virginia.—Acknowledgments may be made within the state of Virginia before the circuit court of any county, the corporation court of any city other than Richmond, in which the writing is to be recorded, and the chancery court of the city of Richmond when the writing may be recorded in that city, the clerk of any such court, his deputy, notary public, justice of the peace, or the clerk of any court of record of this state.[55] Without the state and within the United States acknowledgments may be made before clerks of any courts, justices, commissioners in chancery of a court of record, or notaries public. This includes the Philippines, Porto Rico, or any other territory, possession, or dependency of the United States.[56] Without the United States acknowledgments may be taken by an ambassador, minister plenipotentiary, minister resident, chargé d'affaires, consul general, consul, vice consul, or commercial agent appointed by the government of the United States to such foreign country, before the proper officer of any court of such country, or the mayor or other chief magistrate of any city, town, or corporation therein.[57]

Two witnesses are necessary when deed is not acknowledged.[58]

[49] Pub. Stat. 1906, § 2577.
[50] Pub. Stat. 1906, § 20.
[51] Pub. Stat. 1906, § 21.
[52] Pub. Stat. 1906, § 2573.
[53] Pub. Stat. 1906, §§ 2921, 2934.
[54] Pub. Stat. 1906, § 2553.
[55] 2 Code 1904, §§ 2500, 2501, as amended by Laws 1906, p. 81, and Laws 1908, p. 126.
[56] 2 Code 1904, § 2501.
[57] 2 Code 1904, § 2501.
[58] 2 Code 1904, §§ 2500, 2501.

If an acknowledgment is taken without the United States, the officer shall affix his official seal.[59] Notary public shall affix date of expiration of term when making certificate within this state, and it shall be as follows: "My term of office expires on the —— day of ——," or words plainly showing when his term shall expire. If a woman appointed as notary legally changes her name, by marriage or otherwise, during term of office, her certificate shall say, "I was commissioned as notary as ——," or words plainly showing name in which commission was issued.[60]

A scroll will answer the purpose of a private seal.[61]

When husband and wife join in a conveyance, such writing shall operate to convey wife's right of dower, but shall not operate any further upon the wife or her representatives by means of any covenant or warranty contained therein which is not made with reference to her separate estate as a source of credit or which, if it relate to her said right of dower or to estate or interest conveyed other than her own, is not made with reference to her separate estate as a source of credit.[62]

Separate examination of married women is no longer required.[63]

Husband and wife must join to mortgage, incumber, or alienate homestead, unless for purchase-money or erection or repair of buildings thereon.[64]

§ 827. Washington.—Acknowledgments may be made within the state of Washington by a judge of the Supreme Court, clerk thereof, or deputy of such clerk; by a judge, clerk, or deputy clerk of superior court; justice of the peace, county auditor or his deputy, or qualified notary public.[65] Without the state and within the United States acknowledgments may be taken by any person authorized by the laws of the state or territory where taken, but in form prescribed for acknowledgments within the state of Washington, or by a commissioner appointed by the governor of this state.[66] Without the United States acknowledgments may be made before a minister plenipotentiary, secretary of legation, chargé d'affaires, consul general, consul, vice consul,

[59] 2 Code 1904, § 2501, p. 1264.
[60] 2 Code 1904, § 2501e, as amended by Act of March 4, 1910.
[61] 2 Code 1904, § 2841.
[62] 2 Code 1904, § 2502.
[63] 2 Code 1904, § 2501, p. 1269.
[64] 2 Code 1904, § 3634.
[65] 2 Annot. Codes and Stat. 1910, § 8754.
[66] 2 Annot. Codes and Stat. 1910, § 8755.

consular agent, or commercial agent appointed by the government of the United States, any notary public, any proper officer of any court of said country, or before the mayor or other chief magistrate of any city, town, or other municipal corporation therein.[67]

By the laws of 1890, all conveyances executed before then, having no subscribing witness nor witnesses thereto, were made valid.[68]

When acknowledgments taken without state are not made before a commissioner of this state, a clerk of a court of record of said state or territory, notary public or other officer having a seal, such acknowledgments shall have attached thereto a certificate of clerk of court of record or other certifying officer of said district or county wherein acknowledgment was taken, attesting the official character of officer and genuineness of his signature.[69] An officer acknowledging without the United States must use his seal, if he has one.[70] Private seals are abolished.[71]

All property acquired after marriage, except by gift, bequest, devise, or descent, is community property. The husband manages and controls it but can not sell or incumber it unless wife joins and acknowledges.[72] Property held by husband or wife at marriage, or afterward acquired by gift, bequest, devise, or descent, is his or her separate property, and either may incumber or convey as though unmarried.[73] A married woman acknowledges a conveyance between herself and husband as if unmarried.[74]

Husband and wife must join in execution and acknowledgment of instrument to convey or mortgage homestead.[75]

§ 828. West Virginia.—Acknowledgments may be taken within the state of West Virginia and other states of the United States by clerk of county court, president of county court within his county, justice of the peace and notary public within county,

[67] 2 Annot. Codes and Stat. 1910, § 8758.
[68] 2 Annot. Codes and Stat. 1910, § 8764.
[69] 2 Annot. Codes and Stat. 1910, § 8756.
[70] 2 Annot. Codes and Stat. 1910, § 8759.
[71] 2 Annot. Codes and Stat. 1910, § 8751.
[72] 2 Annot. Codes and Stat. 1910, §§ 5917, 5918.
[73] 2 Annot. Codes and Stat. 1910, §§ 5915, 5916.
[74] 2 Annot. Codes and Stat. 1910, § 8766.
[75] 1 Annot. Codes and Stat. 1910, § 534.

recorder, prothonotary or clerk of any court within the United States, or a commissioner appointed by the governor of this state and certified under his official signature and seal.[76] Without the United States acknowledgments may be made before a minister plenipotentiary, chargé d'affaires, consul general, consul, deputy consul, vice consul, consular agent, vice consular agent, commercial agent, or vice commercial agent, appointed by the government of the United States to any foreign country, proper officer of any court of such country, or the mayor or other chief magistrate of any city, town, or corporation therein.[77] Two witnesses are required if the deed is not acknowledged.[78]

A notary of this state need not affix his notarial seal to a certificate.[79] Deeds executed out of this state by a notary shall be certified under his official seal.[80] All officers taking acknowledgments without the United States shall certify under their official seals.[81] Every deed or power of attorney executed out of this state, the acknowledgment or proof of which is properly certified, if it be attested by a notary public, under his seal of office, that such instrument was made, entered, or kept in due form according to the law of the place where it was made, entered, or kept, and the official character of such notary be certified to by any court of record, or the mayor or other chief magistrate of any county, city, town, or borough, or under the great seal of the state, kingdom, province, island, or colony in which such notary may reside, shall be evidence in any court in this state.[82] A private seal is required, but a scroll will answer the purpose.[83]

Unless living apart, husband must join in wife's deed.[84] When husband and wife have signed writing purporting to convey real estate, the wife may acknowledge the same together with, or separately from, her husband.[85] When married woman acknowledges conveyance, such writing shall operate to convey her right of dower in real estate embraced therein.[86]

§ 829. **Wisconsin.**—Acknowledgments may be taken within the state of Wisconsin by a judge or clerk of a court of

[76] 1 Code Annot. 1906, §§ 1200, 1956, 2194, 2203, 2205; 2 Code Annot. 1906, §§ 3075, 3076.
[77] 2 Code Annot. 1906, § 3076.
[78] 2 Code Annot. 1906, § 3075.
[79] 1 Code Annot. 1906, § 2195.
[80] 2 Code Annot. 1906, §§ 3076, 3077.
[81] 2 Code Annot. 1906, § 3076.
[82] 2 Code Annot. 1906, § 3943.
[83] 1 Code Annot. 1906, § 291; 2 Code Annot. 1906, § 3048.
[84] 2 Code Annot. 1906, § 2952.
[85] 2 Code Annot. 1906, § 3077.
[86] 2 Code Annot. 1906, § 3079.

record, court commissioner, county clerk, notary public under official seal and with date of expiration of commission, justice of the peace, police justice, or United States court commissioner.[87] Without the state and within the United States acknowledgments may be made before any judge or clerk of a court of record, notary public, justice of the peace, master in chancery, or other officer authorized by the laws of such state, territory, or district to take acknowledgments of deeds therein, or before any commissioner appointed by the governor of this state for such purpose; and, if executed within the jurisdiction of any military post of the United States not within this state, it may be acknowledged before the commanding officer thereof. Acknowledgments may be according to laws of Wisconsin, or state, territory, or district where taken.[88] Without the United States acknowledgments may be taken according to laws of Wisconsin or laws of country where taken by a notary public, or other officer authorized by the laws of such country to take the acknowledgment of deeds therein, commissioner of deeds for Wisconsin, or before any minister plenipotentiary, minister extraordinary, minister resident, chargé d'affaires, commissioner, or consul of the United States, appointed to reside therein, under his hand, and if taken before a notary public, his seal of office shall be affixed thereto; and if such conveyance be executed and acknowledged according to the laws of such country, the certificate of acknowledgment shall certify the fact.[89] Chief clerk of commissioners of public lands may take the acknowledgment of said commissioners to all certificates and patents, and no fees shall be charged therefor.[90] All deeds heretofore acknowledged before a register of deeds are hereby declared valid.[91]

Two subscribing witnesses are required.[92] United States court commissioner taking acknowledgments within the state shall file with the clerk of the circuit court of the county in which he resides his certificate of appointment as such commissioner or a copy thereof certified by the clerk of the court which appointed him.[93] Unless acknowledgments taken without the state are ta-

[87] 1 Stat. 1898, § 2216, as amended by Laws 1901, ch. 38, § 1, and Laws 1907, ch. 568, p. 552.
[88] 1 Stat. 1898, § 2218.
[89] 1 Stat. 1898, § 2220; Laws 1905, ch. 201.
[90] 1 Stat. 1898, § 189, as amended by Laws 1901, ch. 432, § 5.
[91] Act April 24, 1911.
[92] 1 Stat. 1898, § 2216, as amended by Laws 1907, p. 552.
[93] 1 Stat. 1898, § 2216.

ken before a commissioner appointed by the governor of this state for that purpose, a clerk of a court of record with its seal attached, a notary public with his seal attached, or the commanding officer of a military post, such conveyance shall have attached thereto a certificate of the clerk or other proper certifying officer of a court of record of the county or district within which such acknowledgment was taken, under the seal of his office, setting forth official character of acknowledgment officer, genuineness of his signature, and his compliance with laws of such state, territory, or district, if not taken according to laws of Wisconsin.[94]

Seal required, but scroll, device, word "seal," or letters "L. S." will answer for deeds executed by any person, or private corporation not having a corporate seal. This does not apply to official or corporate seals provided by law. An instrument duly executed in corporate name of corporation, which has no corporate seal, by proper officers of corporation under any seal, shall be sufficient. Such conveyance shall be countersigned by secretary or clerk of corporation.[95] Every written instrument conveying realty, acknowledged or proved according to laws of this state in force at time of execution, if made prior to March 1, 1911, will be valid although not sealed.[96]

If wife is of full age, she may, by joint or separate deed, convey her lands in this state or any interest therein, and she shall acknowledge same.[97] A married woman acknowledges a conveyance executed by her alone, or in conjunction with her husband, as if unmarried.[98] A wife of eighteen years or upwards may bar her dower by joining in deed with her husband or by executing a separate deed, and acknowledging in either case.[99] Husband and wife must join to mortgage or alienate homestead or any interest therein.[1]

§ 830. Wyoming. — Acknowledgments may be taken within the state of Wyoming by a judge or clerk of court of record, United States commissioner appointed under and by authority of the United States, county clerk, justice of the peace, notary public, or clerks of United States circuit and district

[94] 1 Stat. 1898, § 2219.
[95] 1 Stat. 1898, § 2215, as amended by Laws 1907, p. 552.
[96] Laws 1911, ch. 215.
[97] 1 Stat. 1898, § 2221.
[98] 1 Stat. 1898, § 2224.
[99] 1 Stat. 1898, §§ 2221, 2222.
[1] 1 Stat. 1898, § 2203, as amended by Laws 1905, ch. 45, § 1.

courts within and for Wyoming. The officer shall indorse on the acknowledgment a certificate, and the date of taking same, under his hand and official seal, if he has one.[2] Without the state and within the United States acknowledgments of deeds executed according to the laws of this state may be taken before the clerk of a court of record, county clerk, commissioner of deeds, or officer authorized by law to take acknowledgments where taken.[3] Without the United States acknowledgments of deeds executed according to Wyoming laws may be taken by a consul general, consul, or vice consul of the United States, and certified under his hand and official seal or the consulate seal; and if there be no such seal, it should be so stated in the certificate.[4]

One witness is required.[5]

If a deed is executed in another state according to the laws of this state, no other authentication beyond official seal is necessary. Otherwise, the clerk of a court of record or county clerk of the same place, having a seal, must certify to the official character and genuineness of signature of officer.[6]

Private seals are abolished.[7]

The separate deed of the husband shall convey no interest in wife's lands.[8] A married woman may convey her real estate as if she were unmarried.[9] A nonresident wife shall join husband in conveying real estate situated within this state, and conveyance shall have same effect as if she were sole. Acknowledgment or proof of execution may be as if sole.[10]

No homestead may be sold, mortgaged, encumbered, or disposed of unless the wife of owner shall, separate and apart from her husband, freely and voluntarily sign and acknowledge the instrument after officer taking acknowledgment has apprised her of her rights and of the effect of signing such instrument. No deed shall be construed as releasing homestead unless it contains a clause expressly releasing such right. In such case, certificate of acknowledgment shall contain a clause substantially as follows, "Including the release and waiver of the right of homestead."[11]

[2] Comp. Stat. 1910, §§ 3633, 3635.
[3] Comp. Stat. 1910, §§ 3636, 3637.
[4] Comp. Stat. 1910, § 3638.
[5] Comp. Stat. 1910, § 3633.
[6] Comp. Stat. 1910, §§ 3633, 3636.
[7] Comp. Stat. 1910, § 3641.
[8] Comp. Stat. 1910, § 3916.
[9] Comp. Stat. 1910, § 3624.
[10] Comp. Stat. 1910, § 3639.
[11] Comp. Stat. 1910, § 3662.

CHAPTER XXXIII

DIGEST OF STATUTES OF DESCENT

SEC.
835. Alabama.
836. Alaska.
837. Arizona.
838. Arkansas.
839. California.
840. Colorado.
841. Connecticut.
842. Delaware.
843. District of Columbia.
844. Florida.
845. Georgia.
846. Idaho.
847. Illinois.
848. Indiana.
849. Iowa.
850. Kansas.
851. Kentucky.
852. Louisiana.
853. Maine.
854. Maryland.
855. Massachusetts.
856. Michigan.
857. Minnesota.
858. Mississippi.
859. Missouri.
860. Montana.
861. Nebraska.
862. Nevada.
863. New Hampshire.
864. New Jersey.
865. New Mexico.
866. New York.
867. North Carolina.
868. North Dakota.
869. Ohio.
870. Oklahoma.
871. Oregon.
872. Pennsylvania.
873. Rhode Island.
874. South Carolina.
875. South Dakota.
876. Tennessee.
877. Texas.
878. Utah.
879. Vermont.
880. Virginia.
881. Washington.
882. West Virginia.
883. Wisconsin.
884. Wyoming.

§ 835. **Alabama.**—In Alabama the real estate of an intestate descends, subject to dower and payment of debts, as follows: 1. To the children and their descendants per stirpes in equal shares. 2. If there be no children or their descendants, then the estate goes to the father and mother of the intestate in equal shares. 3. When only one parent, the other half goes to the brothers and sisters of the intestate and their descendants. 4. If there be but one surviving parent, and no children or their descendants, nor brothers and sisters or their descendants, the entire estate goes to the surviving parent. 5. If there be no children or their descendants, and no father or mother, then to the brothers and sisters and the descendants of such as are dead, in equal parts. 6. If there are no descendants, nor parents, nor brothers or sisters or their descendants, the whole estate shall go to the surviving spouse. 7. If there are no children and no

father or mother nor brothers or sisters and their descendants, or surviving spouse, then to the next of kin in equal degree in equal shares. 8. If there be none of the above mentioned kindred, or husband or wife surviving, the property escheats to the state.[1] 9. There is no representation among collateral kindred except with the descendants of the brothers and sisters of the intestate.[2] 10. No distinction is made between the whole and the half-blood of the same degree, unless the inheritance came to the intestate by descent, devise, or gift from or of some one of his ancestors; in which case all those who are not of the blood of such ancestor are excluded from the inheritance, as against those of the same degree.[3] 11. Posthumous children inherit as if born in the lifetime of the intestate; but no right of inheritance accrues to any other person than the children of the intestate unless born at his death.[4] 12. An illegitimate child inherits from its mother as if born in lawful wedlock; and the mother or kindred of an illegitimate child on the part of the mother which, in default of children of such illegitimate child, or their descendants, is entitled to inherit his estate.[5] 13. Children legally adopted, inherit from their adopted parents.[6] 14. Degrees of kindred are computed according to the rules of civil law.[7] 15. Any estate, real or personal, which has been given by an intestate in his lifetime, as an advancement to any child or other lineal descendant must be considered as a part of the estate of such intestate so far as regards the division and distribution thereof, and must be taken by such child or descendant towards his or her share of the estate. In no case is such child or descendant compelled to refund any part of such advancement. When such advancement is made in real estate it is to be considered a part of the real estate to be divided; when in personal property, as part of the personal estate. If in either case it exceeds his share of the real or personal property, he receives so much less of the other as will make his whole share equal. The value of the advancement is to be taken as expressed in the conveyance or charge thereof by the intestate or in the receipt given by the person receiving the advancement; in default of such expression or receipt the value is to be estimated as of the time when given.[8] 16. An

[1] Code 1907, § 3754.
[2] Code 1907, § 3756.
[3] Code 1907, § 3758.
[4] Code 1907, § 3759.
[5] Code 1907, § 3760.
[6] Code 1907, § 5202.
[7] Code 1907, § 3757.
[8] Code 1907, §§ 3767-3777.

alien has the same rights of inheritance in intestate property as a citizen.[9] 17. A surviving widow is entitled to dower in all the lands of her deceased husband of which he was seised at any time during coverture. The quantity of her interest is as follows: (1) When the husband dies leaving no lineal descendants and his estate is solvent she is entitled to be endowed of one-half of his lands. (2) When his estate is insolvent, to one-third part thereof. (3) When there are lineal descendants, one-third part whether the estate be solvent or not. But if a married woman is possessed of a separate estate at the death of her husband, and if such estate is greater than her dower interest, she shall have no dower; but if less, she shall have so much dower as will make her separate estate equal to the whole dower interest.[10] 18. Where the wife dies intestate the husband is entitled to one-half of her personalty absolutely and life estate in the realty by right of curtesy.[11]

§ 836. Alaska.—In Alaska the real estate of an intestate owner descends as follows: 1. In equal shares to his or her children and to the issue of any deceased child by right of representation; if there be no child of the intestate living at the time of his or her death, to all his or her other lineal descendants; and if all such descendants are in the same degree of kindred to the intestate, they shall take such realty equally; or otherwise, according to the right of representation. 2. If the intestate leave no lineal descendants, to his wife, or in case the intestate be a married woman and leave no lineal descendants, to her husband; and if the intestate leave no wife or husband, then to his or her father. 3. If the intestate leave no lineal descendants, nor husband, nor wife, nor father, such realty shall descend in equal shares to the brothers and sisters of the intestate, and to the issue of any deceased brothers or sisters by right of representation; but if intestate leave a mother also, she takes an equal share with such brothers and sisters. 4. If the intestate leave no lineal descendants, nor husband, nor wife, nor father, brother, nor sister, living at his or her death, such realty descends to his mother to the exclusion of issue of the deceased brothers or sisters of the intestate. 5. If the intestate leave no lineal descend-

[9] Code 1907, § 2831.
[10] Code 1907, §§ 3813, 3814.
[11] Code 1907, §§ 3763, 3765.

ants, nor husband nor wife, nor father, mother, brothers, nor sisters, such realty descends to his or her next of kin in equal degree, provided, however, that when there are two or more collateral kindred in equal degree, but claiming through different ancestors, those who claim through the nearest ancestor shall be preferred to those claiming through a more remote ancestor. 6. If the intestate shall leave one or more children, and the issue of one or more deceased child or children, and any of such surviving children shall die under age without having been married, all such realty that came to such deceased child by inheritance from such intestate shall descend in equal shares to the other children of such intestate, and to the issue of any other children of such intestate who shall have died, by right of representation; but if all the other children of such intestate shall be also dead, and any of them shall have left issue, such realty so inherited by such deceased child shall descend to all the issue of such other children of the intestate in equal shares, if they are in the same degree of kindred to such deceased child; otherwise they shall take by right of representation. 7. If the intestate leave no lineal descendants or kindred, such real estate shall escheat to the United States.[12] 8. An adopted child shall be deemed, for the purposes of inheritance, the same as if he had been born in lawful wedlock, except that he shall not be capable of inheriting property expressly limited to heirs of the body or bodies of the adoptive parent or parents, nor shall he inherit property from the lineal or collateral kindred of such parent or parents by right of representation.[13] 9. An alien may acquire lands by inheritance, but such lands must be sold within ten years to a bona fide purchaser for value. 10. When any man and his wife shall be seised in her right of any estate of inheritance in lands, the husband shall, on the death of his wife, hold the lands for his life as tenant thereof by curtesy, although such husband and wife may not have had issue born alive.[14] 11. Illegitimate children inherit from the mother but not through her. The mother inherits from her illegitimate child who dies without leaving a widow, husband, or lawful issue. Illegitimate children are legitimatized by the marriage of their parents.[15] 12. Posthumous children are considered

[12] Carter's Ann. Code 1900, § 168.
[13] Carter's Ann. Code 1900, ch. 4.
[14] Carter's Ann. Code 1900, ch. 8.
[15] Carter's Ann. Code 1900, ch. 5, §§ 171, 172.

as living at the death of their parent.[16] 13. Kindred of the half-blood inherit equally with those of the whole-blood in the same degree.[17] 14. Degrees of kindred are computed according to the civil law.[18] 15. The widow is entitled to the use during her life of one-third part in value of all the lands whereof her husband died seised of an estate of inheritance. Dower may be barred by jointure settled on her with her assent before marriage, providing such jointure consists of a freehold estate in lands, for at least the life of the wife, to take effect in possession or profit immediately upon the death of the husband.[19] 16. Any estate, real or personal, that may have been given by the intestate in his lifetime, as an advancement to any child or other lineal descendant, shall be considered as a part of the estate of the intestate, so far as regards the division and distribution thereof among his issue, and shall be taken by such child or other descendant toward his share of the estate of the intestate. If the amount of such advancement shall exceed the share of the heir so advanced, he shall be excluded from any further portion in the division and distribution of the estate, but he may not be required to refund any part of such advancement; and if the amount so received shall be less than his share, he shall be entitled to as much more as will give him his full share of the estate of the deceased. If such advancement be made in real estate, the value thereof shall, for the purposes mentioned herein, be considered a part of the real estate to be divided; and if it be personal estate, it shall be considered a part of the personal estate; and if in either case it shall exceed the share of real estate and personal estate respectively, that would have come to the heir so advanced, he shall not refund any part of it, but shall receive so much less out of the other part of the estate as will make his whole share equal to those of the other heirs who are in the same degree with him.[20]

§ 837. **Arizona.**—In Arizona, a person dying intestate, and leaving no surviving husband or wife, his estate shall descend and pass in parcenary to his kindred, male and female, in the following course: 1. To his children and descendants. 2. If there

[16] Carter's Ann. Code 1900, ch. 5, § 181.
[17] Carter's Ann. Code 1900, ch. 18, § 173.
[18] Carter's Ann. Code 1900, ch. 18, § 173.
[19] Carter's Ann. Code 1900, ch. 7.
[20] Carter's Ann. Code 1900, ch. 5.

be no children nor their descendants, then to his father and mother in equal portions. But if only the father or mother survive the intestate, then his estate shall be divided into two equal portions, one of which shall pass to such survivor, and the other half shall pass to the brothers and sisters of the deceased and to their descendants; but if there be none then the whole estate shall be inherited by the surviving father or mother. 3. If there be neither father nor mother, then the whole of such estate shall pass to the brothers and sisters of the intestate and to their descendants. 4. If without kindred then the whole estate shall be divided into two moieties, one of which shall go to the paternal and the other to the maternal kindred; and if only one of these be living then the estate shall be divided into two equal parts, one of which shall go to the survivor and the other to the descendants of such deceased's grandfather or grandmother. If there be no surviving grandfather or grandmother, then the whole estate shall go to their descendants.[21] 5. Where any person shall die intestate and shall leave a husband or wife, the estate shall descend in the following course: (1) If the deceased have a child or children, or their descendants, the surviving husband or wife shall be entitled for life to one-third of the land of the intestate, with remainder to the child or children, or their descendants. (2) If deceased have no child or children, or their descendants, then the surviving husband or wife shall be entitled to one-half of the land of the intestate without remainder to any person, and the other half shall pass and be inherited according to the rules of descent and distribution; provided, however, that if the deceased have neither father nor mother, then the surviving husband or wife shall be entitled to the whole of the estate.[22] 6. On the death of the husband one-half of the community property shall go to the surviving wife, the other half is subject to testamentary disposition by the husband, but in the absence of such disposition, that half goes to the descendants equally if such descendants are in the same degree of kindred to the decedent, otherwise it goes according to the right of representation; in the absence of such disposition and descendants, it is subject to distribution in the same manner as his separate property. On the death of the wife one-half of the community property goes to

[21] Rev. Stat. 1913, § 1091.

[22] Rev. Stat. 1913, § 1092.

the surviving husband, the other half is subject to testamentary disposition by the wife, and in the absence of such disposition that half goes to the descendants equally if such descendants are of the same degree of kindred to the decedent, otherwise it goes according to the right of representation. In the absence of such disposition by the wife, and descendants, it is distributed in the same manner as separate property of the husband.[23] 7. Aliens can not acquire property by descent, except mineral lands.[24] 8. Ancestral property not recognized, except that if the intestate was the legally adopted heir of another and leave no husband, wife, or children, the property derived by gift, devise, or descent from the person who adopted him shall descend to the heirs of such person.[25] 9. Collaterals of the half-blood take half portions when they share with the whole-blood. When there are no heirs of the whole-blood to share with they take the whole portion.[26] 10. Only posthumous children who are lineal descendants of the intestate can inherit his property.[27] 11. Illegitimate children inherit from and through their mother. Marriage of the parents of an illegitimate child and the subsequent recognition of such child by the father, renders such child legitimate.[28] 12. Children or their descendants to whom advancements have been made, must bring such advancements into hotchpot, and account therefor in value as of the date of the advancement.[29] 13. All heirs in the same degree take per capita; but where some of those in the same degree are dead and their issue are enttiled to partition, such issue shall take per stirpes.[30]

§ 838. **Arkansas.**—In Arkansas, upon the death of an intestate, his real and personal property shall be distributed in parcenary to his male and female kindred, subject to his debts and widow's dower, as follows: 1. To children and their descendants in equal parts. 2. If there be no children, then to the father, then to the mother. 3. To the brothers and sisters and their descendants in equal parts. 4. To the grandfather, grandmother, uncles, and aunts, and their descendants, in equal parts, and so on without end, passing to the nearest lineal ancestor and their children and their descendants in equal parts.[31] 5. If there are

[23] Rev. Stat. 1913, § 1100.
[24] Rev. Stat. 1913, § 4716.
[25] Rev. Stat. 1913, § 1093.
[26] Rev. Stat. 1913, § 1095.
[27] Rev. Stat. 1913, § 1097.
[28] Rev. Stat. 1913, § 1104.
[29] Rev. Stat. 1913, § 1098.
[30] Rev. Stat. 1913, § 1099.
[31] Kirby's Dig. of Stats. 1904, § 2636.

no paternal or maternal kindred the whole shall go to the surviving husband or wife, and in default of these, it shall escheat to the state.[32] 6. In case there be no descendants, and the estate came from the father of the intestate, it shall descend to the father and his heirs; if it came from the mother, it shall descend to her and her heirs. But if the estate be a new acquisition it shall ascend to the father for his lifetime, and then in remainder to the collateral kindred as above stated. In default of a father, then to the mother for her lifetime, then to the collateral heirs, the brothers and sisters; and the descendants of the father are preferred to those of the mother.[33] 7. If a husband die, leaving a widow and no children, such widow shall be endowed in fee simple of one-half of the real estate of which such husband died seised, where said estate is a new acquisition, and not an ancestral estate; and one-half of the personal estate, absolutely and in her own right, as against collateral heirs, but, as against creditors, she shall be endowed with one-third of the real estate in fee simple if a new acquisition and not ancestral, and one-third of the personal property absolutely. Provided, if the real estate of the husband be an ancestral estate she shall be endowed in a life estate of one-half of said estate as against collateral heirs, and one-third as against creditors.[34] 8. Posthumous children of the intestate inherit as if born in the lifetime of the intestate; but no right of inheritance accrues to any other heirs unless born in the lifetime of the intestate.[35] 9. Illegitimate children may inherit from the mother.[36] 10. Relatives of the half and whole-blood share alike; but where the inheritance comes from an ancestor, those not of the blood of the ancestor are excluded.[37] 11. In cases not provided for, the inheritance descends according to the course of the common law.[38] 12. A person may make another his heir-at-law by a declaration in writing, acknowledged by any proper officer and recorded.[39] 13. When the inheritance descends to several, they inherit as tenants

[32] Kirby's Dig. of Stats. 1904, § 3642.
[33] Kirby's Dig. of Stats. 1904, § 2645.
[34] Kirby's Dig. of Stats. 1904, ch. 55.
[35] Kirby's Dig. of Stats. 1904, § 2637.
[36] Kirby's Dig. of Stats. 1904, § 2638.
[37] Kirby's Dig. of Stats. 1904, § 2647.
[38] Kirby's Dig. of Stats. 1904, § 2648.
[39] Kirby's Dig. of Stats. 1904, § 2658.

in common.[40] 14. Advancements made to any child or other lineal descendant must be considered as a part of the estate so far as regards the division and distribution thereof, and must be taken by such child or descendant toward his share of the estate. In no case is he compelled to refund any part of the advancement. When such advancement is made in real estate it is to be considered part of the real estate to be divided; when in personal estate, as part of the personal estate. If in either case it exceeds his share of the realty or personalty, he receives so much less of the other as will make his whole share equal. The value of the advancement is to be taken as expressed in the conveyance or charge thereof by the intestate, or in the receipt given by the person advanced; failing such expression it is estimated according to the value when given.[41]

§ 839. **California.**—In California the separate property of an intestate descends to his heirs in the following course: 1. If the decedent leave a surviving husband or wife and only one child, or the lawful issue of one child, in equal shares to the surviving husband or wife and child, or issue of such child. 2. If a surviving husband or wife and more than one child, or one child living and the lawful issue of one or more deceased children, one-third to the surviving husband or wife, and the remainder in equal shares to the children and to the lawful issue of any deceased child, by right of representation; but if there be no child living, the remainder goes to all the lineal descendants, and if they are in the same degree of kinship to the decedent, they share equally, otherwise by right of representation. 3. If the decedent leaves no surviving husband or wife, the whole estate goes to the children and their issue by right of representation, share and share alike. 4. If there be no issue, the estate goes one-half to the surviving husband or wife, and the other half to the father and mother in equal shares; or, if one be dead, to the survivor. 5. If there be no father or mother, then their one-half goes in equal shares to the brothers and sisters and to the children or grandchildren of any deceased brother or sister, by right of representation. 6. If there be no issue, or husband or wife, the estate goes to the father and mother, or the survivor,

[40] Kirby's Dig. of Stats. 1904, § 2649.

[41] Kirby's Dig. of Stats. 1904, §§ 2650-2653.

or if both be dead, then in equal shares to the brothers and sisters and to the children or grandchildren of any deceased brother or sister by right of representation. 7. If a decedent leave a surviving husband or wife, and neither issue, father, mother, brother, or sister, nor children nor grandchildren of brother or sister, the whole estate goes to the surviving husband or wife. 8. If the decedent leave neither issue, husband, wife, father, mother, brother, or sister, the estate must go to the next of kin in equal shares, except those claiming through nearest ancestors preferred. 9. If the decedent leaves several children, or one child and the issue of one or more children, and any such surviving child dies under age, and not having been married, all the estate that came to the deceased child by inheritance from such decedent descends in equal shares to the other children of the same parent, and to the issue of any such other children, who are dead, by right of representation. 10. If at the death of such child, who dies under age, not having been married, all the other children of his parents are also dead, and any of them have left issue, the estate that came to such child by inheritance from his parents descends to the issue of all other children of the same parent; and if all the issue are in the same degree of kindred to the child, they share the estate equally, otherwise they take according to the right of representation. 11. If the deceased is a widow, or widower, and leave no issue, and the estate, or any portion thereof, was common property of such decedent and his or her deceased spouse, while such spouse was living, such property goes in equal shares to the children of such deceased spouse and to the descendants of such children by right of representation, and if none, then one-half of such common property goes to the father and mother of such decedent in equal shares, or to the survivor of them if either be dead, or if both be dead, then in equal shares to the brothers and sisters of such decedent and to the descendants of any deceased brother or sister by right of representation, and the other half goes to the father and mother of such deceased spouse in equal shares, or to the survivor of them if either be dead, or if both be dead then in equal shares to the brothers and sisters of such deceased spouse and to the descendants of any deceased brother or sister by right of representation. 12. If the estate, or any portion thereof, was separate property of such deceased spouse, while living, and came

to such decedent from such spouse by descent, devise, or bequest, such property goes in equal shares to the children of such spouse and to the descendants of any deceased child by right of representation, and if none, then to the father and mother of such spouse, in equal shares, or to the survivor of them if either be dead, or if both be dead, then in equal shares to the brothers and sisters of such spouse and to the descendants of any deceased brother or sister by right of representation. 13. If the decedent leave no husband, wife, or kindred, and there be no heirs to take his estate, or any portion thereof, under the foreign rules, the same escheats to the state.[42] 14. The community property is distributed as follows: Upon the death of the husband, one-half goes to the surviving wife, and if the husband dies intestate, the other half is distributed as separate property, except that the widow does not share in that with descendants. Upon the death of the wife the entire community property, without administration, belongs to the surviving husband.[43] 15. An adopted child and its adoptive parent sustain toward each other the legal relations of parent and child, and inherit from each other.[44] 16. Every illegitimate child is in all cases an heir of his mother, and inherits in the same manner as if born in lawful wedlock; but does not represent father or mother to inherit from any kindred, unless the parents have married, and the father, after such marriage, has acknowledged him or adopted him. And the issue of marriages null in law are legitimate. If an illegitimate child, unacknowledged and unadopted by the father, die intestate without issue, his estate descends to his mother or her heirs. 17. Kindred of the half-blood inherit equally with those of the whole-blood in the same degree, unless the inheritance came to the intestate by descent, devise, or gift of some one of his ancestors, in which case all those who are not out of the blood of such ancestors must be excluded from such inheritance.[45] 18. Advancements made to children or other lineal descendants must be accounted for, but need not be refunded. All gifts and grants are advancements, if so expressed in the instrument of advancement or acknowledged as such by the person to whom the gift has been made. If the value of the gift be expressed it will be so

[42] Civ. Code 1915, § 1386.
[43] Civ. Code 1915, §§ 1384, 1386, 1401, 1402.
[44] Civ. Code 1915, § 228.
[45] Civ. Code 1915, § 1394.

held in the distribution; otherwise the value of the advancement is taken as of the date of the gift.[46]

§ 840. Colorado.—In Colorado, where the intestate leave a husband or wife surviving the estate descends as follows: 1. If there are no children or their descendants the whole estate goes to the surviving husband or wife. 2. If there be surviving children or descendants of children, then one-half goes to the surviving husband or wife and the other half to the children or descendants of children. 3. If there be no surviving husband or wife the estate descends as follows: (1) To the surviving children or descendants of children who are dead, such descendants collectively taking the share which the parents, if living, would have taken. (2) If there be no children nor their descendants, then to the father and mother, share and share alike; if there be no father, then to the mother; if no mother, then to the father; and if neither father nor mother, then to the brothers and sisters, and to the descendants of brothers and sisters who are dead, the descendants collectively taking the share of their immediate ancestors in equal parts. (3) If none of the relatives above enumerated are living, then to the grandfather, grandmother, uncles, aunts, and their descendants, the descendants taking collectively the share of their immediate ancestors in equal parts. (4) If none of the above enumerated relatives be living, then to the nearest lineal ancestors and their descendants, the descendants taking collectively the share of their immediate ancestors in equal parts.[47] 4. Posthumous children inherit in like manner as if born in the lifetime of the intestate.[48] 5. Children of the half-blood inherit the same as children of the whole-blood; but collateral relatives of the half-blood inherit only half the measure of collateral relatives of the whole-blood.[49] 6. Adopted children inherit as if born in lawful wedlock; but upon the decease of the foster-parent or parents and the subsequent decease of the adopted child or children without issue, the property of such adopting parents descends to his or her next of kin, and not to the next of kin of such adopted child.[50] 7. Illegitimate children inherit the same as those born in wedlock if the

[46] Civ. Code 1915, §§ 1395-1399.
[47] Mills' Ann. Stat. 1912, § 7838.
[48] Mills' Ann. Stat. 1912, § 7839.
[49] Mills' Ann. Stat. 1912, § 7840.
[50] Mills' Ann. Stat. 1912, § 7840.

parents subsequently intermarry and such children be recognized after such intermarriage by the father to be his.[51]

§ 841. **Connecticut.**—In Connecticut the estate of the intestate descends in the following course: 1. To the children of the intestate and the legal representatives of those who may be dead. 2. If there be no children or any legal representatives of children, then to the parent or parents of the intestate. 3. If there be no children or any representatives of children, nor parent, then equally to the brothers and sisters of the intestate, of the whole-blood and those who legally represent them. 4. If there be none of the above, then equally to the brothers and sisters of the half-blood and those who equally represent them. 5. If there be none of the above mentioned kindred, then equally to the next of kin in equal degree, kindred of the whole-blood to take in preference to kindred of the half-blood in equal degree, and no representatives to be admitted among collaterals after the representatives of brothers and sisters. 6. All the real estate of the intestate which came to him by descent, gift or devise from any kinsman shall go: (1) Equally to the brothers and sisters of the intestate and those who legally represent them of the blood of the person or ancestor from whom such estate came or descended; and (2) in case there be no brothers and sisters or legal representatives as aforesaid, then equally to the children of such person or ancestor and those who legally represent them; and (3) if there be no such children or their representatives, then equally to the brothers and sisters of such person or ancestor and those who legally represent them; and (4) if there be none such, then it shall be divided in the same manner as other real estate; provided that when such intestate shall be a minor, and shall not leave any lineal descendants or brother or sister of the whole-blood, or any descendants of such brother or sister, or any parent, such estate shall be distributed equally to the next of kin to the intestate of the blood of the person or ancestor from whom such estate came or descended; and if there be no such kindred then to the next of kin of the intestate generally.[52] 7. Illegitimate children are legitimatized by the subsequent marriage of their parents and recognition of them as their own.[53] 8. The right of in-

[51] Mills' Ann. Stat. 1912, § 7844.
[52] Gen. Stat. 1902, §§ 396-398.
[53] Gen. Stat. 1902, § 396.

heritance of nonresident aliens is limited.[54] 9. An adopted child inherits from its adoptive parents and their relatives and not from its natural parents and their relatives, and the adopting parent inherits from such child. When a surviving parent of a minor child shall remarry, or when a single person who has an adopted minor child shall marry, the other party to such marriage or remarriage may adopt such minor child, and such child shall then inherit from such adopting parent and relatives instead of from relatives of any parent deceased at the time of such adoption.[55] 10. When any child or other lineal descendant has received an advancement, he, or his representative shall receive only so much of the estate as will, together with the advancement, make his share equal to what he would have received had no advancement been made.[56]

§ 842. **Delaware.**—In Delaware, when any person dies intestate, having title or right, legal or equitable, in fee simple, to any lands, tenements or hereditaments, such estate descends, subject to dower or curtesy, in coparcenary as follows: 1. To the children of the intestate; and the lawful issue of any deceased child, by right of representation. 2. If there be no children or lawful issue of deceased children, then to the brothers and sisters of the intestate of the whole-blood and their issue, by right of representation. 3. Where the estate came to the intestate by descent or devise from his parent or ancestor, and there be no issue of the intestate, then to his brothers and sisters and their issue by right of representation, provided that brothers and sisters of the whole-blood and their issue, shall be preferred to brothers and sisters of the half-blood and their issue. 4. If the intestate left no issue or their descendants, nor brothers or sisters or the issue of any deceased brother or sister, then the estate goes to the intestate's father. 5. If there be neither children or their issue, brothers or sisters or their issue, nor father, the estate goes to the mother of the intestate. 6. If there be no such kindred as above mentioned, then the estate goes to the next of kin in equal degree, and their issue by right of representation; provided that collateral kindred, claiming through a nearer common ancestor, shall be preferred to those claiming through one more remote.[57]

[54] Gen. Stat. 1902, §§ 4410, 4411.
[55] Gen. Stat. 1902, § 234.
[56] Gen. Stat. 1902, § 396.
[57] Rev. Code 1915, § 3267.

7. Posthumous children are considered as though living at the death of the intestate.[58] 8. When an illegitimate child dies intestate and without lawful issue, the mother, if living, inherits the estate, and if she be dead, it goes to her lawful issue, share and share alike.[59] 9. Aliens take title to real estate by inheritance the same as citizens.[60] 10. Children legally adopted have the same rights of inheritance as natural children.[61]

§ 843. **District of Columbia.**—In the District of Columbia the lands, tenements, and hereditaments of an intestate descends as follows: 1. To the child or children and their descendants, if any, equally. 2. If there be no child or children or their descendants, and the estate descended to the intestate on the part of the father, then to the brothers and sisters of the intestate of the blood of the father and their descendants equally. 3. If there be no brother or sister as aforesaid, or a descendant from such brother or sister, then to the grandfather on the part of the father. 4. If the estate descended to the intestate on the part of the mother, then it follows the mother's line. 5. If the estate vested in the intestate by purchase, it descends: (1) To the children or their descendants, (2) to the brothers and sisters of the whole-blood of the intestate and their descendants in equal degree, equally, (3) to brothers and sisters of the half-blood and their descendants, (4) to the father, (5) to the mother, (6) to the grandfather and his descendants. 6. If there be no descendants or kindred, then it goes to the husband or wife, or his or her kindred. 7. Aliens may inherit real estate the same as citizens. 8. Advancements made to any child or other lineal descendant must be brought into hotchpot, if there be another child or children unprovided for. 9. Illegitimate children are legitimatized by the subsequent marriage of their parents and acknowledgment of such children as legitimate by the father. 10. Posthumous children of the intestate and their descendants inherit as if born at the death of the intestate.

§ 844. **Florida.**—In Florida, whenever any person having title to real estate of inheritance shall die intestate as to such estate, it shall descend in parcenary to the male and female kindred as follows: 1. To the children or their descendants and the

[58] Rev. Code 1915, § 3268.
[59] Rev. Code 1915, ch. 28, § 27.
[60] Rev. Code 1915, § 3194.
[61] Rev. Code 1915, § 3067.

husband, if the decedent be a married woman and the husband survive her. 2. If there be no children or their descendants, and the decedent be a married woman, and her husband survive her, all the property, real and personal, shall go to the husband. 3. If there be no children or their descendants, and the decedent be a married man and his wife survive him, all his property, real and personal, shall go to the wife. 4. If there be no children or their descendants, and no husband or wife, then to the father and mother in equal parts or all to the survivor. 5. If there be no children or their descendants, nor husband or wife, nor father or mother, then to the brothers and sisters and their descendants, or such of them as there may be. 6. If there be none of the aforesaid, the inheritance shall be divided into moieties, one of which shall go to the paternal, the other to the maternal kindred in the following course, namely: (1) To the grandfather. (2) If no grandfather, then to the grandmother, uncles and aunts on the same side, and their descendants, or such of them as there be. (3) If there be no grandmother, uncle or aunt, or their descendants, then to the great-grandfathers, or great-grandfather if there be but one. (4) If there be no great-grandfathers, then to the great-grandmothers, or great-grandmother if there be but one; and the brothers and sisters of the great-grandfathers and great-grandmothers and their descendants, or such of them as there be. (5) And so in other cases without end, passing to the nearest lineal male ancestors, and for want of them, to the lineal female ancestors, in the same degree, and the descendants of such male and female ancestors, or such of them as there may be.[62] 7. Adopted children inherit as heirs at law.[63] 8. Aliens have the same rights to inheritance as citizens.[64] 9. The homestead descends to the widow if there be no children; but if there be a child or children, she shall be entitled to dower or a child's part as she may elect.[65] 10. Posthumous children of the intestate inherit the same as if born at the death of the intestate.[66] 11. Illegitimate children are capable of inheriting or transmitting inheritance on the part of the mother.[67] 12. Advancements made to children must be brought into hotchpot, and the advancement must be valued as of the date when made and not at the death of

[62] Gen. Stat. 1906, § 2295.
[63] Gen. Stat. 1906, § 2301.
[64] Gen. Stat. 1906, § 2291.
[65] Gen. Stat. 1906, § 2297.
[66] Gen. Stat. 1906, § 2290.
[67] Gen. Stat. 1906, § 2292.

the intestate.[68] 13. Collaterals of the half-blood inherit only half as much as collaterals of the whole-blood.[69]

§ 845. Georgia.—In Georgia the estate of an intestate descends as follows: 1. If the intestate leave a husband surviving he takes the entire estate, unless she leave children or descendants of children, in which event he and the children take share and share alike, but descendants of children take per stirpes. 2. If the intestate leave a wife surviving she takes the entire estate, unless there are children, or those representing children deceased, in which event the wife shall have a child's part, but if there are more than five children or their descendants, the wife shall have one-fifth part of the estate. If the wife elect to take dower, she has no further interest in the realty. 3. Children and their descendants stand in the first degree from the intestate and inherit equally, accounting for advancements. The lineal descendants of children stand in the place of their deceased parents, and in all cases of inheritance from a lineal ancestor, the distribution is per stirpes. 4. Brothers and sisters of the intestate stand in the second degree, and inherit, if there be no widow or surviving husband, nor children or their descendants. The half-blood on the paternal side inherit equally with the whole-blood. If there be no brother or sister of the whole or half-blood on the paternal side, then those of the half-blood on the maternal side inherit. Children or grandchildren of deceased brothers and sisters stand in the place of their parents; but there is no representation further than this among collaterals. 5. The father inherits equally with brothers and sisters and stands in the same degree. If there be no father, but a mother alive, she inherits as the father would. 6. In all degrees more remote than the foregoing the paternal and maternal next of kin stand on equal footing. 7. First cousins, uncles and aunts stand next in degree and inherit equally. 8. The more remote degrees are determined by the rules of the canon law, as in force in the English courts prior to July 4, 1776.[70] 9. An adopted child inherits from its adoptive parents, but such parent does not inherit from such child.[71] 10. Where any persons who could inherit from each other are killed or lost, and it is impossible to determine which died first, the property of each

[68] Gen. Stat. 1906, § 2302.
[69] Gen. Stat. 1906, § 2299.
[70] Code 1911, §§ 3930, 3931.
[71] Code 1911, § 3016.

shall descend to their respective heirs, excluding each as heir of the other, but nothing herein contained shall be held to prevent children of either from inheriting as heirs of the other.[72] 11. Illegitimate children inherit from their mother and from each other, children of the same mother, in the same manner as if legitimate. If a mother have both legitimate and illegitimate children, they shall inherit alike the estate of their mother. If an illegitimate child die, leaving no issue, his mother, brothers and sisters inherit his estate equally. If an illegitimate child die intestate, leaving no widow, or any lineal descendants, or illegitimate brother or sister, or descendant of a brother or sister, or mother, but shall leave a brother or sister of legitimate blood, such brother or sister, or descendant of such brother or sister inherits the estate; in default of any such person, brothers and sisters of the mother of such illegitimate child, or their descendants, or the maternal grandparents of such illegitimate inherits the estate.[73]

§ 846. **Idaho.**—The real and personal property of an intestate passes to and is distributed among his heirs, subject to the payment of his debts, as follows: 1. If decedent leave a surviving husband or wife and only one child, in equal shares to such surviving husband or wife and child or the issue of such child. 2. If more than one child, one-third to the surviving husband or wife and the remainder in equal shares to his children or their lawful issue by right of representation, but if no child is living at the time of death of the decedent, the remainder goes to his lineal descendants. 3. If not survived by husband or wife, the real estate goes to the children in equal shares. 4. If decedent leaves no issue, one-half goes to the surviving husband or wife and the other half to the decedent's father and mother in equal shares, and if either be dead the whole of said half goes to the other. 5. If decedent leaves neither issue, husband nor wife, the estate goes to his father and mother in equal shares, or if either be dead, then to the other. 6. If neither issue, husband, wife, father nor mother, the estate goes in equal shares to the brothers and sisters of the decedent. 7. If the decedent leave husband or wife, but neither issue, father, nor mother, the whole estate goes to the surviving husband or wife. 8. If neither issue,

[72] Code 1911, § 3932.

[73] Code 1911, §§ 3029, 3030.

husband, wife, father, mother, brother, nor sister, the estate goes to the next of kin in equal degree. 9. If the decedent leaves no heir or person entitled to take the estate under the statute, the same escheats to the state.[74]

§ 847. **Illinois.**—In Illinois, estates, both real and personal, of residents and nonresident proprietors dying intestate, or whose estates or any part thereof shall be deemed and taken as intestate estate, after all just debts and claims against such estates are fully paid, shall descend to and be distributed in manner following, to wit: 1. To his or her children and their descendants, in equal parts; the descendants of the deceased child or grandchild taking the share of their deceased parents in equal parts among them. 2. When there is no child of the intestate, nor descendant of such child, and no widow or surviving husband, then to the parents, brothers and sisters of the deceased and their descendants, in equal parts among them, allowing to each of the parents, if living, a child's part, or to the survivor of them if one be dead, a double portion; and if there is no parent living, then to the brothers and sisters of the intestate, and their descendants. 3. When there is a widow or surviving husband, and no child or children, or descendants of a child or children of the intestate, then (after the payment of all just debts) one-half of the real estate and the whole of the personal estate shall descend to such widow or surviving husband as an absolute estate forever, and the other half of the real estate shall descend as in other cases, where there is no child or children or descendants of a child or children. 4. When there is a widow or a surviving husband, and also a child or children or descendants of such child or children of the intestate, the widow or surviving husband shall receive, as his or her absolute personal estate, one-third of all the personal estate of the intestate. 5. If there is no child of the intestate or descendants of such child, and no parent, brother or sister or descendant of such parent, brother or sister, and no widow or surviving husband, then such estate shall descend in equal parts to the next of kin to the intestate in equal degrees, (computing by the rules of the civil law) and there shall be no representation among collaterals, except with the descendants of brothers and sisters of the intestate; and in no case shall there be any distinc-

[74] Rev. Code 1908, ch. 14.

tion between the kindred of the whole and the half-blood. 6. If any intestate leaves a widow or surviving husband, his or her estate shall descend to such widow or surviving husband. 7. If the intestate leaves no kindred, and no widow or husband, his or her estate shall escheat to and vest in the county in which said real estate or personalty, or the greater part thereof, is situated.[75] 8. An illegitimate child shall be heir of its mother and any maternal ancestor, and of any person from whom its mother might have inherited, if living; and the lawful issue of an illegitimate person shall represent such person, and take, by descent, any estate which the parent would have taken, if living. The estate, real and personal, of an illegitimate person, shall descend to and vest in the widow or surviving husband and children, as the estate of other persons in like cases. In case of the death of an illegitimate intestate leaving no child or descendant of a child, the whole estate, personal and real, shall descend to and absolutely vest in the widow or surviving husband. When there is no widow or surviving husband, and no child or descendants of a child, the estate of such person shall descend to and vest in the mother and her children, and their descendants—one-half to the mother, and the other half to be equally divided between her children and their descendants, the descendants of a child taking the share of their deceased parent or ancestor. In case there is no heir as above provided, the estate of such person shall descend to and vest in the next of kin to the mother of such intestate, according to the rule of the civil law. When there is no heirs or kindred, the estate of such person shall escheat to the state, and not otherwise.[76] An illegitimate child, whose parents have intermarried, and whose father has acknowledged him or her as his child, shall be considered legitimate.[77] 9. Any real or personal estate given by an intestate in his lifetime as an advancement to any child or lineal descendant, shall be considered as part of the intestate's estate, so far as it regards the divisions and distribution thereof among his issue, and shall be taken by such child or other descendant towards his share of the intestate's estate; but he shall not be required to refund any part thereof, although it exceeds his share. If such advancement is made in real estate,

[75] Hurd's Rev. Stat. 1915-1916, ch. 39, § 1.

[76] Hurd's Rev. Stat. 1915-1916, ch. 39, § 2.

[77] Hurd's Rev. Stat. 1915-1916, ch. 39, § 3.

and the value thereof is expressed in the conveyance or in the charge thereof made by the intestate, or in the written acknowledgment thereof by the party receiving it, it shall be considered as of that value in the divisions and distribution of the estate; otherwise, it shall be estimated according to the value when given.[78] No gift or grant shall be deemed to have been made in advancement unless so expressed in writing or charged in writing, by the intestate, as an advancement, or acknowledged in writing by the child or other descendant.[79] If a child or other descendant so advanced, dies before the intestate, leaving issue, the advancement shall be taken into consideration in the division or distribution of the estate of the intestate, and the amount thereof shall be allowed accordingly by the representatives of the heirs so advanced, as so much received towards their share of the estate, in like manner as if the advancement had been made directly to them.[80] 10. A posthumous child of an intestate shall receive its just proportion of its ancestor's estate, in all respects, as if it had been born in the lifetime of the father.[81] If, after making a last will and testament, a child shall be born to any testator, and no provision be made in such will for such child, the will shall not on that account be revoked; but unless it shall appear by such will that it was the intention of the testator to disinherit such child, the devises or legacies by such will granted and given, shall be abated in equal proportions to raise a portion for such child equal to that which such child would have been entitled to receive out of the estate of such testator if he had died intestate.[82] 11. Whenever a devisee or legatee in any last will and testament, being a child or grandchild of the testator, shall die before such testator, and no provision shall be made for such contingency, the issue, if any there be, of such devisee or legatee, shall take the estate devised or bequeathed as the devisee or legatee would have done had he survived the testator, and if there be no such issue at the time of the death of such testator, the estate disposed of by such devise or legacy shall be considered and treated as intestate estate.[83] 12. An adopted child is deemed, for the purposes

[78] Hurd's Rev. Stat. 1915-1916, ch. 39, § 4.
[79] Hurd's Rev. Stat. 1915-1916, ch. 39, § 7.
[80] Hurd's Rev. Stat. 1915-1916, ch. 39, § 8.
[81] Hurd's Rev. Stat. 1915-1916, ch. 39, § 9.
[82] Hurd's Rev. Stat. 1915-1916, ch. 39, § 10.
[83] Hurd's Rev. Stat. 1915-1916, ch. 39, § 11.

of inheritance, the child of the adoptive parents, the same as if he had been born to them in lawful wedlock, except that he shall not be capable of taking property expressly limited to the body or bodies of the adoptive parents, nor property from the lineal or collateral kindred of such parents by right of representation.[84] The parents by adoption and their heirs shall take by descent, from the adopted child, and the descendants and husband or wife, of such child, only such property as he has taken from or through the adoptive parents.[85]

§ 848. **Indiana.**—In Indiana the real and personal property of an intestate descends, subject to the rights of the surviving husband or wife, and decedent's debts, in the following manner: 1. To the children in equal portions. 2. If any child or children of such intestate shall die intestate, leaving a child or children, such child or children shall inherit the share which would have descended to the father or mother; and the grandchildren and more remote descendants and all other relatives of the intestate, whether lineal or collateral, shall inherit by the same rule; providing, that if the intestate shall have left at his death grandchildren only, alive, they shall inherit equally. 3. If there be no lawful issue or their descendants alive, one-half the estate goes to the father and mother of such intestate, as joint tenants, or if either be dead, to the survivor, and the other half to the brothers and sisters and to the descendants of such as are dead, as tenants in common. 4. If there be neither issue, or their descendants, nor father nor mother, the brothers and sisters of the intestate living, and the descendants of such as are dead, shall take the inheritance as tenants in common. If there be no brothers or sisters of the intestate or their descendants, the father or mother shall take the inheritance as joint tenants; and if either be dead the other shall take the estate. 5. If there be no person entitled to take the inheritance according to the preceding rules it shall descend in the following way: (1) If the inheritance came to the intestate by gift, devise, or descended from the paternal line it shall go to the paternal grandfather and grandmother, and the survivor of them; if neither of them be living it shall go to the uncles and aunts in the paternal line, and their

[84] Hurd's Rev. Stat. 1915-1916, p. 36, § 5.

[85] Hurd's Rev. Stat. 1915-1916, p. 36, § 6.

descendants, if any of them be dead; and if no such relatives be living, it shall go to the next of kin, in equal degree of consanguinity among the paternal kindred; and if there be none of the paternal kindred entitled to take the inheritance as above described, it shall go to the maternal kindred in the same way. (2) If the inheritance came to the intestate by gift, devise, or descent from the maternal line, it shall go to the maternal kindred in the same way; and if there be none of the maternal kindred entitled to take the inheritance, it shall go to the paternal kindred in the same way. (3) If the estate came to the intestate otherwise than by gift, devise, or descent it shall be divided into two equal parts, one of which shall go to the paternal and the other to the maternal kindred, in the way above described; and on the failure of either line the other shall take the whole. 6. Kindred of the half-blood shall inherit equally with those of the whole-blood; but if the estate shall have come to the intestate by gift, devise, or descent from any ancestor, those only who are of the blood of such ancestor shall inherit; provided, that on failure of such kindred, other kindred of the half-blood shall inherit as if they were the whole-blood. 7. Illegitimate children inherit from the mother as if they were legitimate, and through the mother, if dead, any property or estate which she would, if living, have taken by gift, devise, or descent from any other person. 8. An illegitimate child or children of a man dying intestate and having acknowledged such child or children during his lifetime as his own, shall inherit his estate, the same as if legitimate. 9. If a man shall marry the mother of an illegitimate child, and acknowledge it as his own, such child shall be deemed legitimate. 10. The mother of an illegitimate intestate child, inherits his estate, in the absence of issue or other descendants of such child; and if such mother be dead, her descendants or collateral kindred shall take the inheritance in the order hereinbefore prescribed. 11. In the absence of kindred capable of inheriting the property of an intestate, it escheats to the state. 12. Posthumous children inherit equally with those born before the death of the intestate. 13. No person who unlawfully causes the death of another, and shall have been convicted thereof, or aids or abets in such unlawful killing of another, shall inherit the estate of the person so unlawfully killed. 14. An estate which shall have come to the intestate by gift or conveyance in consideration of love and af-

fection, shall, if the intestate die without children or their descendants revert to the donor, if living at the intestate's death, saving to the widow or widower, however, his or her rights therein. 15. Curtesy and dower are abolished, and the widow takes one-third of the estate in fee simple, free from debts; provided that, when the estate exceeds in value $10,000, she takes one-fourth only; and when it exceeds $20,000, one-fifth only. 16. If a widow marry a second or subsequent time, holding real estate in virtue of any previous marriage, and there be a child or children or their descendants alive by such marriage, she can not alienate the estate; and if during such subsequent marriage she die, the estate goes to her children by the former marriage, if any there be. 17. If a wife die testate or intestate leaving a widower, one-third of her real estate descends to him subject to its proportion of the debts of the wife contracted before her marriage. 18. If a husband die intestate, leaving a widow and one child only, his real estate shall descend one-half to his widow and one-half to his child. 19. If a man die intestate leaving surviving a second or subsequent wife without child by him, but leaving a child or children or their descendants alive, by a previous wife, such surviving, childless, second or subsequent wife, shall take only a life estate in one-third of the lands of her deceased husband, and the fee thereof shall at the death of such husband vest at once in such child or children or the descendants of such as may be dead.[86] 20. If a husband or wife die intestate, leaving no child, but a father or mother, of either of them, then three-fourths of the estate goes to the surviving wife or husband, and one-fourth to the father and mother jointly, or to the survivor of them; but if the estate does not exceed $1,000, the whole goes to the surviving husband or wife. 21. If a husband or wife die intestate, leaving no child and no father or mother, the whole of his or her property, real and personal, shall go to the survivor. 22. If any child or other lineal descendant of an intestate shall have been advanced by deceased, by settlement or portion of real or personal property, the value thereof shall be reckoned with that part of the surplus of the personal estate which shall remain to be distributed among the children; and if such advancement be equal or superior to the amount which would be distributed to such child as his share of such surplus of advancements, then

[86] Burns' Rev. Stat. 1914, § 3019.

such child or descendant, or those representing either of them, shall be excluded from any share in the distribution of such surplus. But if such advancement be not equal to such amount, such child or descendant, or those taking as their representatives, shall be entitled to receive so much only as shall be sufficient to make all the shares of all those entitled to be equal, as near as can be estimated.[87] 23. An adopted child shall receive all the rights and interests in the estate of the adopting father or mother, by descent or otherwise, that such child would take if it was the natural heir of the adopting father or mother.[88]

§ 849. **Iowa.**—In Iowa the property of an intestate descends, subject to rights of dower, and debts against the estate, in the following course: 1. To the children and their issue, by right of representation.[89] 2. If the intestate leaves no issue, the whole of the estate to the amount of $7,500 after the payment of the debts and expenses of administration, and one-half of all the estate in excess of $7,500, goes to the surviving spouse, and the other one-half of said excess goes to the parents.[90] 3. If there be no surviving spouse, the entire estate goes to the parent or parents of the intestate.[91] 4. If both parents be dead, the portion that would have fallen to them is disposed of in the same manner as if they had outlived the intestate and died in the possession thereof, and so on through the ascending ancestors and their issue.[92] 5. If the heirs are not thus found, the uninherited portion shall go to the wife of the intestate, or to her heirs if she be dead, according to like rule; and if the intestate had more than one wife, who either died or survived the lawful wedlock, such uninherited portion shall be equally divided between the one who is living and of the heirs of those who are dead, or between the heirs of all, if all are dead, such heirs taking by right of representation.[93] 6. If there be no heirs the estate escheats to the state.[94] 7. Illegitimate children inherit from their mother and she from them. They also inherit from the father when the paternity is established during his lifetime or they have been recognized by him as his children, but such recognition must have

[87] Burns' Rev. Stat. 1914, §§ 2990-3055.
[88] Burns' Rev. Stat. 1914. § 870.
[89] Ann. Code 1897, § 3378.
[90] Supp. Code 1913, § 3379.
[91] Supp. Code 1913, § 3379.
[92] Ann. Code 1897, § 3381.
[93] Ann. Code 1897, § 3382.
[94] Ann. Code 1897, § 3387.

been in writing or general and notorious. Under such circumstances if the recognition has been mutual between such children and their father he may inherit from them.[95] 8. Adopted children inherit from their adoptive parent the same as if born in lawful wedlock.[96] 9. Nonresident aliens are prohibited from acquiring title to real estate by descent, except that the widow and heirs of naturalized citizens, and of aliens who have acquired lands in this state, may hold such lands acquired by descent for a period of twenty years, at the end of which time they shall revert to the state unless they have been sold to a bona fide purchaser for value.[97] 10. Any real or personal property given by way of advancement to an heir must be brought into hotchpot and is to be valued as of the time of the gift, but if such advancement exceeds the amount to which he would be entitled on distribution he can not be required to refund the excess.[98]

§ 850. Kansas.—In Kansas the real and personal property of an intestate descends, subject to the rights of the surviving husband or wife and the debts of the decedent, in the following course: 1. In equal shares to the surviving children and the living issue, if any, of prior deceased children; but such issue shall collectively inherit only that share which his parent would have been entitled to if living.[99] 2. If no child or issue of child are living, the whole estate goes to the widow or widower.[1] 3. If he leave no issue or wife, the whole of his estate goes to his parents or to the survivor.[2] 4. If both parents are dead it shall be disposed of in the same manner as if they or either of them had outlived the intestate, and died in the possession and ownership of the portion thus falling to them, and so through ascending ancestors and their issue.[3] 5. Posthumous children inherit as if they had been born in the lifetime of the intestate.[4] 6. Illegitimate children inherit from the mother, and the mother from such children. They inherit from the father when recognized by him generally and notoriously, or in writing. The father of an illegitimate child inherits from such child when the relationship is mutual. When thus inheriting from an illegitimate child, the

[95] Ann. Code 1897, §§ 3384, 3385.
[96] Ann. Code 1897, § 3253.
[97] Ann. Code 1897, §§ 2889, 2890.
[98] Ann. Code 1897, § 3383.
[99] Gen. Stat. 1915, § 3841.
[1] Gen. Stat. 1915, § 3842.
[2] Gen. Stat. 1915, § 3843.
[3] Gen. Stat. 1915, § 3843.
[4] Gen. Stat. 1915, § 3852.

mother and her heirs take preference to the father and his heirs.[5] 7. Children of the half-blood inherit equally with children of the whole-blood.[6] 8. Aliens can not inherit unless the right is conferred by treaty with the United States.[7] 9. Property given by way of advancement to a child or other lineal descendant must be brought into hotchpot as of its value when given to him, but if such advancement exceeds the amount to which he would be entitled he can not be required to refund such excess.[8] 10. One-half in value of all the real estate in which a husband or wife at any time during the marriage had a legal or equitable interest, which has not been sold on execution or other judicial sale, and not necessary for the payment of debts, shall be set apart as the property of the surviving husband or wife, to be held by him or her in fee simple.[9] 11. When a child has been legally adopted, the relation between the adoptive parent and the child adopted shall be as to their legal rights and liabilities the same as if the relation of parent and child existed between them, except that the adoptive father or mother shall never inherit from the child; but to all other persons the adopted child shall stand related as if no such act of adoption had been taken.[10]

§ 851. **Kentucky.**—In Kentucky, when a person having right or title to real estate of inheritance shall die intestate as to such estate it shall descend, subject to the rights of husband or wife, in parcenary to his kindred, male and female, in the following order: 1. To his children and their descendants. 2. If there be no children or their descendants, then to his father and mother, if both are living, one moiety to each; but if the father be dead, then the mother, if living, shall inherit the whole estate; if the mother be dead, then the whole estate shall pass to the father. 3. If there be no children or their descendants, nor father nor mother, the estate goes to the intestate's brothers and sisters and their descendants. 4. If there be none of the above mentioned, one moiety shall pass to the paternal, and the other to the maternal kindred in the following order: (1) To the grandfather and grandmother equally if living, but if one be dead then the entire moiety shall go to the survivor. (2) If no grand-

[5] Gen. Stat. 1915, §§ 3844, 3845, 3846, 3847.
[6] Gen. Stat. 1915, § 3851.
[7] Const. of Iowa, § 121.
[8] Gen. Stat. 1915, §§ 3848, 3849.
[9] Gen. Stat. 1915, § 3831.
[10] Gen. Stat. 1915, § 6362.

father or grandmother, then to the uncles and aunts and their descendants. (3) If none, then to the great-grandfather and great-grandmother in the same manner prescribed for grandfather and grandmother as in subdivision (1) above. (4) If none, then to the brothers and sisters of the grandfather and grandmother and their descendants and so on with other cases without end passing to the nearest lineal ancestors and their descendants as herein prescribed. 5. If there is no such kindred of one of the parents, the whole shall go to the kindred of the other. If there is neither paternal nor maternal kindred, the whole shall go to the husband or wife of the intestate, or, if the husband or wife is dead, to his or her kindred, as if he or she had survived the intestate, and died entitled to the estate.[11] 6. When any or all of a class first entitled to inherit are dead, leaving descendants, such descendants shall take by stock, i. e., by representation the share of their respective parents.[12] 7. When a person dies intestate without issue having real estate of inheritance, the gift of either of his parents, such parent, if living, shall inherit the whole of such estate.[13] 8. If an infant dies without issue having title to real estate derived by gift, devise, or descent from one of his parents, the whole shall descend to that parent and his or her kindred, as hereinbefore directed, if there are any; if there are none, then in like manner to the other parent and his or her kindred; but the kindred of one shall not be excluded by the kindred of the other parent if the latter is more remote than the grandfather, grandmother, uncle or aunt of the intestate and their descendants.[14] 9. Collaterals of the half-blood inherit only one-half as much as those of the whole-blood, or as ascending kindred when they take with them.[15] 10. In taking title by descent, it shall be no bar to a party that any ancestor from whom he derives his descent from the intestate is or has been an alien.[16] 11. Illegitimate children shall be capable of inheriting and transmitting an inheritance on the part of or to the mother; and illegitimates of the same mother shall be capable of inheriting and transmitting an inheritance on the part of each other as if such illegitimates were born in lawful wedlock of the same parents. If a man having a child by a woman, shall afterward marry her, such child,

[11] Carroll's Stat. 1915, § 1393.
[12] Carroll's Stat. 1915, § 1394.
[13] Carroll's Stat. 1915, § 1400.
[14] Carroll's Stat. 1915, § 1401.
[15] Carroll's Stat. 1915, § 1395.
[16] Carroll's Stat. 1915, § 1396.

or its descendants, being recognized by him before or after marriage, shall be deemed legitimate. The issue of an illegitimate or void marriage shall be legitimate.[17] 12. A child born of the widow within ten months after the death of the intestate shall inherit from him in the same manner as if he were in being at the time of such death.[18] 13. Any property or money given by a parent or grandparent to a descendant shall be charged to the descendant and those claiming through him on distribution of the estate of the parent or grandparent, except that the maintaining or educating or the giving of money to a child or grandchild without any view to a portion or settlement in life shall not be deemed an advancement.[19] 14. After the death of either the husband or wife, the survivor shall have an estate for his or her life in one-third of all the real estate of which he or she or any one for his or her use, was seized of an estate in fee simple during the coverture.[20] 15. Adopted children are the legal children of their adoptive parents.[21]

§ 852. Louisiana.—In Louisiana the estate of an intestate descends in the following order: 1. To the legitimate children, without distinction of sex or primogeniture, and though they be born from different marriages, they inherit equally and by heads, when in the same degree, and inherit by their own right; they inherit by roots, when all or part of them inherit by representation.[22] 2. If there be no children or descendants, but a father and mother, and brothers and sisters, or descendants of these last, one-half of the estate goes to the father and mother and the other to the brothers and sisters, or their descendants. If either parent of the person who has died without issue has died before him, the portion which would have been inherited by such deceased parent goes to the brothers and sisters of the deceased, or their descendants.[23] 3. If the deceased has left neither descendants nor brothers nor sisters, nor descendants from them, or father or mother, but only other ascendants, these ascendants inherit to the exclusion of all collaterals, as follows: if there be ascendants in the paternal and maternal line in the same degree

[17] Carroll's Stat. 1915, §§ 1397, 1398.
[18] Carroll's Stat. 1915, § 1399.
[19] Carroll's Stat. 1915, § 1407.
[20] Carroll's Stat. 1915, § 2132.
[21] Carroll's Stat. 1915, § 2071.
[22] Merrick's Rev. Civ. Code 1913, art. 902.
[23] Merrick's Rev. Civ. Code 1913, art. 903.

the estate is divided into two equal shares, one going to the ascendants on the paternal, and the other to the ascendants on the maternal side, whether the number of ascendants on each side be equal or not, the ascendants in each line inheriting by heads; but if there is in the nearest degree but one ascendant in the two lines, such ascendant excludes all other ascendants of a more remote degree and alone takes the succession.[24] 4. If there be no issue or their descendants, nor brothers or sisters, nor their descendants, nor father or mother, the inheritance goes to the collateral relations of the intestate, those in the nearest degree of kindred to the intestate taking to the exclusion of all others. If there are several persons in the same degree, they take per capita.[25] 5. Representation takes place ad infinitum in the direct descending line, but does not take place in favor of ascendants, the nearest ascendant in any degree always excluding those more remote.[26] 6. In the collateral line, representation is admitted in favor of the children and descendants of brothers and sisters of the deceased, whether they inherit in concurrence with uncles and aunts, or, whether the brothers and sisters of the deceased having died, the estate devolves on their descendants in equal or unequal degrees.[27] 7. In all cases of representation the partition is made by roots; and if one root has several branches, a subdivision is also made by roots in each branch and the members of the branch take between them by heads.[28] 8. When the intestate has left neither descendants, ascendants, nor collateral relations, the surviving wife who has not been separated from her husband shall inherit from him. If, on the contrary, the wife died intestate without leaving lawful ascendants, descendants, or collateral relations, the surviving husband who has not been separated from her shall not inherit from her except in case she shall leave no natural children by her duly acknowledged.[29] 9. In all cases when either husband or wife dies, leaving no ascendants or descendants, and without having disposed by will of his or her share in the community property, such undisposed of shares shall be inherited by the survivor in full ownership.[30] 10. Illegitimate

[24] Merrick's Rev. Civ. Code 1913, arts. 905, 906, 907.
[25] Merrick's Rev. Civ. Code 1913, art. 914.
[26] Merrick's Rev. Civ. Code 1913, art. 895.
[27] Merrick's Rev. Civ. Code 1913, art. 897.
[28] Merrick's Rev. Civ. Code 1913, art. 898.
[29] Merrick's Rev. Civ. Code 1913, art. 924.
[30] Merrick's Rev. Civ. Code 1913, art. 915.

children inherit from their mother when they have been duly acknowledged by her, if she has left no legitimate child or descendants, to the exclusion of her father and mother and their descendants or collaterals of lawful kindred.[31] 11. Illegitimate children inherit from their father who has duly acknowledged them, when he has left no descendants, ascendants, nor collateral relations, nor surviving wife, and to the exclusion only of the state.[32] 12. The law does not grant any right of inheritance to illegitimate children to the estate of legitimate relations of their father or mother.[33] 13. The estate of an illegitimate child deceased without posterity belongs to the father or mother who has acknowledged him, or in equal proportions to both when both have acknowledged him.[34] 14. If the father and mother of an illegitimate child die before him the estate of such child shall pass to his illegitimate brothers and sisters, or their descendants.[35] 15. In default of lawful relations or of surviving husband or wife, or acknowledged illegitimate child, the estate goes to the state.[36] 16. The children or grandchildren, coming to the succession of their fathers, mothers, or other ascendants, must collate what they have received from them inter vivos, directly or indirectly, and they can not claim legacies made to them by such ascendants unless the donations and legacies have been made to them expressly as an advantage over their co-heirs and besides their portion. This rule takes place where the children or their descendants succeed to their ascendants as legal or as testamentary heirs, and whether they have accepted the succession unconditionally, or with the benefit of inventory. 17. Children legally adopted are given the same rights of inheritance as natural children.

§ 853. **Maine.**—In Maine the real estate of an intestate, subject to the payment of debts, of which he dies seised, descends as follows: 1. If he leaves a widow and issue, one-third to the widow. If no issue, one-half to the widow. And if no kindred, the whole to the widow. To a widower, the same shares in the wife's realty. In any event one-third shall descend to the widow

[31] Merrick's Rev. Civ. Code 1913, art. 918.
[32] Merrick's Rev. Civ. Code 1913, art. 919.
[33] Merrick's Rev. Civ. Code 1913, art. 920.
[34] Merrick's Rev. Civ. Code 1913, art. 922.
[35] Merrick's Rev. Civ. Code 1913, art. 923.
[36] Merrick's Rev. Civ. Code 1913, art. 929.

or widower free from debts. 2. The remainder of intestate's property, if no widow or widower, descends in equal shares to his children, and to the lawful issue of a deceased child by right of representation. If no child is living, to all his lineal descendants equally if of the same degree; if not, according to the right of representation. 3. If no such issue, to the father and mother in equal shares. 4. If no such issue or father, one-half to the mother. If no such issue or mother, one-half to the father. In either case the remainder descends in equal shares to the brothers and sisters or their children or grandchildren according to the right of representation. 5. If no such issue, father, brother or sister, then to the mother. If no such issue, mother, brother or sister, then to the father; in either case to the exclusion of the issue of deceased brothers and sisters. 6. If no such issue, father, mother, brother or sister, to the next of kin in equal degree; when they claim through different ancestors, to those claiming through nearest ancestor. 7. When a minor dies unmarried, leaving property inherited from either of his parents, it descends to the other children of the same parent, and the issue of those deceased; in equal shares, if all are of the same degree, otherwise according to the right of representation. 8. If the intestate leaves no widower, widow, or kindred, the property escheats to the state. 9. Kindred of the half-blood inherit equally with those of the whole-blood of the same degree.[37] 10. An illegitimate child born since March 24, 1864, is the heir of his parents who intermarry. Such child born at any time is the heir of his mother. If the father of an illegitimate child adopts him or her into his family or in writing acknowledges him or her before some justice of the peace or notary public that he is the father such child is also the heir of his or her father. In either of such cases, such child and its issue shall inherit from its parents respectively, and from their lineal and collateral kindred, and those from such child and its issue the same as if legitimate.[38] 11. Degrees of kindred are computed by the rules of the civil law. 12. Gifts of real estate to a child or grandchild are deemed advancements when so expressed in the gift, or acknowledged in writing to be such. Such advancements must be brought into hotchpot as of the value expressed in the gift or acknowledgment beforesaid, otherwise as of the time when given. When the advancement exceeds the

[37] Rev. Stat. 1916, ch. 80, § 1.

[38] Rev. Stat. 1916, ch. 80, § 3.

share of such child or grandchild he is excluded from distribution, but he shall not be required to refund the excess. If an advancement of personal estate exceeds his share of the personal estate, he receives so much less of the real estate as will make his whole share equal. If such child or grandchild die before the intestate, leaving issue, the advancement made to him shall be regarded as made to the issue.[39] 13. Aliens may take property by descent the same as citizens.[40] 14. An adopted child becomes, to all intents and purposes, the child of his adopters, the same as if born to them in lawful wedlock, except that he shall not inherit property expressly limited to heirs of the body of the adopters, nor shall he inherit property from the lineal or collateral kindred of such adopters.[41]

§ 854. Maryland.—In Maryland estates in lands, tenements, or hereditaments, held in fee simple, or in fee simple conditional or in fee tail generally descends from an ancestor in fee simple as follows: 1. To the child and children and their descendants, if any, equally. 2. If no child or descendant, and the estate descended to the intestate on the part of the father, then to the father. 3. If no father living then to the brothers and sisters of the intestate of the blood of the father and their descendants equally. 4. If no brother or sister as aforesaid, child or children, grandchild or grandchildren, or other descendants from such brothers or sisters, then to the grandfather on the part of the father. 5. If no such grandfather be living, then to the descendants of such grandfather, and their descendants in equal degree equally. 6. If no descendant of such grandfather, then to the father of such grandfather, and if none such living then to the descendants of the father of such grandfather in equal degree; and so on, passing to the next lineal male paternal ancestor; and if none such to his descendants in equal degree without end. 7. If no paternal ancestor or descendants from such ancestor then to the mother of the intestate. 8. If no mother living then to her descendants in equal degree equally. 9. If no such mother be living, or descendants from such mother, then to the maternal ancestors and their descendants in the same manner as above directed as to the paternal ancestors and their descendants. 10. If

[39] Rev. Stat. 1916, ch. 80, §§ 4, 5, 6, 7.

[40] Rev. Stat. 1916, ch. 78, § 2.

[41] Rev. Stat. 1916, ch. 72, § 38.

the estate descended to the intestate on the part of the mother, and the intestate shall die without any children or descendants, then the estate shall go to the mother. 11. If no mother living, then to the brothers and sisters of the intestate of the blood of the mother and their descendants in equal degree equally. 12. If no such brothers or sisters or descendants of such brothers or sisters then to the grandfather on the part of the mother. 13. If no such grandfather living then to his descendants in equal degree equally. 14. If no such descendants of such grandfather then to the father of such grandfather, and if none such living then to his descendants in equal degree, and so on, passing to the next male maternal ancestor; and if none such living, to his descendants in equal degree. 15. If no such maternal ancestor or descendants from such maternal ancestor then to the father of the intestate. 16. If no father living, to his descendants in equal degree equally. 17. If no father living or descendants from the father then to the paternal ancestors and their descendants, in the same manner as hereinbefore directed as to the maternal ancestors. 18. If the estate be vested in the intestate by purchase or shall descend to or be vested in the intestate in any other manner as hereinbefore mentioned, and there be no child or descendant of such intestate, then the estate shall descend to the brothers and sisters of the intestate of the whole-blood and their children, grandchild or grandchildren, and their other descendants in equal degree equally. 19. If no brother or sister of the whole-blood or child or children, grandchild or grandchildren, or descendants from such brother or sister, then to the brothers and sisters of the half-blood and their descendants in equal degree equally. 20. If no brother or sister of the whole-blood or half-blood or any descendant from such brother or sister, then to the father, and if no father living then to the mother, and if no mother living then to the grandfather on the part of the father, and if no such grandfather living then to the descendants of such grandfather in equal degree equally. 21. If no such grandfather, or any descendants from him, then to the grandfather on the part of the mother, and if no such grandfather then to his descendants in equal degree equally, and so on without end, alternating the nearest male paternal ancestor, and his descendants, and the nearest maternal ancestor and her descendants, giving preference to the paternal an-

cestor and his descendants. 22. If there be no descendants or kindred of the intestate as aforesaid to take the estate then the same shall go to the husband or wife, as the case may be, and if the husband or wife be dead then to his or her kindred in like course, as if such had survived the intestate and then had died entitled to an estate by purchase, and if the intestate has had more husbands and wives than one, and shall die before such intestate, then the estate shall be equally divided among the kindred of the several husbands and wives in equal degree equally. 23. Representation per stirpes is admitted in descending or collateral line, but among collaterals not after brother's and sister's grandchildren. 24. Subsequent marriage and acknowledgment by a father legitimizes and such children inherit and transmit as if born in lawful wedlock. Illegitimate children inherit from their mother and from each other and from descendants of each other.[42] 25. An adopted child has the same rights of inheritance in the estate of the adoptive parent as natural children. 26. Aliens not enemies may take and hold lands by descent the same as citizens.[43] 27. Any child or descendant of an intestate, born after the death of the decedent, but none others, shall have the same right of inheritance as if born before such death.[44] 28. Advancements of real estate made to a child or other lineal descendant must be brought into hotchpot.[45]

§ 855. Massachusetts.—In Massachusetts the lands, tenements, or hereditaments, of an intestate, or any right or interest therein in fee simple or for the life of another, descends, subject to his debts, in the following course: 1. In equal shares to the issue of the intestate in the same degree, otherwise by right of representation. And if there be no issue of the intestate living at his death, then to all his other lineal descendants; equally, if they are all in the same degree of kindred to the intestate; otherwise according to the right of representation. 2. If there be no issue, then equally to the father and mother or the survivor of them. 3. If there be no issue, father or mother, then to brothers and sisters and their issue equally if of the same degree, otherwise by right of representation. 4. If no issue, father or mother, or is-

[42] Pub. Gen. Laws 1904, art. 46, §§ 1-31.
[43] Pub. Gen. Laws 1904, art. 16, § 70.
[44] Pub. Gen. Laws 1904, art. 46, § 25.
[45] Pub. Gen. Laws 1904, art. 46, § 31.

sue of father or mother, then to nearest of kin in equal degree according to the civil law through the nearest ancestor. 5. If the intestate is a married woman, and leaves a husband and no issue, he takes the real estate in fee not exceeding $5,000 in value. If the intestate is a married man and leaves a wife and no issue, she takes the real estate in fee not exceeding $5,000 in value, in addition to her dower. If the intestate leaves a widow and no kindred all of his estate descends to the surviving wife; and if the intestate is a married woman and leaves no kindred all of her estate descends to the surviving husband.[46] 6. If there be no kindred, nor surviving husband or wife, then the estate escheats to the state.[47] 7. Degrees of kindred are computed according to the rules of the civil law.[48] 8. Kindred of the half-blood inherit equally with those of the whole-blood in the same degree.[49] 9. Illegitimate children inherit from their mother and from any maternal ancestor, and the lawful issue of an illegitimate child shall take by representation. If an illegitimate child die without issue entitled to inherit, the estate goes to his mother. An illegitimate child is made legitimate by a subsequent marriage of its parents and acknowledgment on the part of the father.[50] 10. Posthumous children are considered as living at the death of their parents.[51] 11. An alien has substantially the same rights as a citizen whether he be resident or nonresident.[52] 12. An adopted child shall take the same share of the property which the adopting parent could dispose of by will as the child would have taken if born to such parent in lawful wedlock.

§ 856. **Michigan.**—In Michigan the real estate of an intestate descends, subject to his debts, as follows: 1. One-third to the surviving wife or husband, and the remaining two-thirds to the issue, and if the intestate leaves no surviving wife or husband, then the whole estate goes to the issue, and if all the said issue are in the same degree of kindred to the intestate, they shall share the estate equally, otherwise they shall take according to the right of representation. 2. If the intestate shall leave a widow or widower and no issue, one-half of

[46] Rule construed in Holmes v. Holmes, 194 Mass. 552, 80 N. E. 614.
[47] Rev. Laws 1902, ch. 133, § 1.
[48] Rev. Laws 1902, ch. 133, § 2.
[49] Rev. Laws 1902, ch. 133, § 2.
[50] Rev. Laws 1902, ch. 133, §§ 3, 4, 5.
[51] Rev. Laws 1902, ch. 133, § 6.
[52] Rev. Laws 1902, ch. 134, § 1.

the estate shall descend to such widow or widower and the remainder to the father and mother of the intestate in equal shares, and if there be but one of the parents living, then to the survivor alone; and if the intestate shall leave no issue, husband or wife, his or her estate shall descend to the father and mother in equal shares, and if there be but one of the parents living, then to the survivor alone; and if the intestate shall leave no issue, father or mother, his or her estate shall descend, subject to the provisions herein made for the widow or widower, if a widow or widower survive the deceased, to his or her brothers and sisters and the children of deceased brothers and sisters, if such persons are in the same degree of kindred to the intestate, they shall take equally, otherwise they shall take by right of representation. Provided, however, if such intestate shall die . . . under the age of twenty-one years and not having been married, all the estate that came to such intestate by inheritance from a parent which has not been lawfully disposed of, shall descend to the other children and the issue of deceased children of the same parent, if there be such children or issue, and if such persons are in the same degree of kindred to said intestate they shall take equally, otherwise they shall take by right of representation. 3. If the intestate shall leave no issue, husband, wife, father, mother, brother, sister, nor children of brother or sister, his estate shall descend to his next of kin in equal degree excepting that when there are two or more collateral kindred of equal degree but claiming through different ancestors, those who claim through the nearest ancestors shall be preferred to those claiming through an ancestor more remote. 4. If the intestate shall leave a husband or wife and no issue or father, mother, brother, nor sister, and there shall be no children or brother or sister, the estate of such intestate shall descend to the husband or wife of such intestate, as the case may be. 5. A provision herein made for the widow shall be in lieu of dower and homestead rights. 6. If the intestate shall leave no wife nor husband nor any kindred, his or her estate shall escheat to the state.[53] 7. Children legally adopted shall become and be the heirs at law of their adoptive parents.[54] 8. Aliens have substantially the same rights of inheritance as citizens. 9. Kindred of the half-blood inherit equally with those of the whole-blood, in the same degree, unless

[53] Howell's Stat. 1913, § 10959. [54] Howell's Stat. 1913, § 10972.

the inheritance be ancestral; in such case those who are not of the blood of such ancestor are excluded.[55] 10. Degrees of kindred are computed according to the rules of the civil law.[56] 11. An illegitimate child inherits from its mother but not through her. If an illegitimate child die intestate without issue, his estate shall descend to his mother, or to his relatives on the part of his mother. Illegitimate children are legitimatized by the subsequent marriage of the parents, or by the written acknowledgment by the father of paternity.[57] 12. Advancements to a child or other lineal descendant must be brought into hotchpot. If the amount of such advancement exceeds the share of an heir the person so advanced shall be excluded from any portion of the distribution of the estate, and, if the amount thereof shall be less than his share, he shall be entitled to as much more as will give him his full share of the estate.[58]

§ 857. **Minnesota.**—In Minnesota the estate of an intestate descends as follows: 1. The surviving husband or wife takes the homestead for life discharged of debts, except debts which were valid charges thereon at the time of the death of the intestate. If the intestate leave no issue or issue of issue, the homestead becomes absolute in the surviving husband or wife.[59] 2. One-third of all other lands of which deceased was, during coverture, seised or possessed by fee simple or inferior tenure, descends to the surviving husband or wife, subject in just proportion with the other real estate to the payment of deceased's debts not paid from the personal estate. 3. The residue of said other lands and if no surviving consort, the whole of said other lands, subject to the debts of the intestate, descends to the children in equal shares and the lawful issue of deceased children by right of representation. 4. If no child nor issue of any deceased child the whole of said estate goes to the surviving consort. 5. If none of the above, to the intestate's father and mother in equal shares; if but one surviving, then to such survivor. 6. If none of the foregoing, to the brothers and sisters and the lawful issue of deceased brother or sister by right of representation. 7. If none of the foregoing nor living issue of any collateral kindred

[55] Howell's Stat. 1913, § 10963.
[56] Howell's Stat. 1913, § 10963.
[57] Howell's Stat. 1913, §§ 10960-10962.
[58] Howell's Stat. 1913, §§ 10964-10969.
[59] Gen. Stat. 1913, § 7237.

in equal degree, claiming through different ancestors, those claiming through the nearest ancestor preferred to those more remote. 8. If any person die leaving several surviving children or one child and the issue of one or more children, and any such surviving child dies under age and not having been married all the estate that came to the deceased child by inheritance from such deceased parent shall descend in equal shares to the other children of the same parent and to the issue of any such children who have died, by right of representation. 9. If, at the death of such child, who dies under age and not having been married, all the other children of said parent being also dead, and any of them having left issue, the estate that came to such child by inheritance by his said parent shall descend to all the issue of the other children of the said parent, according to the right of representation. 10. If the intestate leave no spouse nor kindred his estate shall escheat to the state.[60] 11. Degrees of kindred are computed according to the rules of the civil law.[61] 12. Kindred of the half-blood inherit equally with those of the whole-blood in the same degree, unless the inheritance comes to the intestate by descent, devise, or gift of some one of his ancestors, in which case all those who are not of the blood of such ancestor shall be excluded from such inheritance.[62] 13. Adopted children inherit from their adoptive parents the same as natural children.[63] 14. Aliens may acquire real estate by inheritance the same as citizens.[64] 15. Posthumous children are considered as living at the death of their parent.[65] 16. Every illegitimate child is the heir of the person who shall, in writing, duly signed and witnessed, acknowledge the paternity of such child. An illegitimate child is always the heir of his mother; but he can not inherit through his father or mother unless before his death his parents intermarry, and his father, after such marriage, acknowledges him as his child, or adopts him in his family. If any illegitimate child dies intestate without issue, his estate goes to his mother or her heirs at law.[66]

§ 858. **Mississippi.**—In Mississippi, when any person dies seised of an estate of inheritance of lands, tenements, and hered-

[60] Gen. Stat. 1913, § 7238.
[61] Gen. Stat. 1913, § 7242.
[62] Gen. Stat. 1913, § 7242.
[63] Gen. Stat. 1913, § 7156.
[64] Gen. Stat. 1913, §§ 6696, 6697, 6699, 6700.
[65] Gen. Stat. 1913, § 7236.
[66] Gen. Stat. 1913, § 7240, 7241.

itaments not disposed of by will, the same descends as follows: 1. To the children and their descendants in equal parts, the descendants of the deceased children or grandchildren to take the same share of the deceased parent in equal parts among them. 2. And when there shall not be a child or children of the intestate, nor descendants of such children, then the estate goes to the father and mother and to the brothers and sisters of the intestate, and their descendants in equal parts, the descendants of a sister or brother of the intestate to have, in equal parts among them, their deceased parent's share. 3. And if there shall not be a child or children of the intestate, or descendants of such children, or brothers or sisters, or descendants of them, or father or mother, then such estate shall descend, in equal parts, to the next of kin of the intestate in equal degree, computing by the rules of the civil law. 4. There shall not be any representation among collaterals, except among the descendants of the brothers and sisters of the intestate.[67] 5. There is no distinction between the kindred of the whole and the half-blood, except that the kindred of the whole-blood, in equal degree, shall be preferred to the kindred of the half-blood, in the same degree.[68] 6. Illegitimate children, if their parents afterward marry, inherit as legitimate children of the father, if their father acknowledge them as his children. They inherit from their mother and her kindred according to the statute of descent and distribution as above set out.[69] 7. If the intestate leave a husband or wife surviving, and no issue, the whole estate goes to such survivor; but if there are children, or their issue, such surviving spouse takes a child's part.[70] 8. If there is no person capable of inheriting the estate, it escheats to the state.[71] 9. Residing aliens take by inheritance the same as citizens, but nonresident aliens are not permitted to inherit from an intestate.[72] 10. Where advancements have been made to a child or other lineal descendant, such advancement must be brought into hotchpot with the whole estate, real and personal. And such advancement shall be valued as of the time it was made.[73] 11.

[67] Hemingway's Ann. Code 1917, § 1381.
[68] Hemingway's Ann. Code 1917, § 1382.
[69] Hemingway's Ann. Code 1917, § 1387.
[70] Hemingway's Ann. Code 1917, § 1383.
[71] Hemingway's Ann. Code 1917, § 1521.
[72] Hemingway's Ann. Code 1917, § 2272.
[73] Hemingway's Ann. Code 1917, § 1388.

The property, real and personal, exempted by law from sale under execution or attachment, shall, on the death of the husband or wife owning it, descend to the survivor of them, and the children and grandchildren of the decedent, as tenants in common; but such property is not subject to partition, or sale for partition, during her widowhood, so long as it is occupied or used by the widow, unless by her consent.[74] 12. The adoption of a child does not entitle it to inherit from the adoptive parent unless the right is specifically conferred.[75]

§ 859. Missouri.—In Missouri, when a person, having title to real or personal property, shall die intestate, it shall descend and be distributed, male and female, subject to the payment of his debts and widow's dower, in the following course: 1. In the case of an unmarried man it descends: (1) To the father, mother, brothers and sisters, and their descendants in equal parts. (2) If there be but one parent or brother or sister living, then to the survivor alone. (3) If there be neither father, mother, brother, sister, nor descendants of such, then to the grandfather, grandmother, uncles, aunts, and their descendants in equal parts. (4) If there be neither father, mother, brother, sister, nor descendants of such, nor grandfather, grandmother, uncles, aunts, nor their descendants, then to the great-grandfather, great-grandmother, and their descendants in equal parts; and so on in other cases without end, passing to the nearest lineal ancestor and their children in equal parts. 2. In case the intestate be an unmarried woman the same rules govern as are mentioned in rule "one" above. 3. In case the intestate be a widower, (1) and there be neither children nor other lineal descendants, the same rules govern as are mentioned in rule "one." 2. If there be but one child, the entire estate goes to such child or its descendants. (3) If there be more than one child it goes to his children or their descendants in equal parts. (4) If there be no child or their descendants then to his father, mother, brothers and sisters or their descendants in equal parts. (5) If there be neither father, mother, brothers or sisters, or their descendants, then to the grandfather, grandmother, uncles and aunts and their descendants in equal parts and so on as in "subdivision (4) of rule one." 4. The

[74] Hemingway's Ann. Code 1917, § 1389.

[75] Hemingway's Ann. Code 1917, § 299.

estate of an intestate widow descends according to the rules mentioned in rule "three" above. 5. In case the intestate be a married man, who dies without issue: (1) If the husband die leaving no issue or other descendants in being, the widow is entitled to all the real and personal estate which came to the husband in right of the marriage, and to all the personal estate of the husband which came to his possession with the written assent of the wife, remaining undisposed of absolutely, not subject to the payment of the husband's debts, and to one-half of the real and personal estate belonging to the husband at the time of his death absolutely, subject to the payment of the husband's debts. (2) The other one-half of the real and personal estate belonging to the husband at the time of his death, descends to his father, mother, brothers and sisters, and their descendants in equal parts; and if there be no father, mother, brothers or sisters, nor their descendants, then to the wife. 6. In the case of a married woman leaving no issue: (1) The husband is entitled to one-half of the real and personal estate belonging to the wife at the time of her death, absolutely subject to the payment of the wife's debts. (2) The other one-half of her estate goes to her father, mother, brothers and sisters and their descendants in equal parts; if there are none of these it goes to the surviving husband.[76] 7. In the case of a married man with issue: (1) The widow may take her dower interest, or she may elect to take the share equal to a child's part in the real estate of her husband in lieu of dower. (2) Subject to the widow's dower the real estate goes to his child or children or their descendants in equal parts.[77] 8. In the case of a married woman leaving issue: (1) The husband takes an estate for life in the real estate of the wife. (2) Subject to the surviving husband's life estate the real and personal property passes to her children and their descendants in equal parts.[78] 9. When the inheritance is directed to pass to ascending and collateral kindred of the intestate, if part of such collateral be of the whole-blood and the other part of the half-blood only, those of the half-blood inherit only one-half as much as those of the whole-blood; but if all such collaterals be of the half-blood, they take whole portions, except as to descendants who take double portions.[79] 10. A legally adopted child inherits from its adoptive

[76] Rev. Stat. 1909, § 332.
[77] Rev. Stat. 1909, § 356.
[78] Rev. Stat. 1909, §§ 120, 332.
[79] Rev. Stat. 1909, § 335.

parents in like manner as a natural child.[80] 11. All posthumous children or descendants of the intestate shall inherit in like manner as if born in the lifetime of the intestate; but no right of inheritance shall accrue to any person, other than the children or descendants of the intestate, unless they are in being and capable in law as taking as heirs at the time of the intestate's death.[81] 12. When all persons entitled to inherit are of equal degree of consanguinity to the intestate, they take per capita; if of different degrees, they take per stirpes.[82] 13. Illegitimate children shall be capable of inheriting and transmitting inheritance on the part of their mother, and such mother may inherit from her illegitimate children. Illegitimates are made legitimate by the subsequent marriage of the parents and recognition on the part of the father.[83] 14. Aliens may acquire real or personal property by descent within certain limitations and conditions.[84] 15. When the intestate in his lifetime has advanced to a child its share, or part thereof, the advancement so made must be brought into hotchpot.[85]

§ 860. **Montana.**—In Montana the real and personal property of one who dies intestate descends as follows: 1. If the decedent leave a husband or wife and one child, or the lawful issue of one child, it is divided equally between the surviving spouse and child, or the issue of such child. 2. If more than one child, or one child living and the lawful issue of one or more deceased children, one-third goes to the surviving husband or wife, and the remainder in equal shares to the child and to the lawful issue of any deceased child by right of representation. 3. But if there be no children of the decedent living at his death, or issue of a child, such remainder goes to all of intestate's lineal descendants. 4. If there be no surviving husband or wife, but issue, the whole of the estate goes to such issue. 5. If the decedent leave no issue, then the estate goes in equal shares to the husband or wife and to the decedent's father or mother, or if either of the latter be dead, the whole moiety to the survivor. 6. If the intestate leave no father or mother, then one-half of the estate goes in equal shares to the brothers and sisters and to the children of such as are dead. 7. If the decedent leave a surviving husband

[80] Rev. Stat. 1909, §§ 1673, 1675.
[81] Rev. Stat. 1909, § 333.
[82] Rev. Stat. 1909, § 336.
[83] Rev. Stat. 1909, §§ 340, 341.
[84] Rev. Stat. 1909, § 339.
[85] Rev. Stat. 1909, § 337.

or wife and no issue, and no father nor mother, nor brother nor sister, the whole estate goes to the surviving husband or wife. 8. If the decedent leave no surviving husband or wife, and no issue, nor father nor mother, nor brother nor sister, the estate must go to the next of kin in equal degree, taking then as they claim their ancestor according to the remoteness. 9. If the decedent leave no husband, nor wife, nor kindred, the estate escheats to the state.[86] 10. Illegitimate children share equally in the estate of their mother, the same as legitimate children, and are heirs of the person who, in writing, signed in the presence of a competent witness, acknowledges himself to be the father of such children. If an illegitimate child dies intestate without lawful issue, who has not been acknowledged or adopted by his father, the estate goes to his mother, or in case of her decease, to her heirs at law.[87] 11. Any property given by the decedent in his lifetime as an advancement to any child, or other lineal descendant, is a part of the estate of the decedent for the purpose of division and distribution thereof among his issue, and must be taken by such child or other lineal descendant towards his share of the estate of the decedent.[88] 12. Resident aliens can take by succession as citizens, but nonresident aliens must appear and claim the succession within five years after the death of the decedent.[89] 13. An adopted child and his adoptive parent sustain towards each other the legal relation of parent and child, and have all the rights and are subject to all the duties of that relation.[90] 14. Kindred of the half-blood inherit equally with those of the whole-blood in the same degree, unless the inheritance came to the intestate by descent, devise, or gift of some one of his ancestors, in which case all those who are not of the blood of such ancestor must be excluded from such inheritance.[91]

§ 861. **Nebraska.** — In Nebraska, when any person shall die, leaving a husband or wife surviving, all the real estate which the deceased was seised of an estate of inheritance at any time during the marriage, or in which the deceased was possessed of an interest either legal or equitable at the time of his or her death, which has not been lawfully conveyed by the husband and wife while residents of this state, or by the deceased while the

[86] Rev. Code 1907, § 4820.
[87] Rev. Code 1907, § 4821.
[88] Rev. Code 1907, § 4829.
[89] Rev. Code 1907, § 4835.
[90] Rev. Code 1907, § 3768.
[91] Rev. Code 1907, § 4828.

husband or wife was a nonresident of this state, which has not been sold under execution or judicial sale, and which has not been lawfully devised, shall descend subject to his or her debts and the rights of homestead in the manner following: 1. One-fourth part to the husband or wife, if the survivor is not the parent of all the children of the deceased and there be one or more children, or the issue of one or more deceased children, surviving. 2. One-third part to the husband or wife if the survivor is the parent of all the children of the deceased and there be two or more children, or one child and the issue of one or more deceased children surviving. 3. One-half to the husband or wife, if the survivor is the parent of all the children of the deceased and there be only one child or the issue of a deceased child surviving. 4. One-half to the husband or wife, if there be no children nor the issue of any deceased child or children surviving. 5. If the deceased leave relatives of his or her blood, the residue of the real estate of which he or she shall die seized, in the cases above named, when not lawfully devised, shall descend subject to the rights of homestead, in the same manner and to the same persons as hereinafter provided for the descent of real estate of deceased persons leaving no husband or wife surviving; and in the event the deceased leave no relatives of his or her blood, the residue of the real estate herein provided for shall also descend to the surviving husband or wife.[92] 6. When any person leaving no husband or wife surviving shall die, seised of any real estate, or any right thereto, or entitled to any interest therein in fee simple, or for the life of another, not having lawfully devised the same, it shall descend, subject to his debts, in the manner following: (1) In equal shares to his children, and to the lawful issue of any deceased child by right of representation; and if there be no child of the deceased living at his death, the estate shall descend to all his other lineal descendants; and if all the said descendants are in the same degree of kindred to the deceased, they shall have the estate equally; otherwise they shall take according to the right of representation. (2) If the deceased shall leave no issue, the estate shall descend to the father and mother of the deceased, or to the survivor of them. (3) If the deceased shall leave no issue, nor father nor mother, the estate shall descend in equal shares to his brothers and sisters, and to the children of

[92] Nebraska Rev. Stat. 1913, ch. 17, art. 1, § 1265.

any deceased brother or sister, by right of representation. (4) If the deceased shall leave no issue, nor father nor mother, nor sister nor brother, the estate shall descend to his next of kin in equal degree, but claiming through different ancestors, those who claim through the nearest ancestor shall be preferred to those claiming through an ancestor more remote. (5) If any person shall die leaving several children, or leaving one child and the issue of one or more other children, and any such surviving child shall die under age, and not having been married, all the estate that came to the deceased child by inheritance from such deceased parent, shall descend in equal shares to the other children of the same parents and to the issue of any such children who shall have died by right of representation. (6) If at the death of such child who shall die under age and not having been married, all the other children of said parent shall also be dead, and any of them shall have left issue, the estate that came to the said child, by inheritance, from his or said parent, shall descend to the issue of the other children of the same parent; and if all the said issue are in the same degree of kindred to the said child, they shall take the estate equally; otherwise they shall take according to the right of representation. (7) If the deceased shall leave no kindred nor husband nor wife, the estate shall escheat to the state.[93] 7. Every illegitimate child shall be considered as an heir of the person who shall, in writing, signed in the presence of a competent witness, have acknowledged himself to be the father of such child, and shall in all cases be considered as an heir of his mother, and shall inherit his or her estate in whole or in part as the case may be, in the same manner as if he had been born in lawful wedlock; but he shall not be allowed to claim, as representing his father or mother, any part of the estate of his or her kindred, either lineal or collateral, unless, before his death, his parents shall have intermarried and had other children, and his father, after such marriage, shall have acknowledged him, as aforesaid, or adopted him into his family, in which case such child and all legitimate children shall be considered as brothers and sisters, and on the death of either of them intestate and without issue, the other shall inherit his estate, and he theirs, as hereinbefore provided, in like manner as if all the children had been legitimate, saving to the father and mother respectively their rights in the

[93] Nebraska Rev. Stat. 1913, ch. 17, art. 1, § 1266.

estate of all the said children as provided hereinbefore, in like manner as if all had been legitimate.[94] If an illegitimate child shall die intestate, without lawful issue, his estate shall descend to his mother, or in case of her decease, to her heirs at law.[95] 8. The degrees of kindred shall be computed according to the rule of the civil law; and kindred of the half-blood shall inherit equally with those of the whole-blood, unless the inheritance came to the intestate by descent, devise or gift of some one of his ancestors, in which case all those who are not of the blood of such ancestor shall be excluded from such inheritance.[96] 9. Any estate, real or personal, that may have been given by the intestate in his lifetime, as an advancement to any child or other lineal descendant, shall be considered as a part of the estate of the intestate, so far as regards the division and distribution thereof among his issue, and shall be taken by such child or other descendant towards his share of the estate of the intestate.[97] If the amount of such advancement shall exceed the share of the heir so advanced, he shall be excluded from any further portion in the division and distribution of the estate, but he may not be required to refund any part of such advancement; and if the amount so received shall be less than his share, he shall be entitled to as much more as will give him his full share of the estate of the deceased.[98] If such advancement be made in real estate, the value thereof shall, for the purposes mentioned in the preceding section, be considered a part of the real estate to be divided; and if it be in personal estate, it shall be considered a part of the personal estate; and if in either case it shall exceed the share of real estate and personal estate respectively, that would have come to the heir so advanced, he shall not refund any part of it, but shall receive so much less out of the other part of the estate as will make his whole share equal to those of the other heirs who are in the same degree with him.[99] All gifts and grants shall be deemed to have been made in advancement, if they are expressed in the gift or grant to be so made, or if charged in writing by the intestate as an advancement, or acknowledged in writing as

[94] Nebraska Rev. Stat. 1913, ch. 17, art. 1, § 1273.
[95] Nebraska Rev. Stat. 1913, ch. 17, art. 1, § 1274.
[96] Nebraska Rev. Stat. 1913, ch. 17, art. 1, § 1275.
[97] Nebraska Rev. Stat. 1913, ch. 17, art. 1, § 1276.
[98] Nebraska Rev. Stat. 1913, ch. 17, art. 1, § 1277.
[99] Nebraska Rev. Stat. 1913, ch. 17, art. 1, § 1278.

such by the child or other descendant.[1] If the value of the estate so advanced shall be expressed in the conveyance, or in the charge thereof made by the intestate, or in the acknowledgment of the party receiving it, it shall be considered as of that value in the division and distribution of the estate; otherwise it shall be estimated according to its value when given, as nearly as the same can be ascertained.[2] If any child or lineal descendant so advanced shall die before the intestate, bearing issue, the advancement shall be taken into consideration in the division and distribution of the estate and the amount thereof shall be allowed accordingly by the representatives of the heirs so advanced, in like manner as if the advancement had been made directly to them.[3] 10. Posthumous children are considered as living at the death of their parents.[4] 11. An adopted child, and the person or persons adopting it, sustain toward each other the usual relation and the adopted child has bestowed upon him or her equal rights, privileges and immunities of children born in lawful wedlock, of parent and child.[5] 12. No distinction is made by law between resident aliens and citizens in reference to the possession, enjoyment or descent of property.[6]

§ 862. **Nevada.**—In Nevada the estate of an intestate, when not limited by the marriage contract, shall descend: 1. If there be surviving husband or wife and one child or its issue, one-half to such surviving husband or wife and the other half to such child or its issue. If there be a surviving husband or wife and more than one child, one-third to such survivor and the remainder in equal shares to the children. If there be lineal descendants, but no living children, the remainder shall go to such descendants. 2. If he or she leave no issue, the estate shall go in equal shares to the surviving husband or wife and to the intestate's father, and if he or she shall leave no father, it shall go in equal shares to the surviving husband or wife and to the intestate's mother. If he or she shall leave no issue nor father nor mother, the whole community property of the estate shall go to the surviving husband or wife and one-half of the separate prop-

[1] Nebraska Rev. Stat. 1913, ch. 17, art. 1, § 1279.
[2] Nebraska Rev. Stat. 1913, ch. 17, art. 1, § 1280.
[3] Nebraska Rev. Stat. 1913, ch. 17, art. 1, § 1281.
[4] Nebraska Rev. Stat. 1913, ch. 17, art. 1, § 1282.
[5] Nebraska Rev. Stat. 1913, ch. 17, art, 1, § 1623.
[6] Const. of Nebraska, art, 1, § 25.

erty of the intestate shall go to the surviving husband or wife, and the other half thereof shall go in equal shares to the brothers and sisters of the intestate, and to the children of any deceased brother or sister by right of representation. If he or she shall leave no issue, nor husband or wife, the estate shall go to his or her father if living, if not to his or her mother, if living. 3. If there be no issue, nor husband nor wife, nor father, nor mother, then in equal shares to the brothers and sisters of the intestate and to the children of any deceased brother or sister by right of representation. 4. If the intestate shall leave no issue, nor husband, nor wife, nor father, nor mother, and no brother or sister living at his death, the estate shall go to the next of kin in equal degree, excepting that when there are two or more collateral kindred in equal degree, but claiming through different ancestors, those who claim through the nearest ancestors shall be preferred to those who claim through ancestors more remote; provided, however, that if any person shall die leaving children, or one child and issue of one or more children and any such surviving child shall die under age and not having been married, all the estate that come to such deceased child by inheritance from such deceased parent shall descend in equal shares to the other children of the same parent, and to the issue of any such other children who may have died, by right of representation. 5. If at the death of such child, who shall die under age, and not having been married, all the other children of his said parent being also dead, and any of them having left issue, the estate that come to such child by inheritance from his or her said parent, shall descend to all of the other issue of the other children of the same parent, and if all the said issue are in the same degree of kindred to said child, they shall share the said estate equally; otherwise, they shall take according to the right of representation. 6. If the intestate shall leave no husband nor wife nor kindred, the estate shall escheat to the state.[7] 7. An illegitimate child is the heir of its mother and of its father if he acknowledge it as his child by a writing signed before a competent witness. If the parents of such illegitimate intermarry and acknowledge him he shall inherit as a legitimate child. The issue of all marriages deemed null in law or dissolved by divorce shall be legitimate.[8] 8. Children legally adopted have all the rights of inheritance as natural

[7] Rev. Laws 1912, § 6116.

[8] Rev. Laws 1912, § 6117.

children.[9] 9. Nonresident aliens, except Chinese, have the same rights of inheritance as resident citizens.[10] 10. Degrees of kindred are computed according to the rules of the civil law.[11] 11. Children of the whole-blood inherit estates which descend from their ancestor to the exclusion of children of the half-blood.[12] 12. Posthumous children are considered as living at the death of the intestate.[13] 13. Advancements made to a child or other lineal descendants are considered as a part of the estate, so far as regards a division and distribution thereof among the issue of the intestate, and shall be taken by such child or other descendant towards his share of the estate. If the amount of such advancement shall exceed the share of the heir so advanced, he shall be excluded from any further portion in the division and distribution of the estate, but he shall not be required to refund any excess; and if the amount so refunded be less than his share, he shall be entitled to as much more as would give him his full share of the estate of the deceased.[14]

§ 863. **New Hampshire.**—In New Hampshire the real estate of an intestate descends, subject to the right of dower and curtesy, to homestead rights, and to the debts of the intestate, as follows: 1. In equal shares to the children of the deceased and the legal representatives of such of them as are dead. 2. If there be no issue, to the father and mother in equal shares, or if one is deceased to the survivor. 3. If there be no issue, nor father or mother, in equal shares to the brothers and sisters, or their representatives. 4. If there be no issue, nor father nor mother, nor brothers nor sisters of their representatives, then to the next of kin in equal shares. 5. If there be a child or children, and no surviving husband or wife, then the whole estate goes to the children of the deceased in equal shares. 6. An illegitimate child inherits from its mother, and the mother inherits from such children. The real estate of the mother descends in equal shares to her legitimate and illegitimate children and their issue. 7. No representation shall be allowed beyond the degree of brothers' and sisters' grandchildren. 8. If any person be under age and unmarried, his estate, derived by descent or devise from his father or mother, descends to his brothers and sisters, or their

[9] Rev. Laws 1912, § 5829.
[10] Nev. Const., art. 1, § 16.
[11] Rev. Laws 1912, § 6119.
[12] Rev. Laws 1912, § 6119.
[13] Rev. Laws 1912, § 6129.
[14] Rev. Laws 1912, §§ 6120, 6121.

lineal representatives, if any, to the exclusion of the other parent. 9. In default of heirs, the estate escheats to the state.[15] 10. An adopted child is the child of its adopting parent to all intents and purposes, except he shall not take property expressly limited to the heirs of the body of its adopting parent, and if such adopted child die under age leaving property received by gift or inheritance from his natural kindred, his parents by adoption have no share therein.[16] 11. Resident aliens inherit the same as other citizens, and at their decease their property descends in the same manner as in the case of citizens.[17] 12. An advancement made to a child or other lineal descendant, shall be accounted for, according to its value, as part or the whole of the share of the person to whom the advancement has been made. Such advancement, or indebtedness of an heir, may be taken into consideration in the division of the real estate; or it may be considered and adjusted in the distribution of the personal estate. No deed of real estate shall be deemed an advancement unless the same is expressed to be made for love or affection, or unless it is provided to be an advancement by some acknowledgment signed by the party receiving it.[18]

§ 864. **New Jersey.**—In New Jersey, when a person dies intestate, seised of any lands, tenements, or hereditaments in his or her own right, in fee simple, they descend as follows: 1. To the children, and if any be dead, to their issue, by right of representation to the remotest degree. 2. If there be no children or issue of any, then to the brothers and sisters of the whole-blood, and if any be dead to their issue, by right of representation. And the same law of inheritance applies in case of the death of any brother or sister before the person was seised, leaving issue. 3. If no lawful issue, or brothers or sisters, or any lawful issue of such brothers or sisters, then to the father, unless the inheritance came from the part of the mother; in which case it descends as if the father had previously died. 4. If no lawful issue, brothers or sisters, or lawful issue of them, or father, then to the mother in fee unless the inheritance came from the part of the father by descent, gift, or devise, in which case it descends as if the mother had predeceased the person seised. 5. If there be no such kindred

[15] Pub. Stat. 1901, ch. 196.
[16] Pub. Stat. 1901, ch. 181.
[17] Pub. Stat. 1901, ch. 137, § 16.
[18] Pub. Stat. 1901, ch. 196, § 9.

as above, then to the brothers and sisters of the half-blood and their issue by right of representation; unless the inheritance came to the intestate by descent, devise, or gift from one of his or her ancestors, in which case only those of the blood of such ancestor, if any be living, shall take. 6. If there be none of these then to all persons of equal degree of consanguinity, either of the whole or the half-blood; however remote from the person seised the common degree of consanguinity may be. Those not of the blood of the ancestor from whom the land may come are excluded, and if there is any person in being, although more remote of the whole or half-blood of the ancestor he is capable of inheriting. 7. Posthumous children inherit as though born in the life-time of the intestate. 8. The real estate of an illegitimate child dying intestate without lawful issue goes to the mother of such child, and if she predecease such child, then to her heirs at law. Any child born out of lawful wedlock becomes legitimate and entitled to all the rights and privileges of a child born within lawful wedlock, whenever the lawful parents of such child shall have married the one with the other, or shall hereafter so marry and such child shall have been or be recognized and treated by such parents as their child. 9. The common-law right of representation does not exist in the cases covered by rule six above, so that first cousins take in preference to cousins of a more distant degree. 10. In calculating the degrees of consanguinity the civil and not the canon law rule is to be resorted to. 11. Resident and nonresident aliens take property by descent the same as citizens.[19] 12. An adopted child becomes the heir of the person adopting it, except that such child does not inherit estates tail or property coming from the collateral kindred of such adopting parent and the subsequent death of the adopted child without issue, the property of such adopting parent goes to the next of kin of said parent, and if such adopting parent shall have natural children, the adopted child shall share in the inheritance; and such children shall respectfully inherit from and through each other.[20]

§ 865. **New Mexico.**—In New Mexico the real estate of an intestate descends as follows: 1. One-fourth to the surviving

[19] Comp. Stat. 1909-1910, pp. 1917-1923.

[20] Comp. Stat. 1909-1910, pp. 2807-2809.

husband or wife, and the remainder in equal shares to the children, and their heirs by right of representation. 2. If the intestate leaves no issue the whole of his estate shall go to the surviving wife or husband, and if there is no surviving wife or husband, the portion which would have gone to such survivor shall go to the parents of the decedent; and if one of the parents be dead, then to the surviving parent. 3. If both parents be dead, the property is distributed as if such parents had outlived the decedent and died in possession of the property; and so on through the ascending ancestors and their issue. If heirs are not thus found, the portion uninherited goes to the husband or wife of the deceased according to like rules. 4. If there be no heirs of the intestate, the portion uninherited shall go to the heirs of his wife, if dead, according to like rules, and if he has more than one wife dead it shall be equally divided among the heirs of all such wives taking by right of representation. 5. If there be no heirs nor kindred, husband or wife, then the estate escheats to the state. 6. Upon the death of the wife, the entire community property, without administration, belongs to the husband. And upon the death of the husband, half of the community property goes to the surviving wife and the other half is subject to the testamentary disposition of the husband; and in the absence of such disposition goes one-fourth to the surviving wife and the remainder in equal shares to the children of the deceased. 7. Posthumous children unprovided for by the father's will shall inherit the same interest as though no will had been made. 8. Illegitimate children inherit from the mother and the mother, from the children, and they inherit from the father when they have been recognized by him as his children; but such recognition must have been general and notorious or else in writing, and then only when the father has no legitimate children. If the recognition has been mutual the father may inherit from his illegitimate children, but the mother and her heirs take preference to the father and his heirs. Illegitimate children become legitimate by the marriage of their parents.[21] 9. Aliens inherit property the same as citizens.

§ 866. **New York.**—In New York the real estate of an intestate remaining after payment of debts, goes by descent as fol-

[21] Ann. Stat. 1915, ch. 29.

lows, subject to dower and curtesy: 1. To the lineal descendants of the intestate. 2. To the intestate's father. 3. To the mother of the intestate. 4. To the collateral relatives of the intestate.[22] The above course of descent is subject to the following rules: (1) If lineal descendants are all of equal degree of consanguinity to intestate they share equally; (2) if of unequal degree they take the shares which their parents, if living, would have taken; (3) in default of lawful descendants, the father takes the fee unless the inheritance came on the part of the mother, in which case, if the mother is dead, he takes the life estate, with reversion to such brothers and sisters of the intestate as may be living, and descendants of those dead. If none are living to take the reversion he takes the fee.[23] 5. If there are no descendants and no father, or the inheritance came on the part of the mother, she takes a life estate with reversion to brothers and sisters of the intestate and their descendants. If there are no such reversioners she takes the fee.[24] 6. If there are no descendants, and no father or mother capable of inheriting the estate, it descends to collaterals, in the following order: (1) To the brothers and sisters of the intestate and their descendants; (2) if the estate came on the part of the father to the father's brothers and sisters and their descendants, and if none such, to the mother's brothers and sisters and their descendants; (3) if the estate came on the part of the mother to the mother's brothers and sisters and their descendants; if none such, to the father's brothers and sisters and their descendants; (4) if the estate did not come on the part of either father or mother, to the brothers and sisters both of father and mother and their descendants; (5) if there be no brothers or sisters or descendants of them, to the father's parents if the inheritance came through the father; if they be dead, to the mother's parents; if the inheritance came through the mother, to the mother's parents; if the inheritance did not come through either father or mother, then to living grandparents.[25] 7. Collaterals, when all are equal degree of consanguinity to the intestate, take per capita; if of unequal degree, they take per stirpes.[26] 8. The estate of an illegitimate intestate, dying without issue, descends to the mother, if living; if she be dead, to his relative entitled

[22] Consol. Laws 1909, § 81.
[23] Consol. Laws 1909, §§ 82, 83, 84.
[24] Consol. Laws 1909, § 85.
[25] Consol. Laws 1909, § 88.
[26] Consol. Laws 1909, §§ 86, 87.

to take on her part, as if he had been legitimate. Illegitimate children inherit both real and personal property from the mother, as if legitimate, if the mother has no lawful descendants.[27] 9. Relatives of the half-blood inherit equally with those of the whole-blood, unless the inheritance came to the intestate by descent, devise, or gift of an ancestor, in which case all those not of the blood of such ancestor are excluded.[28] 10. In cases not provided for, the estate descends according to the course of the common law.[29] 11. Posthumous children inherit as if born in the lifetime of the intestate.[30] 12. The alienism of an intestate does not preclude inheritance by any person otherwise capable of inheriting.[31] 13. A legally adopted child of an intestate shares in the real and personal estate as if his legitimate child, and the foster parent stands in the same relation as a natural parent in respect to inheritance from the adopted child. But adoption does not deprive the child of his rights of inheritance and succession from his natural parents. A husband can not adopt a child without his wife's consent. 14. Any advancement of real or personal property by a decedent to a child shall be charged to him on the division or distribution of the estate, but the maintenance or educating or the giving money to a child without a view to a portion or settlement in life shall not be deemed an advancement.[32]

§ 867. **North Carolina.**—In North Carolina the property of an intestate descends according to the following rules: 1. The inheritance lineally descends to the issue of the person who died last seised; but does not lineally ascend except as hereinafter provided. 2. Females inherit equally with males and younger children with older children. 3. The lineal descendants of any deceased person shall represent their ancestor and stand in the same place as the person himself would have stood, had he been living. 4. On failure of lineal descendants and where the inheritance has been transmitted by descent from an ancestor or has been derived by gift, or settlement, from an ancestor, to whom the person thus advanced would, in the event of such ancestor's death, have been the heir, or one of his heirs, the inheritance shall descend to the next collateral relations capable of inheriting of the person last seised, who were of the blood of such ancestor, sub-

[27] Consol. Laws 1909, § 89.
[28] Consol. Laws 1909, § 91.
[29] Consol. Laws 1909, § 92.
[30] Consol. Laws 1909, § 93.
[31] Consol. Laws 1909, § 95.
[32] Consol. Laws 1909, § 96.

ject to the two preceding rules. 5. On failure of lineal descendants, and where the inheritance has not been transmitted by descent or derived as aforesaid from the ancestor or where, if so transmitted or derived, the blood of such ancestor is extinct, the inheritance shall descend to the next collateral relation, capable of inheriting of the person last seised, whether of the paternal or maternal line, subject to rules two and three. 6. Collateral relations of the half-blood shall inherit equally with those of the whole-blood, and the degrees of relationship shall be computed according to the rules which prevail in descents at common law; provided, that in all cases where the person last seised shall have left no issue capable of inheriting, nor brother, nor sister, nor issue of such, the inheritance shall vest in the father if living, and if not, then in the mother if living. 7. No inheritance shall descend to any person as heir of the person last seised unless such person shall be in life at the death of the person last seised, or shall be born within ten lunar months after the death of the person last seised. 8. When any person shall die leaving none who can claim as heir to him, his widow shall be deemed his heir, and as such, shall inherit his estate. 9. When there shall be no legitimate issue, every illegitimate child of the mother, and the descendant of any such child deceased, shall be considered an heir, and as such, shall inherit her estate, but such child or descendant shall not be allowed to claim, as representing the mother, any part of the estate of her kindred, either lineally or collaterally. Illegitimate children shall be considered legitimate as between themselves and their representatives, and their estates shall descend accordingly in the same manner as if they had been born in lawful wedlock, and in the case of the death of any such child or his issue without legal issue, his estate shall descend to such person as would inherit it if all such children had been born in wedlock; provided, that when any illegitimate child shall die without issue, his inheritance shall vest in the mother in the same manner as provided hereinbefore. 10. Every estate for the life of another not divided shall be deemed an inheritance of the deceased owner within the meaning and operation of the foregoing rules. 11. Every person in whom a seising is required by any of the provisions of the foregoing rules shall be deemed to have been seised if he had any right, title, or interest in the inheritance. 12. The children of colored parents, born at

any time before the first of January, 1868, or persons living together as man and wife, are hereby declared legitimate children of such parents or either one of them, with all the rights of heirs at law, and next of kin, with respect to the estate or estates of any such parents or either one of them. 13. The adoption of a child establishes reciprocal rights of inheritance between such child and its adoptive parents. 14. Aliens take by descent the same as citizens. 15. Whenever a parent shall die intestate, having in his or her lifetime settled upon or advanced to any of his or her children any real or personal estate, such child so advanced in real estate shall be utterly excluded from any share in the real estate descended from such parent, except so much thereof as will, when added to the real estate advanced, make the share of him who is advanced equal to the share of those who may not have been advanced, or not equally advanced. And any child so advanced in personal estate shall be utterly excluded from any share in the personal estate of which the parent died possessed, except so much thereof as will, when added to the personal estate advanced make the share of him who is advanced equal to the share of those who may not have been advanced, or not equally advanced; and in case any one of the children shall have been advanced in real estate in greater value than an equal share thereof which may come to the other children, he or his legal representatives shall be charged in the distribution of the personal estate of such deceased parent with the excess in value of such real estate so advanced as aforesaid over and above an equal share as aforesaid. And in case any of the children shall have been advanced in personal estate of greater share than an equal share thereof which goes to the other children, he or his legal representatives shall be charged in the division of the real estate, if there be any, with the excess in value which he may have received, as aforesaid, over and above an equal distributive share of the personal estate.[33]

§ 868. **North Dakota.**—In North Dakota, when any person having title to an estate not limited by a marriage contract dies intestate, it descends in the following manner: 1. If decedent leaves surviving husband or wife, and only one child, or lawful issue of one child, in equal shares to the surviving husband

[33] Pell's Revisal 1908, § 1556.

or wife, and such child or issue; and if there be not more than one child living, or one child and the lawful issue of one or more deceased children, one-third goes to the surviving husband or wife and the remainder in equal shares to the children and to the lawful issue of any deceased child by right of representation. But if there is no child of the deceased living at his death, the remainder goes to all of his lineal descendants, and if in the same degree of kindred equally, otherwise according to right of representation. If there be no surviving husband or wife, but decedent leaves issue, the whole estate goes to such issue, and if it consists of more than one child living, or one child and the lawful issue of one or more deceased children, then the estate goes in equal shares to the children living, or to the child living and the issue of the deceased child or children by right of representation. 2. If the decedent leave no issue and the estate does not exceed $10,000, all of the estate goes to the surviving husband or wife, and of all property in excess of $10,000, one-half thereof goes to the surviving husband or wife and the other half to the decedent's father and mother in equal shares, or if one is dead to the survivor, and if the father and mother are dead and decedent leaves any brothers or sisters, then in equal shares to the decedent, or to the children of any deceased brother or sister by right of representation. If decedent leaves no issue, nor husband, or wife, the estate must go to the father and mother in equal shares or the survivor of them. If the decedent leaves a surviving husband or wife and no issue, and no father or mother, brother, sister, or children of a deceased brother or sister, then the whole estate goes to the surviving husband or wife. 3. If there be no issue, nor husband nor wife, nor father nor mother, then the estate goes in equal shares to the brothers and sisters of the deceased, and to the children of such deceased brother or sister by right of representation. 4. If the decedent leaves no issue, nor husband, nor wife, nor father nor mother, nor brothers or sisters, the whole estate must go to the next of kin in equal degree, excepting where there are two or more collateral degrees, but claiming through different ancestors, those who claim through the nearest ancestor must be preferred to those claiming through an ancestor more remote. However, if the decedent leave several children, or one child and the issue of one or more, and any such surviving child die under age and not

having married, all the estate that came to the deceased child by inheritance from such decedent, descends in equal shares to the other children of the same parent, and to the issue of any such other children who are dead, by right of representation. 5. If at the death of such child, who dies under age, not having been married, and all the other children of the parents are also dead, and any of them have left issue, the estate that comes to such child by inheritance from his parents descends to the issue of all other children of the same parent, and if all issue are in the same degree of kindred to the deceased, they share the estate equally, otherwise according to the right of representation. 6. If the decedent leave no husband, wife, or kindred, the estate escheats to the state. 7. If the decedent be an infant and leave no parent, nor brother nor sister, but leaving any person of kin acting in the capacity of a foster parent who may have assumed or had imposed upon him, the duty or obligation of the personal care, custody, support or maintenance of such infant after the decease of its natural parents, and until its decease, but where such relationship was not created by a guardianship of the estate of such infant, then its estate shall descend to such foster parent.[34] 8. The degree of kindred is established by the number of generations and each generation is termed a degree.[35] 9. Kindred of the half-blood inherit equally with those of the whole-blood, unless the inheritance came to the intestate by descent, devise, or gift of some one of his ancestors, when those of the half-blood are excluded.[36] 10. Upon the death of a person in whom the title to real property constituting a homestead is vested, such homestead descends (1) to the surviving husband or wife for life; or, (2) if there be no surviving husband or wife to the decedent's minor child or children until the youngest attains majority, or through the surviving husband or wife dying before, then thereafter to the decedent's minor child or children until the youngest attains majority.[37] 11. An adopted child shall be deemed as respects inheritance, the child of its adoptive parents.[38] 12. Aliens acquire real estate by inheritance the same as citizens.[39] 13. Posthumous children are considered as living at the death of their parents.[40] 14. If there be no surviving husband

[34] Comp. Laws 1913, § 5743.
[35] Comp. Laws 1913, § 5747.
[36] Comp. Laws 1913, § 5752.
[37] Comp. Laws 1913, § 5627.
[38] Comp. Laws 1913, § 4448.
[39] Comp. Laws 1913, § 5759.
[40] Comp. Laws 1913, § 5276.

or wife or heirs capable of inheriting the estate, it escheats to the state.[41] 15. Advancements made to any child or other lineal descendant must be brought into hotchpot, but such person advanced shall in no case be required to refund gifts or advancements if so expressed in the instrument or charged in writing by the intestate as an advancement, or acknowledged in writing as such by the person advanced. The value of the advancement is taken as expressed in the conveyance; otherwise according to its value when given. When the issue of a person to whom an advancement has been made inherit, they must account for the advancement.[42] 16. Every illegitimate child is an heir of the person who, in writing signed in the presence of a competent witness, acknowledges himself to be the father of such child; and in all cases is an heir of his mother, and inherits his or her estate in whole or in part, as the case may be, in the same manner as if he had been born in lawful wedlock; but he does not represent his father or mother by inheriting any part of the estate of his or her kindred, either lineal or collateral, unless before his death his parents shall have intermarried, and his father, after such marriage, acknowledges him as his child or adopts him into his family.[43]

§ 869. **Ohio.**—In Ohio the real estate of an intestate which came by descent, devise, or deed of gift from an intestate, passes by descent as follows: 1. To the children or their lineal representatives. 2. To the husband or wife, relict of such intestate, during natural life. 3. To the brothers or sisters of the intestate, who are of the blood of the ancestor from whom the estate came. 4. If there be no brothers or sisters of the intestate of the blood of the ancestor from whom the estate came, or their legal representatives, and the estate came by deed of gift from an ancestor who is living, the estate shall ascend to such ancestor. 5. If the ancestor from whom the estate came is deceased, it shall pass to the children of such ancestor, or their legal representatives; if there are no such children, or their legal representatives, the estate shall pass to and vest in the husband or wife, relict of such ancestor, if the parent of the decedent, during the life of such relict; and on the death of such husband or wife,

[41] Comp. Laws 1913, § 5743.
[42] Comp. Laws 1913, §§ 5753-5757.
[43] Comp. Laws 1913, § 5745.

or if there is no such husband or wife, the estate shall pass to the brothers and sisters of such ancestor or their legal representatives, and for want of such brothers and sisters, or their legal representatives, to the brothers and sisters of the half-blood of the intestate, or their legal representatives, though such brother or sister be not of the blood of the ancestor from whom the estate came. 6. If there are no such half-brothers or sisters of the intestate, or their legal representatives, the estate shall pass to the next of kin to the intestate of the blood of the intestate from whom the estate came, or their legal representatives.[44] 7. If the estate came not by descent, devise, or deed of gift, it shall pass as follows: (1) To the children of the intestate and their legal representatives. (2) To the husband or wife, relict of such intestate. (3) To the brothers and sisters of the intestate of the whole-blood, or their legal representatives. (4) To the brothers and sisters of the half-blood or their legal representatives. (5) To the father, or if he be dead to the mother. (6) To the next of kin or their legal representatives of the blood of the intestate.[45] 8. If there are no kindred capable of inheriting, then the estate goes to the surviving husband or wife as an estate of inheritance; and if there be no such relict, it escheats to the state.[46] 9. When the relict of a deceased husband or wife shall die intestate and without issue possessed of any real or personal property which came to such intestate from any former deceased husband or wife by deed of gift, devise, or bequest, or under the provisions of rule seven, then such estate real and personal shall pass to and vest in the children of such deceased husband or wife or the legal representatives of such children. If there are no children or their legal representatives living, then such estate, real and personal, shall pass and descend, one-half to the brothers and sisters of such intestate, or their legal representatives, and one-half to the brothers and sisters of such deceased husband or wife from whom such personal or real estate came or their personal representatives.[47] 10. Illegitimate children shall inherit or transmit inheritance from and to the mother, and from and to those from whom she may inherit, or to whom she may transmit the inheritance in like manner as if born in lawful wedlock. When a man has by a woman one or more children, and after-

[44] Laning's Rev. Stat. 1905, § 6855.
[45] Laning's Rev. Stat. 1905, § 6856.
[46] Laning's Rev. Stat. 1905, § 6857.
[47] Laning's Rev. Stat. 1905, § 6859.

wards marries her, such child or children, if acknowledged by him as his child or children, shall be deemed legitimate; and the issue of parents whose marriage is deemed null at law shall nevertheless be deemed legitimate.[48] 11. Aliens take real property by inheritance the same as citizens.[49] 12. Advancements made by an intestate during his lifetime to a child or other lineal descendant must be brought into hotchpot, but in no case can the person advanced be required to refund. If any such advancement be made in real estate, the value thereof shall be considered and taken as a part of the real estate to be divided, and if in money or other personal estate, it shall be considered and taken as a part of the personal estate to be distributed; and if, in either case, it exceeds the value of the real or personal estate that would have come to the heir to whom such advancement was made, he or she shall not refund any part of it, but shall receive so much less out of the other part of the estate of the intestate as will make his or her whole share, as near as can be estimated, equal to that of either of the other heirs who are not in the same degree of consanguinity with him or her. If the value of the estate, real or personal, so advanced is expressed in the deed of conveyance, or in the charge thereof made by the intestate, or in the receipt in writing, given by the person receiving such advancement, it shall be considered and taken to be of that value, in the division and distribution of the estate, otherwise it shall be estimated as of its value when advanced.[50] 13. An adopted child inherits from its adoptive parent or parents, but not through them, from their ancestors.

§ 870. **Oklahoma.**—When any person having title to any estate not otherwise limited by marriage contract, dies without disposing of the estate by will, it descends and must be distributed in the following manner: 1. If the decedent leave a surviving husband or wife, or the lawful issue of one child, in equal shares to the surviving husband, or wife and child, or issue of such child. If the decedent leave a surviving husband or wife, and more than one child living, or one child living and the lawful issue of one or more deceased children, one-third to the surviving husband or wife, and the remainder in equal shares to his

[48] Laning's Rev. Stat. 1905, §§ 6871, 6872.

[49] Laning's Rev. Stat. 1905, § 6870.

[50] Laning's Rev. Stat. 1905, §§ 6866-6869.

children, and to the lawful issue of any deceased child, by right of representation; but if there be no child of the decedent living at his death, the remainder goes to all his lineal descendants; and if all the descendants are in the same degree of kindred to the decedent they share equally, otherwise they take according to the right of representation: Provided, that if the decedent shall have been married more than once, the spouse at the time of death shall inherit the property not acquired during covertures with such spouse only an equal part with each of the living children of decedent, and the lawful issue of any deceased child by right of representation. If the decedent leave no surviving husband or wife, but leave issue, the whole estate goes to such issue, and if such issue consists of more than one child living or one child living, and the lawful issue of one or more deceased children, then the estate goes in equal shares to the children living, or to the child living, and the issue of the deceased child or children by right of representation. 2. If the decedent leave no issue, the estate goes one-half to the surviving husband or wife, and the remaining one-half to the decedent's father or mother, to them in equal shares; but if there be no father or mother, then said remaining one-half goes, in equal shares, to the brothers and sisters of the decedent, and to the children of any deceased brother or sister, by right of representation. If decedent leave no issue, nor husband nor wife, the estate must go to the father or mother, or if he leave both father and mother, to them in equal shares: Provided, that in all cases where the property is acquired by the joint industry of husband and wife during coverture, and there is no issue, the whole estate shall go to the survivor, at whose death, if any of the said real property remain, one-half of such property shall go to the heirs of the husband and one-half to the heirs of the wife, according to the right of representation. 3. If there be no issue, nor husband nor wife, nor father, nor mother, then in equal shares to the brothers and sisters of the decedent, and to the children of any deceased brother or sister, by right of representation; if the deceased, being a minor, leave no issue, the estate must go to the parents equally, if living together; if not living together, to the parent having had the care of said deceased minor. 4. If the decedent leave no issue nor husband nor wife, nor father and no brother or sister is living at the time of his death, the estate goes to his mother, to

the exclusion of the issue, if any, of deceased brothers or sisters. 5. If the decedent leave a surviving husband or wife, and no issue, and no father, nor mother, nor brother, nor sister, the whole estate goes to the surviving husband or wife. 6. If the decedent leave no issue, nor husband or wife, and no father or mother, nor brother nor sister, the estate must go to the next of kin, in equal degree, but claiming through different ancestors, those who claimed through the nearest ancestors must be preferred to those claiming through an ancestor more remote. 7. If the decedent leave several children, or one child and the issue of one or more children, and any such surviving child dies under age, and not having been married, all the estate that came to the deceased child by inheritance from such decedent, descends in equal shares to the other children of the same parent, and to the issue of any such other children who are dead, by right of representation. 8. If, at the death of such child who dies under age, not having been married, all the other children of his parents are also dead, and any of them have left issue, the estate that came to such child by inheritance from his parent descends to the issue of all other children of the same parent; and if all issue are in the same degree of kindred to the child, they share the estate equally; otherwise they take according to the right of representation. 9. If the decedent leave no husband, wife, or kindred, the estate escheats to the state for the support of common schools.[51] Every illegitimate child is an heir of the person who in writing, signed in the presence of a competent witness, acknowledges himself to be the father of such child; and in all cases is an heir of his mother; and inherits his or her estate, in whole or in part, as the case may be, in the same manner as if he had been born in lawful wedlock; but he does not represent his father or mother by inheriting any part of the estate of his or her kindred, either lineal or collateral, unless before his death his parents shall have intermarried, and his father after such marriage, acknowledges him as his child, or adopts him into his family; in which case such child and all the legitimate children are considered brothers and sisters, and on the death of either of them, intestate, and without issue, the others inherit his estate, and are heirs, as hereinbefore provided, in like manner as if all the children had been

[51] Oklahoma Rev. Laws 1910, § 8418.

legitimate; saving to the father and mother, respectively, their rights in the estate of all the children in like manner as if all had been legitimate. The issue of all marriages null in law, or dissolved by divorce, are legitimate.[52] If an illegitimate child, who has not been acknowledged or adopted by his father, dies intestate, without lawful issue, his estate goes to his mother, or, in case of her decease, to her heirs at law.[53] Any estate, real or personal, given by the decedent in his lifetime, as an advancement to any child or other lineal descendant, is a part of the estate of the decedent for the purpose of division and distribution thereof among his issue, and must be taken by such child, or other lineal descendant, toward his share of the estate of the decedent.[54]

§ 871. **Oregon.**—In Oregon the real estate of an intestate descends as follows: 1. In equal shares to the children and the issue of deceased children by right of representation. If no children living, to the lineal descendants. 2. If no lineal descendants, to the surviving husband or wife; and if no surviving husband or wife, then equally to the father and mother of the intestate. 3. If there be no lineal descendants, nor husband, nor wife, nor father, then to the mother; or if there be no lineal descendants, nor wife, nor husband, nor mother, then to the father. If there be no lineal descendants, husband, wife, father, or mother, then equally to the brothers and sisters and the issue of the deceased brothers and sisters by representation. 4. If there be no lineal descendants, husband, wife, father, mother, brothers or sisters, then to the next of kin. 5. If a child die under the age of twenty-one years, leaving no husband, wife, or children, then to the heirs of the ancestor from whom such real estate descended, the same as if such child died before the death of such ancestor. 6. If there be no lineal descendants or kindred, or husband or wife, the estate escheats to the state.[55] 7. An adopted child has the same rights as a child born to the adopted parents in lawful wedlock, except that he can not inherit as an heir of the body or as a child of a deceased child by right of representation.[56] 8. Aliens have the same rights of inheritance as citizens.[57]

[52] Oklahoma Rev. Laws 1910, § 8420.
[53] Oklahoma Rev. Laws 1910, § 8421.
[54] Oklahoma Rev. Laws 1910, § 8795.
[55] Lord's Laws 1909, § 7348.
[56] Lord's Laws 1909, § 7089.
[57] Lord's Laws 1909, § 7172.

9. Illegitimates inherit from the mother but not through her. When an illegitimate child dies intestate without leaving husband or wife or lawful issue, the estate passes to the mother. Illegitimate children are made legitimate by the marriage of their parents.[58] 10. Degrees of kindred are computed according to the rules of the civil law.[59] 11. Kindred of the half-blood inherit equally with those of the whole-blood in the same degree.[60] 12. Any estate, real or personal, that may have been given by the intestate in his lifetime, as an advancement to any child or other lineal descendant, shall be considered as a part of the estate of the intestate, so far as regards the division and distribution thereof among his issue, and shall be taken by such child or other descendant toward his share of the estate of the intestate. If the amount of such advancement shall exceed the share of the heir so advanced, he shall be excluded from any further portion in the division and distribution of the estate, but he shall not be required to refund any part of such advancement; and if the amount so received shall be less than his share, he shall be entitled to as much more as will give him his full share of the estate of the deceased. If such advancement be made in real estate, the value thereof shall, for the purposes mentioned in the preceding section, be considered a part of the real estate to be divided; and if it be in personal estate, it shall be considered a part of the personal estate; and if in either case it shall exceed the share of real and personal estate respectively, that would have come to the heir so advanced, he shall not refund any part of it, but shall receive so much less out of the other part of the estate as will make his whole share equal to those of the other heirs who are in the same degree with him. All gifts and grants shall be deemed to have been made in advancement, if they are expressed in the gift or grant to be so made, or if charged in writing by the intestate as an advancement, or acknowledged in writing as such by the child or other descendant. If the value of the estate so advanced shall be expressed in the conveyance, or in the charge thereof made by the intestate, or in the acknowledgment of the party receiving it, it shall be considered as of that value in the division and distribution of the estate; otherwise it shall be estimated according to its value when given, as nearly as the same

[58] Lord's Laws 1909, §§ 7351, 7352. [60] Lord's Laws 1909, § 7353.
[59] Lord's Laws 1909, § 7353.

can be ascertained. If any child or lineal descendant so advanced shall die before the intestate, bearing issue, the advancement shall be taken into consideration in the division and distribution of the estate, and the amount thereof shall be allowed accordingly by the representatives of their heirs so advanced, in like manner as if the advancement had been made directly to them.[61]

§ 872. **Pennsylvania.**—In Pennsylvania the real estate of a person dying intestate descends as follows: 1. If the intestate leave a surviving wife and issue, the wife takes one-third for life; but if there be no issue, she takes the sum of $5,000 payable out of the real or personal estate or both as she may elect, and in addition thereto shall be entitled to one-half of the remaining real estate for life; if he leaves no known heirs she takes all in fee. 2. If the intestate leave a surviving husband, he has a life estate in the real estate, as tenant by the curtesy, whether there be issue of the marriage or not. 3. Subject to these estates, the children and issue of deceased children take the estate in equal shares. If they stand in different degrees of consanguinity, they take by representation. If in the same degree, they take per capita. 4. In default of issue, and subject to estates of widow and surviving husband, the real estate goes to the father and mother jointly, and to the survivor for life, and subject to their estates, or, if they both be dead, to the brothers and sisters of the intestate of the whole-blood, and the children and grandchildren of any deceased brothers and sisters, in fee, in equal shares. 5. If there be no issue of the intestate, nor brother, nor sister, nor nephew or niece of the whole-blood, the real estate goes, subject to the life estates aforesaid, to the next of kin of the intestate, being descendants of brothers and sisters of the whole-blood. 6. In default of issue and brothers and sisters of the whole-blood and their descendants, and subject to the life estates of the widow or surviving husband, the real estate is vested in the father and mother, or whichever of them is living, for such estate as the intestate had therein. 7. Subject to all the estates above mentioned, the real estate descends to the brothers and sisters of the half-blood and their descendants in like manner. 8. If the intestate left no kindred related to him as above, the real estate descends to his next of kin who is of the blood of the last pur-

[61] Lord's Laws 1909, §§ 7354-7359.

chaser. If there be none, then to the next of kin generally. If there be kindred of the blood of the last purchaser, none other can take an estate of inheritance. 9. Degrees of consanguinity are reckoned according to the rules of the civil law. 10. Children and descendants of deceased grandparents shall represent such deceased grandparents whenever grandparents are entitled as next of kin to intestate's real or personal estate. 11. Minors, and since the act of June 1, 1911, adult persons may be adopted as heirs of the adopting parents. 12. In default of all known kindred, widow, or surviving husband, the real and personal estate of an intestate escheats to the state. 13. Illegitimate children and their mother may inherit from each other, and illegitimates born of the same mother may inherit from each other. 14. Advancements to children in the intestate's lifetime are deducted from their shares.[62]

§ 873. **Rhode Island.**—In Rhode Island the rules of descent are as follows: 1. To the intestate's children and their descendants. 2. If there be no children or their descendants, then to the parents in equal shares or to the surviving parent of such intestate. 3. If there be no parent, then to the brothers and sisters of the intestate, and to their descendants.[63] 4. If there be none of the foregoing then the estate passes in equal moiety to the paternal and maternal kindred: (1) To the grandparents, in equal shares, if any there be; (2) if there be no grandparent then to the uncles and aunts, or their descendants; (3) if there be no grandparents, uncles or aunts, or their descendants, then to the great-grandparents in equal shares; (4) if there be no great grandparents then to the granduncles and grandaunts, and their descendants.[64] 5. When the title to any real estate of inheritance came to the intestate by gift or devise from intestate's parents or their kindred, and intestate shall be without children, such estate shall go to the kin nearest to the intestate, of the blood of the person from whom such estate came or descended, if there be any such kin.[65] 6. An alien has the same right of inheritance as a citizen.[66] 7. No right of inheritance accrues to any person whatever, other than to the children

[62] Pruden's Digest (13th ed.) 1905, pp. 1994-2006.
[63] Gen. Laws 1909, ch. 316, § 1.
[64] Gen. Laws 1909, ch. 316, § 2.
[65] Gen. Laws 1909, ch. 316, § 6.
[66] Gen. Laws 1909, ch. 252, § 4.

of the intestate, unless such person be in being, and capable in law, to take as heir at the time of the intestate's death.[67] 8. When the inheritance is directed to go by moieties, as in rule four to the paternal and maternal kindred, if there be no such kindred on the one part, the whole estate goes to the other part; and if there be none of either part, the whole goes to the husband or wife of the intestate; and if the wife or husband be dead, it goes to his or her kindred in the like course as if such husband or wife had survived the intestate, and then died, entitled to the estate.[68] 9. The descendants of any person deceased inherit the estate which such person would have inherited had he survived the intestate.[69] 10. Illegitimate children and their mother inherit from each other.[70] 11. Advancements made to any child or other lineal descendant must be deducted from the share of the person so advanced. If real estate shall be conveyed by deed of gift or personal estate shall be delivered to a child or other lineal descendant, and charged, or a memorandum thereof in writing made by the intestate or by his order, or shall be delivered expressly for that purpose in the presence of two witnesses, who were requested to take notice thereof, the same shall be deemed an advancement to such child to the value of such real or personal estate.[71]

§ 874. **South Carolina.**—In South Carolina the real estate of an intestate descends as follows: 1. One-third in fee to the surviving wife; and the remainder to the children equally if more than one; but if only one the remainder shall be vested in that one absolutely forever. 2. If intestate leave no children or other lineal descendant but shall leave a widow, and father or mother, or brothers and sisters, or brother or sister of the whole-blood, the widow is entitled to one-half and the other one-half shall be equally divided between the father, or if he be dead, the mother and the brothers and sisters of the whole-blood. 3. If intestate leave no father or mother, or issue, but shall leave a widow and brothers and sisters, or brother or sister of the whole-blood, the widow shall be entitled to one-half and the brothers and sisters to the other half as tenants in common. Where the

[67] Gen. Laws 1909, ch. 316, p. 1148.
[68] Gen. Laws 1909, ch. 316, § 4.
[69] Gen. Laws 1909, ch. 316, p. 1148.
[70] Gen. Laws 1909, ch. 316, p. 1148.
[71] Gen. Laws 1909, ch. 316, p. 1151.

intestate leaves a widow and a brother or sister of the half-blood and a child or children of a brother or sister of the whole-blood, the widow takes one-half of the estate and the other half is to be equally divided between the brothers and sisters of the half-blood, and the children of the brothers and sisters of the whole-blood. 4. If there be none of the above kindred, the widow takes one-half of the estate, and the other one-half goes to lineal ancestors. 5. If there be none of the latter, then the widow takes two-thirds, and the residue goes to the next of kin to the intestate. 6. Degrees of kindred are computed by beginning with the ancestor, reckoning up to the common ancestor and down to the claimant, exclusively, each step representing a single degree. 7. Where the intestate leaves no surviving widow, the share that would have gone to her had she survived goes as provided for in the preceding clauses for the rest of the estate. 8. On the death of an intestate wife, the husband takes the same share in his wife's estate that she would have taken in his had she survived him; and the remainder goes in the same course as described in the case of intestacy of the husband. 9. If there is no husband surviving, his share goes as is provided in the preceding rules for the rest of the estate. 10. If the intestate leave no issue, parent, nor brother nor sister of the whole-blood, nor their children, nor brothers nor sisters of the half-blood, nor lineal ancestor, nor next of kin, the whole estate goes to the surviving husband or wife.[72] 11. Alien widows are entitled to dower, and descent can be traced through aliens.[73] 12. Adopted children inherit through their adoptive parents. But no person who adopts an illegitimate child can give to such child by deed, will, or otherwise, any greater portion of his estate than is now allowed by law, unless such person has no lawful wife or issue living at the time of his death, and in case of the adoptive parent dying intestate, such illegitimate child can inherit from such parent no greater portion of his estate than may be given such child by deed or will when such intestate leaves a widow or lawful issue surviving.[74] 13. Advancements made to a child or other lineal descendant must be brought into hotchpot by the person advanced or his legal representatives, and the value of the advancement is to be estimated at the death of the intestate, so that neither the im-

[72] Code of Laws 1912, § 3555.
[73] Code of Laws 1912, § 3556.
[74] Code of Laws 1912, § 3798.

provements of the real estate by such child or children, or the increase of personal property shall be taken into computation.[75]

§ 875. **South Dakota.**—In South Dakota the property of an intestate, after the debts of the decedent, and the expenses of the administration have been paid, must be distributed as follows: 1. If the decedent leave a surviving husband or wife, and only one child, or the lawful issue of one child, in equal shares to the surviving husband or wife and child, or issue of such child. If the decedent leave a surviving husband or wife, and more than one child living, or one child living, and the lawful issue of one or more deceased children, one-third to the surviving husband or wife, and the remainder in equal shares to his children, and to the lawful issue of any deceased child, by right of representation; but if there be no child of the decedent living at his death, the remainder goes to all of his lineal descendants; and if all the descendants are in the same degree of kindred to the decedent, they share equally, otherwise they take according to the right of representation. If the decedent leave no surviving husband or wife, but leave issue, the whole estate goes to such issue, and if such issue consists of more than one child living or one child living and the lawful issue of one or more deceased children, then the estate goes in equal shares to the children living, or to the child living, and the issue of the deceased child or children by right of representation. 2. If the decedent leave no issue and the estate does not exceed in value the sum of five thousand dollars, all the estate goes to the surviving husband or wife; if the estate exceeds five thousand dollars then the first five thousand dollars to the survivor, and all the property in excess of five thousand dollars in value, one-half goes to the surviving husband or wife, and the other half goes to the decedent's father and mother in equal shares, and if either is dead the whole goes to the other, but if neither survive then such portion goes in equal shares to the brothers and sisters of the decedent and to the children or grandchildren of any deceased brother and sister by right of representation. If the decedent leave no issue, nor husband, nor wife, the estate must go to his father and mother in equal shares, or, if either is dead, then to the other. 3. If there be no issue, nor husband, nor wife, nor father, nor mother,

[75] Code of Laws 1912, § 3558.

then in equal shares to the brothers and sisters of the decedent, and to the children of any deceased brother or sister, by right of representation. 4. If the decedent leave a surviving husband or wife, and no issue, and no father, nor mother, nor brother, nor sister, the whole estate goes to the surviving husband or wife. 5. If the decedent leave no issue, nor husband, nor wife, and no father, nor mother, nor brother, nor sister, the estate must go to the next of kin, in equal degree, excepting that when there are two or more collateral kindred, in equal degree, but claiming through different ancestors, those claiming through the nearest ancestors must be preferred to those claiming through an ancestor more remote. However, (see six). 6. If the decedent leave several children, or one child and the issue of one or more children, and any such surviving child dies under age, and not having been married, all the estate that came to the deceased child by right of inheritance from such decedent descends in equal shares to the other children of the same parent, and to the issue of any such other children who are dead, by right of representation. 7. If, at the death of such child who dies under age, not having been married, all the other children of his parents are also dead, and any of them have left issue, the estate that came to such child by inheritance from his parent descends to the issue of all other children of the same parent; and if all the issue are in the same degree of kindred to the child they share the estate equally; otherwise, they take according to the right of representation. 8. If the decedent leave no husband, wife, or kindred, the estate escheats to the state.[76] 9. The degree of kindred is established by the number of generations, and each generation is termed a degree.[77] 10. Kindred of the half-blood inherit equally with those of the whole-blood, unless the inheritance came to the intestate by descent, devise, or gift of some one of his ancestors, when those of the half-blood are excluded.[78] 11. An adopted child shall be deemed as respects inheritance the child of its adoptive parents.[79] 12. Aliens acquire real estate by inheritance the same as citizens.[80] 13. Posthumous children are considered as living at the death of the intestate.[81] 14. Advancements made to any child or other lineal descendant must be

[76] Comp. Laws 1913, § 1094.
[77] Comp. Laws 1913, § 1098.
[78] Comp. Laws 1913, § 1103.
[79] Comp. Laws 1913, § 136.
[80] Comp. Laws 1913, § 1110.
[81] Comp. Laws 1913, § 213.

brought into hotchpot, but such person advanced shall in no case be required to refund gifts or advancements if so expressed in the instrument or charged in writing by the intestate as an advancement, or acknowledged in writing as such by the person advanced. The value of an advancement is taken as expressed in the conveyance; otherwise, according to its value when given. When the issue of the person to whom an advancement has been made inherit, they must account for the advancement.[82] 15. Every illegitimate child is the heir of the person, who, in writing, signed in the presence of a competent witness, acknowledges himself to be the father of such child.[83]

§ 876. Tennessee.—In Tennessee the real estate of an intestate owner is inherited by his lineal descendants, collateral kindred, or ascendants in the following order: 1. By all the sons and daughters of the intestate equally; and if any child of the intestate shall die during the intestate's lifetime his lineal descendants shall take the parent's share. 2. If there be no issue, nor brothers and sisters, nor other issue, then by their parents, if they be living. 3. If the estate was acquired by intestate, and he died without issue, then it goes to his brothers and sisters of the whole and half-blood, and if any such brothers or sisters die during intestate's lifetime leaving issue, then the issue shall represent the parent. 4. In default of brothers and sisters and their issue, then to the father and mother as tenants in common; and if both are dead, in equal moieties to the heirs of the father and mother in equal degree. 5. Where the land came to the intestate by gift, devise, or descent, from a parent or the ancestor of a parent and he die without issue, leaving brothers or sisters of the paternal or maternal line of the half-blood, then the land goes to such brothers and sisters on the part of the parent from whom the land came, in the same manner as to brothers and sisters of the whole-blood, until the line of such parent is exhausted of the half-blood, to the exclusion of the other line. 6. If he leave no brothers or sisters, then it shall go to the parent, if living, from whom or whose ancestor it came, in preference to the other parent. 7. If both parents be dead, then to the heirs of the parent from whose ancestor it came.[84] 8. In respect to

[82] Comp. Laws 1913, §§ 1104, 1105.
[83] Comp. Laws 1913, § 1096, 1097.
[84] Ann. Code 1917, § 4163.

inheritance by grandchildren and nephews, the same rules apply.[85] 9. In case of no heirs, then the husband or wife take in fee simple. 10. There is no representation among collateral for brothers' and sisters' children.[86] 11. There is no distinction made between children of the whole and half-blood.[87] 12. Illegitimate children inherit equally with legitimates from their mother and from each other.[88] 13. Adoption, unless specially restrained by decree of court, confers all of the rights and privileges of a legitimate child, including capacity to inherit, but gives to the person obtaining the adoption no mutual rights of inheritance or interest in the estate of the person adopted.[89] 14. An alien, resident or nonresident, may take real property by descent. 15. All advancements, whether by settlement or otherwise, in the lifetime of the deceased, or by testamentary provision shall be collated and brought into contribution in the partition and distribution of the real and personal estate of the deceased; those in real estate, first in the partition of the real estate, and those in personal estate in the distribution of the personal estate. And should the value of the advancement in real estate exceed the child's share, the overplus shall be collated and brought into contribution in the distribution of the personal estate; and should the value of such advancement in personal estate exceed the share of such child in the personal estate, then the excess shall be brought into contribution in the partition of the real estate.[90]

§ 877. **Texas.**—In Texas, when any person having title to any estate of inheritance, real, personal, or mixed, shall die intestate as to such estate, and shall leave no surviving husband or wife, it shall descend and pass in parcenary to his or her kindred, male and female, in the following course: 1. To his or her children and their descendants, if any there be. 2. If there be no children or their descendants, then to his or her father or mother in equal portions. But if only the father or mother survive the intestate, then his or her estate shall be divided into two equal portions, one of which shall pass to such survivor, and the other one-half shall pass to the brothers and sisters of the deceased,

[85] Ann. Code 1917, § 4164.
[86] Ann. Code 1917, § 4165.
[87] Ann. Code 1917, § 4163, Part 3, a.
[88] Ann. Code 1917, § 4169.
[89] Statute construed and applied. Crocker v. Balch, 104 Tenn. 6, 55 S. W. 307.
[90] Ann. Code 1917, §§ 4174, 4175, 4176.

and to their descendants, or to such of them as there be; but if there be none such, then the whole estate shall be inherited by the surviving father or mother. 3. If there be neither father nor mother, then the whole of such estate shall pass to the brothers and sisters of the intestate, and to their descendants or to such of them as there be. 4. If there be none of the kindred aforesaid, then the inheritance shall be divided into two moieties, one of which shall go to the paternal and the other to the maternal kindred, in the following course, that is to say: to the grandfather and grandmother, in equal portions; but if only one of these be living, then the estate shall be divided into two equal parts, one of which shall go to such survivor and the other shall go to the descendant or descendants of such deceased grandfather or grandmother. If there be no such descendants, then the whole estate shall be inherited by the surviving grandfather or grandmother. If there be no surviving grandfather or grandmother then the whole of such estate shall go to their descendants or to such of them as there may be, and so on without end, passing in like manner to the nearest lineal ancestors and their descendants, or to such of them as there be.[91] 5. When any person, having title to any estate of inheritance, real, personal, or mixed, shall die intestate as to such estate, and shall leave a surviving husband or wife, the estate of such intestate shall descend and pass as follows: (1) If the deceased have a child or children, or their descendants, the surviving husband or wife shall take one-third of the personal estate, and the balance of such personal estate shall go to the child or children of the deceased, and their descendants; the surviving husband or wife shall also be entitled to an estate for life in one-third of the land of the intestate, with remainder to the child or children of the intestate and their descendants. (2) If the deceased have no child or children, or their descendants, then the surviving husband or wife shall be entitled to all the personal estate, and to one-half of the lands of the intestate, without remainder to any person or persons, and the other one-half shall pass and be inherited according to the rules of descent and distribution, as prescribed in the foregoing rules; provided, however, that if the deceased have neither surviving father nor mother, nor surviving brothers or sisters,

[91] Vernon's Sayles Civ. Stat. 1912, tit. 45, art. 2461.

or their descendants, then the surviving husband or wife shall be entitled to the whole of the estate of such intestate, real, personal, and mixed.[92] 6. The community property all goes to the surviving husband or wife, if the deceased have no children.[93] 7. No right of inheritance shall accrue to any person whatsoever other than to children of the intestate, unless they be in being and capable in law to take as heirs at the time of the intestate's death.[94] 8. Collateral kindred of the half-blood inherit only one-half so much as those of the whole-blood; but if all be of the half-blood, they shall have whole portions.[95] 9. Where the children of the intestate's brothers and sisters, uncles and aunts, or any other relations of the deceased standing in the same degree, come into partition, they shall take per capita; and where a part of them be dead, and a part living, the issue of those dead, have right to partition, such issue shall take per stirpes.[96] 10. Where a man, having by a woman a child or children, shall afterward intermarry with such woman, such child or children, if recognized by him, shall thereby be legitimate and made capable of inheriting his estate. The issue, also, in marriages deemed null in law shall nevertheless be deemed legitimate.[97] 11. Illegitimate children shall be capable of inheriting from and through their mother, and of transmitting estates, and shall also be entitled to distributive shares of the personal estate of any of their kindred, on the part of their mother, in like manner as if they had been lawfully begotten of such mother.[98] 12. Homesteads descend as other real property, but no partition can be had of same during the lifetime of the surviving husband or wife, or so long as the survivor may elect to use or occupy the same as a homestead, or so long as the guardian of minor children may be permitted to occupy same by order of court.[99] 13. An adopted child is entitled to all the rights and privileges, both in law and equity, of legal heirs; provided, however, that if the party adopting such heir has, at the time of such adoption, or shall thereafter have a child begotten in lawful wedlock, such adopted child

[92] Vernon's Sayles Civ. Stat. 1912, tit. 45, art. 2462.
[93] Vernon's Sayles Civ. Stat. 1912, tit. 45, art. 2469.
[94] Vernon's Sayles Civ. Stat. 1912, tit. 45, art. 2466.
[95] Vernon's Sayles Civ. Stat. 1912, tit. 45, art. 2464.
[96] Vernon's Sayles Civ. Stat. 1912, tit. 45, art. 2468.
[97] Vernon's Sayles Civ. Stat. 1912, tit. 45, art. 2472.
[98] Vernon's Sayles Civ. Stat. 1912, tit. 45, art. 2473.
[99] Vernon's Sayles Civ. Stat. 1912, tit. 52, ch. 18.

shall in no case inherit more than one-fourth of the estate of the party adopting him.[1] 14. Aliens may take real property by descent, but unless they become inhabitants or declare their intention of becoming citizens they must alienate the land within ten years, or same will be subject to escheat.[2] 15. Advancements made to children or other lineal descendants will be charged against the share of the person so advanced.[3]

§ 878. **Utah.**—In Utah, when any person having title to any estate not otherwise limited by marriage contract dies without disposing of the estate by will, it descends in the following manner: 1. If the decedent leave a surviving husband or wife, and only one child, or the issue of one child, in equal shares to the surviving husband or wife, and child or issue of such child. If the decedent leave a surviving husband or wife, and more than one child living, or one child living and the issue of one or more deceased children, one-third to the surviving husband or wife, and the remainder in equal shares to his children, and to the issue of any deceased child, by right of representation; but if there be no child of the decedent living at his death, the remainder goes to all of his lineal descendants; and if all of the descendants are in the same degree of kindred, they share equally; otherwise, they take according to the right of representation; provided, that the share in the legal and equitable estates and real property of which a deceased husband dies possessed, secured by this section to his widow, shall not be additional to the interest in such estates provided for in lieu of dower. 2. If the decedent leave no surviving husband or wife, but leave issue, the whole estate goes to such issue, and if such issue consists of more than one child living, or one child living, and the issue of one or more deceased child, then the estate goes in equal shares to the children living, or to the child living, and the issue of the deceased child or children by right of representation. 3. If the decedent leave no issue, all of the estate, real and personal, of which the decedent die seised or possessed, if not over five thousand dollars in value, exclusive of debts and expenses, goes to the surviving husband or wife; and if over that value,

[1] Vernon's Sayles Civ. Stat. 1912, tit. 45, art. 2463.
[2] Vernon's Sayles Civ. Stat. 1912, tit. 45, art. 2474.
[3] Vernon's Sayles Civ. Stat. 1912, tit. 45, art. 2467.

five thousand dollars in value thereof goes to the surviving husband or wife, and the excess goes one-half to the surviving husband or wife, and the other one-half to the decedent's father and mother in equal shares, and if either be dead the whole said one-half goes to the other. If there be no father or mother, then one-half of such excess goes in equal shares to the brothers and sisters of the decedent, and to the children of any deceased brother or sister by right of representation. If the decedent leave no issue, nor husband nor wife, the estate must go to his father and mother in equal shares, or if either be dead, then to the other. 4. If there be neither issue, husband, wife, father, nor mother, then in equal shares to the brothers and sisters of the decedent, and the children of any deceased brother or sister, by right of representation. 5. If the decedent leave a surviving husband or wife, and neither issue, father, mother, brother, nor sister, the whole estate goes to the surviving husband or wife. 6. If the decedent leave neither issue, husband, wife, father, mother, brother, or sister, the estate goes to the next of kin in equal degree, excepting when there are two or more collateral kindred, in equal degree, but claiming through different ancestors, those who claim through the nearest ancestors must be preferred to those claiming through an ancestor more remote. 7. If the decedent leave several children, or one child and the issue of one or more children, and any surviving child dies under age, and not having been married, all the estate that came to the deceased child by inheritance from such decedent descends in equal shares to the other children of the same parents and to the issue of any such other children who are dead, by right of representation. 8. If, at the death of such child, who dies under age, not having been married, all the other children of his parents are also dead, and any of them have left issue, the estate that came to such child by inheritance from his parents descends to the issue of all their children of the same parent; and if all the issue are in the same degree of kindred to the child, they share the estate equally; otherwise, they take according to the right of representation. 9. If the decedent leave no husband, wife, nor kindred, and there be no heirs to take the estate or any portion thereof the same shall escheat to the state.[4] 10. An adopted child has all the

[4] Comp. Laws 1907, § 2828.

rights of the legal relation of parent and child.[5] 11. Aliens may take in all cases by succession as well as citizens.[6] 12. An illegitimate child is the heir of the person who acknowledges himself to be the father of such child; and in all cases such child inherits from the mother, in the same manner as if born in lawful wedlock. The issue of all marriages null in law, or dissolved by the decree of divorce, are legitimate. If an illegitimate child dies intestate, without lawful issue, his estate goes to the mother, or in case of her decease to her lawful heirs.[7] 13. Kindred of the half-blood inherit equally with those of the whole-blood in the same degree, unless the inheritance came to the intestate by descent, devise, or gift of some one of his ancestors, in which case all those who are not of the blood of the ancestor will be excluded from the inheritance.[8] 14. Posthumous children are considered as living at the death of the intestate.[9] 15. Advancements made to any child or other lineal descendant must be brought into hotchpot, but in no case can the heir be required to refund. All gifts and grants are made in advancement if expressed in the gift or grant to be so made, or if charged in writing by the intestate as an advancement, or acknowledged in writing to be such by the person advanced. If the value of the estate so advanced is expressed in the conveyance, or in the charge thereof made by the decedent, or in the acknowledgment of the party receiving it, it must be held as of that value in the division and distribution of the estate; otherwise it must be estimated according to its value when given, as nearly as the same can be ascertained. If any child or other lineal descendant receiving an advancement, dies before the decedent, leaving issue, the advancement must be taken into consideration in the division and distribution of the estate, and the amount thereof must be allotted accordingly by the representatives of the heirs receiving the advancements, in like manner as if the advancement had been made directly to them.[10]

§ 879. **Vermont.**—In Vermont the real estate of an intestate descends as follows: 1. In equal shares to the children of the intestate or the legal representatives of deceased children. 2. If there be no children or their legal representatives, one-

[5] Comp. Laws 1907, tit. 2, § 8.
[6] Comp. Laws 1907, § 2847.
[7] Comp. Laws 1907, §§ 2833, 2834.
[8] Comp. Laws 1907, § 2840.
[9] Comp. Laws 1907, § 2846.
[10] Comp. Laws 1907, §§ 2841-2845.

third to the surviving wife. 3. If the husband leave no issue, the surviving wife is entitled to the whole of his estate if it does not exceed $2,000. If the estate exceeds $2,000 then the widow is entitled to $2,000 and one-half of the remainder, and the remaining part of the estate shall descend in the same manner as the whole would if no widow survived. 4. If the wife leaves no issue, the husband has the same share as the wife would have in the estate if he left no issue. 5. If the intestate leave no issue, nor surviving husband nor wife, the estate descends in equal shares to his father and mother, and if the mother is not living the estate descends to the father, or if the father is not living, and the mother survives, the estate descends to the mother. 6. If the intestate leave no issue, nor wife, nor husband, nor father, nor mother, the estate descends in equal shares to the brothers and sisters of such deceased person, and to the lineal representatives of a deceased brother or sister. 7. If none of the relatives above named shall survive, his estate shall descend in equal shares to the next of kin, in equal degrees; but no person shall be entitled by right of representation, to the share of such next of kin who shall have died.[11] 8. The degrees of kindred are computed according to the rules of the civil law.[12] 9. Kindred of the half-blood inherit equally with those of the whole-blood in the same degree.[13] 10. If there be no kindred, surviving husband or wife, the estate escheats to the town for the use of schools.[14] 11. Illegitimate children inherit from their mother as if born in lawful wedlock; and the estate of an illegitimate person dying intestate, and leaving no issue, nor husband, nor wife, shall descend to the mother, and if the mother be dead, through the line of the mother as if the person so dying were legitimate. When the parents of an illegitimate child intermarry, and such child be recognized by the father as his child, it shall be considered legitimate, and be capable of inheriting.[15] 12. Advancements made by the intestate to a child or other lineal descendant must be brought into hotchpot, but in no case can the heir be required to refund. Only such gifts are advancements as are so expressed, or are for the consideration of love and affection, or when the estate so given is charged as such by the deceased in

[11] Pub. Stat. 1906, § 2936.
[12] Pub. Stat. 1906, § 2937.
[13] Pub. Stat. 1906, § 2936.
[14] Pub. Stat. 1906, § 2940.
[15] Pub. Stat. 1906, §§ 2938, 2939.

writing, or is acknowledged as such by the heir in writing, or when personal estate is delivered expressly as an advancement before two witnesses requested to take notice of it. If the amount so advanced is in real property, the same shall be set off, first, toward the heir's share of the real estate, and if it is more than his share, the balance shall be set off toward his share of the personal estate; and if the advancement is in personal estate, the same shall be set off, first, toward the heir's share in the personal estate, and then toward his share in the real estate. But if all the heirs consent, a different application of the advancement may be made. If the child, or other lineal descendant, to whom such advancement is made, dies before the intestate, the advancement shall be reckoned toward the share of the representative, as it would be reckoned toward the share of the heir, if living. Where the value of an advancement is expressed in the conveyance, or in the charge of the same, or in the acknowledgment of the person receiving it, or by the intestate at the time of its delivery before two witnesses, such advancement shall be taken to be of the value so expressed; otherwise it shall be estimated according to the value at the time of making it.[16]

§ 880. **Virginia.**—In Virginia the real estate of an intestate descends as follows: 1. To the decedent's children and their descendants. 2. If no children nor the descendants of any children, to the father. 3. If no father, to his mother, brothers and sisters, and their descendants. 4. If none of these nor their descendants, then one moiety to the paternal and the other to the maternal kindred, in the following order: (1) To the grandfather. (2) If none, to the grandmother, uncles and aunts on the same side, and their descendants. (3) If none such, then to the great-grandfather. (4) If none, to the great-grandmothers, and the brothers and sisters of the great-grandmothers and grandfather, and their descendants and so on, passing to the nearest lineal male ancestors; if none, to the female ancestors in the same degree, and the descendants of such male and female ancestors. 5. If there be no father, mother, brother or sister, or any descendant of either, nor any paternal kindred, the whole shall go to the maternal kindred; if no paternal or maternal kindred, then to the husband or wife, and if the husband or wife be

[16] Pub. Stat. 1906, §§ 2951-2956.

dead, then to his or her kindred in like manner as if the husband or wife had survived the intestate and died entitled to the estate.[17] 6. Collaterals of the half-blood inherit only one-half so much as those of the whole-blood, but if all the collaterals be of the half-blood, then the ascending kindred, if any, shall have double portions.[18] 7. Where those entitled are in the same degree, they take per capita, but where some in that degree are dead, leaving descendants, these descendants take per stirpes.[19] 8. The fact that any party derives title through an alien ancestor shall be no bar to his claim.[20] 9. Illegitimate children inherit from their mother as if legitimate. If a man marry the mother of his illegitimate child, and recognize the child before or after the marriage, it shall be deemed legitimate. Though a marriage be deemed null or be dissolved by law, the issue shall be deemed legitimate.[21] 10. A child born within ten months after the death of the intestate shall inherit as though it was in being at the time of the death.[22] 11. The real estate of an infant dying without issue shall descend and pass to the kindred on the side of that parent from whom it was derived; if none then to those on the side of the other parent.[23] 12. An adopted child shall be to all intents and purposes the child and heir at law of the person adopting it. Property inherited by such child from its parents by adoption, shall, upon its death without issue, pass to the next of kin of its adoptive parents.[24] 13. Advancements made to a child or other lineal descendant, must be brought into hotchpot with the whole estate, real and personal.[25]

§ 881. **Washington.**—When any person shall die seised of any lands, tenements, or hereditaments, or any right thereto, or entitled to any interest therein, in fee simple, or for the life of another, not having devised the same, they shall descend subject to the debts as follows: 1. If the descendant leaves a surviving husband or wife, and only one child, or the lawful issue of one child, in equal shares to the surviving husband or wife and child, or issue of such child; if the decedent leaves a surviving husband or wife, and more than one child living, or one child living and

[17] Ann. Code 1904, § 2548.
[18] Ann. Code 1904, § 2549.
[19] Ann. Code 1904, § 2550.
[20] Ann. Code 1904, § 2551.
[21] Ann. Code 1904, §§ 2553, 2554.
[22] Ann. Code 1904, § 2555.
[23] Ann. Code 1904, § 2556.
[24] Ann. Code 1904, § 2614a.
[25] Ann. Code 1904, § 2561.

the lawful issue of one or more deceased children, one-third to the surviving husband or wife, and the remainder in equal shares to his children and to the lawful issue of any deceased child by right of representation; if there be no child or the descendant living at his death, the remainder goes to all his lineal descendants; and if all the descendants are in the same degree of kindred to the decedent, they share equally; otherwise, they take according to the right of representation. 2. If the decedent leave no issue, the estate goes in equal shares to the surviving husband or wife, and to the decedent's father and mother if both survive. If there be no father nor mother, then one-half goes in equal shares to the brothers and sisters of the decedent, and to the children of any deceased brothers or sisters, by right of representation. If decedent leave no issue, nor husband nor wife, the estate must go to his father and mother. 3. If there be no issue, nor husband nor wife, nor father and mother, nor either, then in equal shares to the brothers and sisters of the decedent, and to the children of any deceased brother or sister, by right of representation. 4. If the decedent leave a surviving husband or wife and no issue, and no father nor mother, nor brother nor sister, the whole estate goes to the surviving husband or wife. 5. If the decedent leave no issue, nor husband nor wife, and no father nor mother, nor brother nor sister, the estate must go to the next of kin, in equal degree, excepting that when there are two or more collateral kindred in equal degree, but claiming through different ancestors, those who claim through the nearest ancestor must be preferred to those claiming through an ancestor more remote. 6. However, if the decedent leave several children, or one child and the issue of one or more other children, and any such surviving child dies under age, and not having been married, all of the estate that comes to the deceased child by inheritance from such decedent descends in equal shares to the other children of the same parent, and to the issue of any such other children who are dead, by right of representation. 7. If, at the death of such child, who dies under age, not having been married, all the other children of his parents are also dead, and any of them have left issue, the estate that came to such child by inheritance from his parent descends to the issue of all other children of the same parent and if all the issue are in the same degree of kindred to the child, they share the estate equally;

otherwise they take according to the right of representation. 8. If the decedent leave no husband, wife, or kindred, the estate escheats to the state.[26] 9. Upon the death of either husband or wife, one-half of the community property shall go to the survivor, subject to the community debts, and the other half shall be subject to the testamentary disposition of the deceased husband or wife, subject also to the community debts. In case no testamentary disposition shall have been made by the deceased husband or wife of his or her half of the community property, it shall descend equally to the legitimate issue of his, her, or their bodies. If there be no issue of said deceased living, or none of their representatives living, then the said community property shall pass to the survivor, to the exclusion of collateral heirs, subject to the community debts, the family allowance, and the charges and expenses of administration.[27]

§ 882. **West Virginia.**—In West Virginia, when any person having title to any real estate of inheritance, shall die intestate as to such estate, it shall descend and pass in parcenary to his kindred, male and female, in the following course: 1. To his children and their descendants. 2. If there be no child, nor the descendants of any child, then to his father. 3. If there be no father, then to his mother, brothers and sisters, and their descendants. 4. If there be no mother, nor brother, nor sister, nor any descendant of either, then one moiety shall go to the paternal, the other to the maternal kindred in the following course: 5. First to the grandfather. 6. If none, then to the grandmother, uncles and aunts on the same side, and their descendants. 7. If none such, then to the great-grandfathers, or great-grandfather, if there be but one. 8. If none, then to the great-grandmothers, or great-grandmother, if there be but one, and the brothers and sisters of the grandfathers and grandmothers, and their descendants. 9. And so on in other cases without end, passing to the nearest lineal male ancestors, and for want of them, to the nearest female ancestors in the same degree, and to the descendants of such male and female ancestors. 10. If there be no father, mother, brother, or sister, nor any descendants of either, nor any paternal kindred, the whole shall go to the ma-

[26] Remington's Codes and Statutes 1915, § 1341.

[27] Remington's Codes and Statutes 1915, § 1342.

ternal kindred; and if there be no maternal kindred, the whole shall go to the paternal kindred. If there be neither maternal nor paternal kindred, the whole shall go to the husband or wife of the intestate; or if the husband or wife be dead, to his or her kindred in the like course as if such husband or wife had survived the intestate and died entitled to the estate.[28] 11. Collaterals of the half-blood shall inherit one-half so much as those of the whole-blood. But if all the collaterals be of the half-blood, the ascending kindred, if any, shall have double portions.[29] 12. When the children of the intestate, or his mother, brothers and sisters, or his grandmother, uncles and aunts, or any of his female lineal ancestors, living with the children of his deceased lineal ancestors, male and female, in the same degree, come into the partition, they shall take per capita or by person; and where, a part of them being dead and a part living, the issue of those dead have right to partition, such issue shall take per stirpes, or by stocks, that is to say, the shares of their deceased parents; but whenever those entitled to partition are all in the same degree of kindred to the intestate, they shall take per capita or by person.[30] 13. Bastards shall be capable of inheriting and transmitting inheritance on the part of their mother; and if a man, having had a child or children by a woman, shall afterward intermarry with her, such child or children, or their descendants, if recognized by him before or after the marriage, shall be deemed legitimate.[31] 14. Any person in ventre sa mere who may be born in ten months after the death of the intestate, shall be capable of taking by inheritance in the same manner as if he were in being at the time of such death.[32] 15. Where any descendant of a person dying intestate as to his estate or any part thereof, shall have received from such intestate in his lifetime, or under his will, any estate, real or personal, by way of advancement, and he or any descendant of his, shall come into the partition and distribution of the estate with the other parceners and distributees, such advancement shall be brought into hotchpot with the whole estate, real and personal, descended or distributable, and thereupon such

[28] West Virginia Code 1916, ch. 78, § 1.
[29] West Virginia Code 1916, ch. 78, § 2.
[30] West Virginia Code 1916, ch. 79, § 3.
[31] West Virginia Code 1916, ch. 79, §§ 5, 6.
[32] West Virginia Code 1916, ch. 79, § 8.

party shall be entitled to his proper portion of the estate, real and personal.[33]

§ 883. **Wisconsin.**—In Wisconsin, when any person shall die seised of any lands, tenements or hereditaments or any right thereto or entitled to any interest therein, in fee simple or for the life of another, not having lawfully devised the same, they shall descend, subject to his debts, except as provided in the next section, in the manner following: 1. In equal shares to his children and the lawful issue of any deceased child by right of representation; and if there be no children of the intestate living at his death his estate shall descend to all his other lineal descendants; and if all the said descendants are in the same degree of kindred to the intestate they shall share the estate equally, otherwise they shall take according to the right of representation. 2. If he shall leave no lawful issue, to his widow; if he shall leave no such issue or widow, to his parents, if living, and if either shall not be living, the survivor shall inherit his said estate. If a woman shall die leaving no issue her estate shall descend to her husband, if she shall have one at the time of her decease, and if she shall leave surviving her neither issue or husband, to her parents, if living, and if either shall not be living, the survivor shall inherit her estate. 3. If he shall leave no lawful issue nor widow nor father nor mother his estate shall descend in equal shares to his brothers and sisters and to the children of any deceased brother or sister by right of representation. 4. If the intestate shall leave no lawful issue, widow, father, mother, brother nor sister, his estate shall descend to his next of kin in equal degree, except that when there are two or more collateral kindred in equal degree, but claiming through an ancestor more remote; provided, however: 5. If any person shall die leaving several children or leaving one child and the issue of one or more other children, and any such surviving child shall die under age, not having been married, all the estate that came to the deceased child by inheritance as by testamentary gift from such deceased parent and all personal property which belongs to such deceased child by reason of distribution under subdivision 6 of section 3935 shall descend and be distributed in equal shares to his other children of the same parent and to the issue of any such other children who shall

[33] West Virginia Code 1916, ch. 79, § 13.

have died, by right of representation. 6. If at the death of such child who shall die under age and not having been married all the other children of his said parent shall also be dead and any of them shall have left issue, the estate that came to said child by inheritance from his said parent shall descend to all the issue of the other children of the same parent; and if all the said issue are in the same degree of kindred to said child they shall share the said estate equally; otherwise they shall take according to the right of representation. 7. If the intestate shall have no widow nor kindred his estate shall escheat to the state.[34] 8. When the owner of any homestead shall die, not having lawfully devised the same, such homestead shall descend free of all judgments and claims against such deceased owner or his estate except mortgages lawfully executed thereon and laborer's and mechanics' liens, in the manner following: (1) If he shall have no lawful issue, to his widow. (2) If he shall leave a widow and issue, to his widow during her widowhood, and upon her marriage or death to his heirs according to the next preceding section. (3) If he shall leave issue and no widow, to such issue according to the preceding section. (4) If he shall leave no issue or widow, such homestead shall descend under the next preceding section, subject to lawful liens thereon; provided, however, if there be no widow or minor child of such deceased owner of any homestead living at the time of his death such homestead shall be subject to and charged with the expenses of his last sickness and his funeral and the costs and charges of administration; and provided further, that if there be no widow and no child and no child of any deceased child of such deceased owner of any homestead such homestead shall be subject to all the debts and liabilities of such deceased owner.[35] 9. The degree of kindred shall be computed according to the rules of the civil law; and kindred of the half-blood shall inherit equally with those of the whole-blood in the same degree, unless the inheritance came to the intestate by descent, devise or gift of some one of his ancestors; in which case all those who are not of the blood of such ancestors shall be excluded from such inheritance.[36] 10. When any adopted child shall die seised or possessed of any estate which came to such child by inheritance from or upon distribution of the estate of

[34] Stats. 1915, ch. 102, § 2270.
[35] Stats. 1915, ch. 102, § 2271.
[36] Stats. 1915, ch. 102, § 2272.

any parent by adoption, not having lawfully devised the same, and leaving no surviving wife, husband, issue or descendants, the same shall not go to the kindred of the blood or next of kin of such adopted child, but shall descend to the heirs or be distributed to the next of kin of such parents by adoption.[37] 11. If any illegitimate child shall die intestate, without lawful issue, his estate shall descend to his mother; or in case of her decease, to her heirs at law. Every legitimate child shall be considered as heir of the person who shall, in writing signed in the presence of a competent witness, have acknowledged himself to be the father of such child or who shall be adjudged to be such father under the provisions of sections 1530 to 1542, inclusive, of the statutes or who shall admit in open court that he is such father, and shall in all cases be considered as heir of his mother, and shall inherit his or her estate, in whole or in part, as the case may be, in the same manner as if he had been born in lawful wedlock; but he shall not be allowed to claim, as representing his father or mother, any part of the estate of his or her kindred, either lineal or collateral, unless before his death his parents shall have intermarried and his father, after such marriage, shall have recognized him as his child, in which case such child shall be thereby legitimatized and he and the legitimate children shall be considered as brothers and sisters, and on the death of either of them, intestate and without issue, the others shall inherit his estate, and he theirs, as hereinbefore provided, in like manner as if all the children had been legitimate, saving to the father and mother, respectively, their rights in the estate of all the said children, as provided hereinbefore in like manner as if all had been legitimate. The issue of all marriages declared null in law shall, nevertheless, be legitimate.[38] 12. Inheritance, or succession by right of representation, takes place when the descendants of any deceased heir take the same share or right in the estate of another person that their parent would have taken if living; posthumous children are considered as living at the death of their parents.[39] 13. Any estate, real or personal, that may have been given by the intestate in his lifetime as an advancement to any child or other lineal descendant shall be considered as a part of the estate of the intestate, so far as it regards the division and distribution

[37] Stats. 1915, § 2272a.
[38] Stats. 1915, §§ 2273, 2274.
[39] Stats. 1915, § 2275.

thereof among his issue, and shall be taken by such child or other descendant toward his share of the estate of the intestate. If the amount of such advancement shall exceed the share of the heir so advanced he shall be excluded from any further portion in the division and distribution of the estate, but he shall not be required to refund any part of such advancement; and if the amount so received shall be less than his share he shall be entitled to as much more as will give him his full share of the estate of the deceased. If such advancement be made in real estate, the value thereof shall, for the purposes mentioned in the preceding section, be considered a part of the real estate to be divided; and if it be in personal estate it shall be considered as a part of the personal estate; if in either case it shall exceed the share of real or personal estate respectively that would have come to the heir so advanced, he shall not be required to refund any part of it; but shall receive so much less out of the other part of the estate as will make his whole share equal to those of the other heirs who are in the same degree with him. All gifts and grants shall be deemed to have been made in advancement if they are expressed in the gift or grant to be so made or if charged in writing by the intestate as an advancement or acknowledged in writing as such by the child or other descendant. If the value of the estate so advanced shall be expressed in the conveyance or in the charge thereof made by the intestate, or in the acknowledgment of the party receiving it, such value shall govern in the division and distribution of the estate; otherwise it shall be estimated according to its value when given, as nearly as the same can be ascertained.[40]

§ 884. **Wyoming.**—In Wyoming the real estate of an intestate descends in parcenary to his kindred, male and female, as follows: 1. If there be a husband or wife and children, or the descendants of any children, surviving, one-half to the surviving husband or wife, and the residue to the surviving children or descendants of children. 2. If there are no children or descendants of children then three-fourths to the surviving husband or wife and one-fourth to the father and mother of the intestate or the survivor of them. 3. If there be no children or their descendants, and the estate does not exceed $20,000, the whole vests

[40] Stats. 1915, §§ 3956, 3957, 3958, 3959.

in the surviving husband or wife. 4. To the children and their descendants by right of representation. 5. To the father, mother, brothers, and sisters, and to the descendants of brothers and sisters who are dead, by right of representation, in equal parts. 6. To the grandfather, grandmother, uncles, aunts, and their descendants, by right of representation, in equal parts.[41] 7. Posthumous children or descendants of the intestate shall inherit in like manner as if born in the lifetime of the intestate; but no right of inheritance shall accrue to any person other than the child or descendants of the intestate, unless they are in being and capable in law as taking as heirs at the time of the intestate's death.[42] 8. Descendants of the half-blood inherit equally with descendants of the whole-blood; but collateral relations of the half-blood shall inherit only one-half the measure of collateral relatives of the half-blood, if there be any of the last named class living.[43] 9. Illegitimate inherit the same as children born in lawful wedlock, if the parents subsequently marry, and such children be afterward recognized by the father to be his legitimate children. Illegitimates inherit from and through the mother. The property of an intestate illegitimate descends: (1) To the widow or surviving husband and children as in other cases; (2) to the widow or surviving husband; (3) to the mother and children and their descendants; to the mother one-half, and the other one-half to be equally divided between her children and their descendants, by right of representation; (4) to the next of kin of the mother.[44] 10. Aliens enjoy the same rights as citizens as to descent of property.[45]

[41] Ann. Comp. Stat. 1910, § 5727.
[42] Ann. Comp. Stat. 1910, § 5728.
[43] Ann. Comp. Stat. 1910, § 5729.
[44] Ann. Comp. Stat. 1910, § 5733.
[45] Ann. Comp. Stat. 1910, § 5730.

CHAPTER XXXIV

DIGEST OF STATUTES OF WILLS

SEC.
890. Alabama.
891. Alaska.
892. Arizona.
893. Arkansas.
894. California.
895. Colorado.
896. Connecticut.
897. Delaware.
898. District of Columbia.
899. Florida.
900. Georgia.
901. Hawaii.
902. Idaho.
903. Illinois.
904. Indiana.
905. Iowa.
906. Kansas.
907. Kentucky.
908. Louisiana.
909. Maine.
910. Maryland.
911. Massachusetts.
912. Michigan.
913. Minnesota.
914. Mississippi.
915. Missouri.
916. Montana.
SEC.
917. Nebraska.
918. Nevada.
919. New Hampshire.
920. New Jersey.
921. New Mexico.
922. New York.
923. North Carolina.
924. North Dakota.
925. Ohio.
926. Oklahoma.
927. Oregon.
928. Pennsylvania.
929. Philippine Islands.
930. Porto Rico.
931. Rhode Island.
932. South Carolina.
933. South Dakota.
934. Tennessee.
935. Texas.
936. Utah.
937. Vermont.
938. Virginia.
939. Washington.
940. West Virginia.
941. Wisconsin.
942. Wyoming.

§ 890. **Alabama.**—All persons of the age of twenty-one years and of sound mind may, by last will, devise lands, tenements or hereditaments, or any interest therein to any person or corporation capable by law of holding the same. If the devisee is incapable of taking, the devise descends, as in case of intestacy, or, if the testator has no heirs competent to take, to the residuary devisee if one be named in the will capable of holding and if not to the state. All persons over the age of eighteen years and of sound mind, and no others, may bequeath their personalty. Every devise which a testator makes, in express terms or any other terms denoting his intention to devise all his real property must be construed to pass all the real estate he was entitled to devise at the time of his death. A will to be effectual to pass real or personal property must be in writing, signed by the testator or some person in his presence, and by his direction, and attested

by at least two witnesses who must subscribe their names thereto in the presence of the testator. This provision does not apply to wills of soldiers or mariners at sea; nor to wills of personal property not exceeding $500, made during testator's last sickness at his dwelling, or where he has resided ten days or more, except when he was taken sick when away from home and died before his return; such wills are valid though unwritten. The subsequent incompetency of witnesses, from whatever cause it may arise, must not prevent the probate of a will if the witnesses are competent at the time of their attestation. A probated foreign will may be proved by bringing into probate court a copy of the will and of the probate, certified by the clerk or officer of court and judge before whom probated.[1]

§ 891. **Alaska.**—Every person of sound mind and over the age of twenty-one years may at last will devise all of his or her property, except dower and curtesy. The will must be in writing, signed by the testator or some other person in his presence and under his direction, and must be attested by at least two witnesses, subscribing their names thereto in the presence of the testator. The subsequent marriage of the testator revokes the will. If a testator die leaving a child or children or descendants thereof not provided for in his will, he is deemed to have died intestate as to them, and all heirs, devisees, and legatees shall refund proportional part. But if such child or children, or their descendants, shall have an equal portion of the testator's estate bestowed upon them by way of an advancement, they take nothing under the will. Any mariner at sea or soldier in the military service may dispose of his wages or other personal property as by common law or by reducing the same to writing. Nuncupative wills are allowed if the testamentary words or the substance thereof is reduced to writing within thirty days after they were spoken, and the writing probated within six months after such words were spoken. Where the beneficiary under a will attests the instrument as a witness, he thereby forfeits the devise or bequest made to him. If any such witness would be entitled to any share in the testator's estate in case the will should not be established, then so much of the estate as would have descended to him as will not

[1] Ala. Civ. Code 1907, ch. 150, §§ 6172-6191.

exceed the value of the devise or bequest made to him in the will is given him; and he may recover the same from the devisees or legatees named in the will in proportion to and out of the parts devised and bequeathed to him. If the execution of such will be attested by a sufficient number of other competent witnesses, as required by code, then such devise shall be valid.[2] If a will by a person owning property in Alaska be probated in any state, territory or district of the United States or in any foreign country, copies of the will and probate certified by the clerk of court and judge may be recorded in the same manner as wills executed in Alaska and be of the same effect. Any such will may be contested in Alaska. A last will and testament, written and subscribed by the testator without the territory, and executed in the mode prescribed by the law of either the testator's domicil or the place where executed, is deemed to be legally executed, and is of the same force and effect as if executed in the mode prescribed by the laws of the territory.[3]

§ 892. **Arizona.**—Every person of sound mind and over the age of twenty-one years, or who may be or may have been lawfully married, shall have power to make a will. Such will shall be in writing and signed by the testator or some other person, by his direction and in his presence, and shall, if not wholly written by himself, be attested by two or more credible witnesses above the age of fourteen years, subscribing their names to the will in the presence of the testator. Where the will is wholly in the handwriting of the testator no witnesses are required. Nuncupative wills are allowed if made in the last sickness of the deceased, and where the property does not exceed fifty dollars in value. But it must be shown by the testimony of three competent witnesses that the testator called on some person to take notice and bear testimony that such is his will, and that the testimony or substance thereof was committed to writing within six days after the making of such will; in such case the amount is not limited. Any soldier in actual military service, or any mariner or seaman being at sea, may dispose of his personal property without regard to the provisions of the statute. Afterborn or pretermitted children take as though there had been no

[2] Carter's Ann. Civ. Code, Alaska, ch. 15, §§ 137-155.

[3] Alaska, Session Laws 1913, ch. 61.

will. Legacies to subscribing witnesses are void unless they were otherwise entitled to share in the estate. Spendthrift trusts are provided for.[4]

§ 893. **Arkansas.**—Every person of sound mind and over the age of twenty-one may, by will, devise all his estate, both real and personal and all interest therein. All persons over the age of eighteen and of sound mind may bequeath by will personalty. A will to be effectual must be subscribed at the end by the testator, or some other person at his request, and the subscription shall be made in the presence of each of the attesting witnesses or shall be acknowledged by him to have been so made to each of the attesting witnesses. At the time of such subscription or at the time of acknowledging the same, the testator shall declare the instrument so subscribed to be his last will and testament. There shall be at least two attesting witnesses each of whom shall, at the request of the testator, sign his name as witness at the end of the will. (The attestation clause must contain the above facts.) Where the entire body of the will and the signature thereto shall be written in the proper handwriting of the testator or testatrix it may be established by the evidence of at least three disinterested witnesses to the handwriting and signature of the testator without attesting witnesses to such will. No will without such subscribing witnesses shall be pleaded in bar of a will subscribed in due form. Nuncupative wills are effectual if made at the time of the last sickness and at the dwelling of the deceased in the presence of at least two witnesses and if the estate bequeathed does not exceed $500. It must also be proved that the testator called on some person present to witness that such was his will. Wills are probated in the county of the testator's residence at time of death. If he had no known place of residence in this state, and land is devised, then in the county where the land, or the greater part of it, lies. When a foreign will relative to an estate within this state, has been proved without the same, a copy thereof and certificate of probate may be offered for probate in this state if it was so executed as to be a valid will of lands in this state by the law thereof. All mariners at sea or soldiers in the military service may dispose of their wages and other personal property as at common law. Citizens of any of the United

[4] Arizona Civ. Code 1913, ch. 19, §§ 1204-1225.

States or territories thereof, owning real or personal property in this state, may devise and bequeath the same by will, executed and proved according to the laws of this state or the place where made.[5]

§ 894. **California.**—Every person over the age of eighteen years, of sound mind, may dispose of real and personal estate by will. A married woman may dispose of all her separate estate by will, without the consent of her husband. Corporations other than counties, municipal corporations, and corporations formed for scientific, literary, or solely educational or hospital purposes, can not take under a will, unless expressed by statute. Every will, other than a nuncupative will, must be in writing, and every will, other than an olographic will, and a nuncupative will, must be executed and attested as follows: 1. It must be subscribed at the end thereof by the testator himself, or some person in his presence and by his direction must subscribe his name thereto. 2. The subscription must be made in the presence of the attesting witnesses, or be acknowledged by the testator to them to have been made by him or by his authority. 3. The testator must, at the time of subscribing or acknowledging the same, declare to the attesting witnesses that the instrument is his will. 4. There must be two attesting witnesses, each of whom must sign the same as a witness, at the end of the will, at the testator's request and in his presence. An olographic will is one that is entirely written, dated and signed by the hand of the testator himself. It is subject to no other form, and may be made in or out of the state, and need not be witnessed. A witness to a written will must write, with his name, his place of residence; and a person who subscribes the testator's name, by his direction, must write his own name as a witness to the will. But a violation of this section does not affect the validity of the will. A conjoint or mutual will is valid, but it may be revoked by any of the testators, in like manner as any other will. If the witnesses are competent when the will is executed, their subsequent incompetency from any cause, does not prevent the probate of the will. Gifts to subscribing witnesses are void, unless there are two other competent witnesses to the same, but a mere charge on the estate of the testator for the payment of debts does not prevent

[5] Arkansas, Kirby's Dig. of Stats. 1904, ch. 160, §§ 8010-8050.

his creditors from being competent witnesses to his will. No will made out of the state is valid as a will in the state, unless executed according to the California laws, except that a will made in a state or country in which the testator is domiciled at the time of his death, and valid as a will under the laws of such state or country, is valid in this state so far as the same relates to personal property, subject to restrictions on devises for charitable uses. No estate, real or personal, shall be bequeathed or devised to any charitable or benevolent society or corporation, or to any person or persons in trust for charitable uses, except the same be done by will duly executed at least thirty days before the decease of the testator; and no such devises or bequests shall collectively exceed one-third of the estate of the testator, having legal heirs. A will is revoked by marriage of a man and birth of issue, or by the survival of his wife, unless otherwise provided for, and the will of a woman is revoked by her subsequent marriage, and is not revived by the death of her husband. Afterborn children, or unintentionally omitted children, take the same share as if the testator had died intestate. A will passes afteracquired rights, unless the contrary intention plainly appears. A nuncupative will may be valid, if the estate bequeathed does not exceed in value one thousand dollars, but it must be proved by two witnesses who were present at the making thereof, one of whom was asked by the testator at the time, to bear witness that such was his will, or to that effect. The decedent must, at the time, have been in actual military service in the field, or doing duty on shipboard at sea, and in either case in actual contemplation, fear, or peril of death, or the decedent must have been, at the time, in expectation of immediate death from an injury received the same day. There can be no proof of any nuncupative will, unless offered after speaking the testamentary words, nor unless the words, or the substance thereof, were reduced to writing within thirty days after making.[6]

§ 895. **Colorado.**—All wills by which any property, real or personal, is devised or bequeathed, shall be reduced to writing and signed by the testator, or by some one in his presence and by his direction, and attested in the presence of the testator by two or more credible witnesses. Males aged twenty-one years and

[6] Cal. Civ. Code 1915, 1270-1313.

females aged eighteen years, being of sound mind and memory, may devise real property by will. All persons aged seventeen years, of sound mind and memory, may dispose of personal property by will. The consent of the husband or wife, in writing, is necessary to the devise or bequest by a married person of more than one-half his or her estate away from the other spouse. Any will, concerning realty in Colorado, which has been admitted to probate before a court in another state or territory may be admitted to probate without further formality if accompanied by a certificate by the proper officer as to the former probate. The marriage of testator revokes his will, but the subsequent birth of child does not. Devises to witnesses are void unless they are otherwise entitled to share in the estate. Gifts to a child or grandchild who died before the testator do not lapse but go to his issue if there be any, otherwise such portion of the estate is considered as intestate estate.[7]

§ 896. **Connecticut.** — All persons of sound mind aged eighteen years may dispose of their estate by will. A will must be written, subscribed by the testator, and attested by three witnesses, each of whom subscribes in the testator's presence. Devises to witnesses are void unless such witness is an heir, or the will is otherwise legally attested. If a devisee or legatee being a child, grandchild, brother or sister of the testator, die before him, his issue take such estate if no other provision is made. And any will executed according to the laws of the state or country where it was executed may be admitted to probate in Connecticut, and is effectual to pass any estate of the testator situated in Connecticut. A will is revoked by subsequent marriage of testator or birth of a child unprovided for. A will proved without the state may be proved within it by authenticated and exemplified copy of the will and record of probate proceedings.[8]

§ 897. **Delaware.**—Any person of sound and disposing mind or memory, aged twenty-one or upward, may make a will of real as well as personal estate. Every will must be in writing, signed by the testator, or some person subscribing the testator's name in his presence and by his express direction, and must be attested and subscribed in his presence by two or more credible

[7] Mills' Ann. Stat., Colo. 1912, §§ 7867-7892.

[8] Conn. Gen. Stat. 1902, §§ 292-305.

witnesses. After-acquired land passes by a will, unless a contrary intention appears. Afterborn children unprovided for take as though the parent died intestate. The birth of a child to a testator having no issue at the time the will was made revokes his will. A widow unprovided for by a will made before marriage takes as though her husband died intestate. A nuncupative will of personal estate to the extent of $200 is valid if pronounced before at least two witnesses requested to take notice of such will and reduced to writing within three days afterward. The last will and testament of a person not residing in the state at the time of his death, if properly executed and probated without the state may be proved in the state provided a copy of the same, duly verified, shall be presented for probate and filed of record in the office of the register of wills in the county where there are any lands, tenements or hereditaments of the testator.[9]

§ 898. **District of Columbia.**—Wills may be made by males aged twenty-one and females aged eighteen, if of sound and disposing mind and capable of executing a valid deed or contract. All wills must be in writing, and signed by the testator or some other person in his presence and by his direction. They must be attested and subscribed in the presence of the testator by two credible witnesses. If it appears that such was the testator's intention after-acquired real estate will pass by will. Nuncupative wills to the amount of one hundred fifty dollars are valid if proved by three witnesses and made in the testator's last illness at his habitation.[10]

§ 899. **Florida.**—Every person of sound mind of the age of twenty-one years may dispose of real and personal property by will. A married woman may dispose by will of her property in the same manner as if not married, even though she be a minor. All general or residuary devises or bequests are construed to apply to the property owned by the testator at the time of his death, unless otherwise restricted. Every will disposing of real estate must be signed by the testator or some other person in his presence and by his express directions, and must be attested and subscribed in his presence by two or more witnesses. All wills of personal property must be in writing and signed by the testator

[9] Del. Rev. Code 1915, §§ 3239-3263. [10] D. C. Code 1910, §§ 1625, 1626, 1634.

or some other person in his presence and by his express direction. A nuncupative will must be proved by the oath of three witnesses present at its making, and it must also be proved by them that the testator at the time of pronouncing such will desired them to bear witness that it was his last will, or to such effect, and that such will was made during his last sickness. Nor can any testimony be received to prove such will after six months from the date of such will, unless it was reduced to writing and sworn to before some judicial officer of the state within six days from making. Foreign wills having been granted by a foreign court, may be admitted to record in the county judge's court, and when recorded, have the same effect as the probate of wills made in the state. An alien may devise and bequeath property as though a citizen.[11]

§ 900. Georgia.—No particular form of words are necessary to make a will. All persons of sound mind over fourteen years of age may make wills. All wills (except nuncupative wills) must be in writing, signed by the party making the same, or by some other person in his presence at his direction, and attested and subscribed in the presence of the testator by three competent witnesses. A witness may attest by his mark if he can swear to it. One witness can not sign for another. If a witness is a legatee, the will is valid, but the legacy is void. Mutual wills may be made either separately or jointly. A deaf, dumb, and blind person may make a will provided both interpreter and scrivener are made attesting witnesses. If a person has a wife or child he can not leave more than one-third of his estate to a religious, charitable or educational association, to the exclusion of his wife or child. A devise or bequest to charity must be made at least ninety days before the testator's death. Marriage of a testator or birth of a child, unprovided for, revokes a will. Foreign wills may be admitted to probate in the same manner as domestic. If probate has been had in the foreign jurisdiction, a certified copy of the will and an authenticated copy of the proceedings, under seal of the court, is prima facie evidence of due execution. Nuncupative wills may be proved by the oaths of three competent witnesses, present at the time of making, whom

[11] Gen. Stats. Fla. 1906, §§ 2269-2287, 2891.

the testator bade bear witness to his will if made during his last sickness.[12]

§ 901. **Hawaii.**—Every person of the age of eighteen years, of sound mind, may dispose of both real and personal estate by will. This includes married women. A will to be valid must be in writing and signed by the testator, or by some person in his presence and by his express direction, and attested by two or more competent witnesses subscribing their names to the will in the presence of the testator. Marriage of a woman revokes her will. Marriage of a man followed by birth of a child to him, will revoke a will, if such contingency is not provided for. Gifts to witnesses who are not heirs are void, unless there are two other competent witnesses.[13]

§ 902. **Idaho.**—Same as California, except no limitations on devises and bequests to charities and corporations.[14]

§ 903. **Illinois.**—Males aged twenty-one and females aged eighteen of sound mind and memory have the power to dispose of real or personal estate by will. All wills must be in writing and signed by the testator or testatrix, or by some person in his or her presence and by his or her direction, and attested in the presence of the testator or testatrix by two or more credible witnesses, two of whom declaring on oath or affirmation before the county court of the proper county that they were present and saw the testator or testatrix sign said will, testament, or codicil in their presence, or acknowledged the same to be his or her act and deed, and that they believed the testator or testatrix to be of sound mind and memory at the time of signing or acknowledging the same, shall be sufficient proof of the execution of said will. A will executed out of the state is admitted to probate in the same manner as a will executed in the state. Any will probated according to law outside the state, concerning estates in Illinois, is good as wills made and executed in the state. Devises or legacies to witnesses, or to their wives or husbands, are void, unless they were otherwise entitled to share in the estate. Personal property may be bequeathed by nuncupative wills, if committed to writing within twenty days after making and proved by two

[12] Ga. Code 1911, §§ 3827-3925.
[13] Rev. Laws Hawaii 1915, §§ 3258-3267.
[14] Idaho Rev. Codes 1908, §§ 5725-5760.

credible disinterested witnesses present at the time the will was spoken and published as such. And also it must be proved by two other witnesses that the will was committed to writing within ten days after the testator's death. A creditor whose debt is secured by the will is a competent witness.[15]

§ 904. Indiana.—All persons, except infants and those of unsound mind, may pass by will real or personal property. This includes married women. Birth to a man of a child unprovided for in his will revokes the will. The marriage of a woman revokes her will. No will except a nuncupative will shall affect any estate, unless it be in writing, signed by the testator, or by some one in his presence, with his consent, and attested and subscribed in his presence by two or more competent witnesses. Nuncupative wills attested by two competent witnesses, made in the testator's last sickness, reduced to writing within fifteen days, are valid to the extent of one hundred dollars. Soldiers in actual military service and mariners at sea may dispose of personal estate in possession and of wages by nuncupative will. A devise to a descendant of the testator who dies in the testator's lifetime, vests in the surviving descendant of the devisee. Wills probated in a foreign state or country may be recorded on production of a duly certified copy in a county where the testator had estate, and if the court is satisfied, the will is of the same effect as if originally probated in the state. Bequests to subscribing witnesses are void unless they were otherwise entitled to share in the estate. A wife may elect as to taking under her husband's will, or under statute.[16]

§ 905. Iowa.—Any person of full age and sound mind may dispose of his property by will, subject to rights of the surviving spouse, given by law. But if a spouse, parent or child survive the testator, no devise to a corporation not organized for pecuniary profit shall be valid in excess of one-fourth the testator's estate. After-acquired property may be devised, if the intention is clear. Personal property to the extent of three hundred dollars may be disposed of by nuncupative will witnessed by two competent persons. A soldier in actual service, or mariner at sea, may dispose of all his personal estate, by such nuncupa-

[15] Ill. Rev. Stats. 1915-1916, pp. 2695-2699.

[16] Burns' Rev. Stat. 1914, §§ 3112, 3131.

tive will. All other wills must be in writing signed by the testator, or by some person in his presence and by his express direction writing his name thereto, and witnessed by two competent persons. A subscribing witness can not receive any benefit from the will unless there are two additional competent witnesses, or unless, by law, without a will, he would receive it. The subsequent birth of a legitimate child before testator's death revokes a will, but not the birth of a posthumous child. Posthumous children take as if the testator had died intestate. Heirs of a devisee who dies before the testator inherit his property, unless a contrary intent is manifest. A will may be deposited with the clerk of the court. A foreign will already probated is admitted to probate on production of a copy thereof and of the original record of probate, authenticated by the clerk of court where probation was made.[17]

§ 906. **Kansas.**—Any person twenty-one years old, of sound mind and memory, may make a will, of real or personal property. There may be a valid verbal will as to personal estate, if reduced to writing and subscribed by two disinterested competent witnesses, within ten days after its speaking. All other wills shall be in writing signed at the end thereof by the testator or some other person in his presence and by his express direction, and shall be attested and subscribed in the presence of the testator by two or more competent witnesses, who saw him subscribe, or heard him acknowledge the same. A devise to a witness is void unless the will can otherwise be proved. A married person can not bequeath away from the other spouse more than half his or her property, without the consent in writing of such spouse. Authenticated copies of wills executed and proved according to the laws of any other state or territory or foreign country relative to any property in Kansas may be admitted to record in the probate court of any county where any part of such property may be situated; and such authenticated copies so recorded shall have the same validity as wills made in Kansas in conformity with the laws thereof. The subsequent birth of a child to the testator revokes the will, unless provision was made for such child. A widow may elect to take under the law of descents, and not under her husband's will. A foreign will can not be contested in this

[17] Iowa Code 1907, §§ 3270-3295.

state. The Rule in Shelley's Case applies to devises of lands. An after-acquired property will pass if such was the intention. Afterborn children take as though there had been no will.[18]

§ 907. **Kentucky.** — Every person of sound mind and twenty-one years of age can make a will which will dispose of any interest he might be entitled to at his or her death, which would descend to his heirs or pass to his personal representatives, even if acquired after the will was made. This includes a married woman, but she can not by will affect her husband's interest against his consent. A will must be in writing and the name of the testator must be subscribed to it by himself, or some other person in his presence at his direction. If not entirely written by the testator the subscription must be made or the will acknowledged by the testator in the presence of at least two credible witnesses, who shall subscribe their names to the will in the testator's presence and in the presence of each other. A person under twenty-one years of age may make a will in pursuance of a power expressly given to that effect and a father under that age may by will appoint a guardian for his child. The will of a person domiciled out of the state at the time of death is valid as to his personalty in the state, if executed according to the law of the domicil. The will of a nonresident relative to estate in the state, which has been probated elsewhere, may be probated in Kentucky by producing an authenticated copy and a certificate of probate. Wills must be probated before the county court of the county of the testator's residence, or if he had no residence, where his estate or part of it, is situated. A soldier in actual service or mariner at sea may dispose of personal effects by verbal will made ten days before death in the presence of two competent witnesses, and if reduced to writing within sixty days after they were spoken. Marriage of either a man or woman revokes his or her will, unless made in the exercise of a power of appointment. Incompetency of an attesting witness does not make the will void. A creditor of the testator or an executor, is a competent witness. A will speaks from the testator's death. The issue of a devisee or legatee who dies before the testator take his share. A pretermitted child takes as though there were no will. A void or lapsed devise passes as in case of intestacy.[19]

[18] Kans. Gen. Stats. 1909, §§ 9776-9847.

[19] Carroll Ky. Stats. 1915, §§ 4825-4855.

§ 908. **Louisiana.**—As the civil law obtains in Louisiana, the provisions of its laws respecting wills are very different from those of other states. All dispositions mortis causa must be made by last will or testament, of which there are many forms. Mutual wills are prohibited, and the testator can not commit the power of disposing to another. There are three classes of wills: 1. Nuncupative or open testament. 2. Mystic or sealed testaments. 3. Olographic testaments. Either nuncupative or mystic wills must be drawn up in writing, and mere verbal testaments are abolished. There are nuncupative testaments by public act and under private signature. Such testaments by public act must be received by a notary in the presence of three witnesses residing in the place where the will is executed, or of five witnesses not residing in the place, and must be dictated by the testator, and written by the notary as it is dictated, then be read to the testator in presence of the witnesses. Express mention at one time made of the whole, observing that all those formalities must be fulfilled is without interruption and without turning aside to other acts. The testament must be signed by the testator if he declares that he does not know how or is not able to sign, express mention of his declaration and of the cause which hinders him to sign must be made in the act. The testament must also be signed by the witnesses or at least one of them for all if the others can not write. A nuncupative testament under private signature must be written by the testator himself, or by any other person from his dictation, or even by one of the witnesses, in the presence of five witnesses residing in the place where the will is received or of seven witnesses residing out of that place; or it will suffice if in the presence of the same number of witnesses the testator present the paper on which he has written his testament or caused it to be written out of their presence, and declare to them that that paper contains his last will and testament. In either case the testament must be read by the testator to the witnesses, or by one of the witnesses to the rest in the presence of the testator. It must be signed by the testator, if he knows how or is able to sign, and by the witnesses, or at least by two of them in case the others know not how to sign, and those of the witnesses who do not know how to sign must affix their mark. In the country it suffices for the validity of the nuncupative testaments under private signature if the testament be passed in the

presence of three witnesses residing in the place where the testament is received, or of five witnesses residing out of that place, provided that in this case a greater number of witnesses can not be had. The mystic, secret or closed testament is made in the following manner: The testator must sign his dispositions, whether he has written them himself or has caused them to be written by another person. The paper containing those dispositions, or the paper serving as their envelope, must be closed and sealed. The testator shall present it, thus closed and sealed to the notary and to three witnesses, or he shall cause it to be closed and sealed in their presence. Then he shall declare to the notary, in the presence of the witnesses, that the paper contains his testament, written by himself, or by another by his direction, and signed by him, the testator. The notary shall then draw up the act of superscription which shall be written on that paper or the sheet which serves as its envelope, and that act shall be signed by the testator, and by the notary and the witnesses. All that is above prescribed shall be done without interruption or turning aside to other acts; and in case that the testator, by reason of any hindrance which has happened since the signing of the testament, can not sign the act of superscription, mention shall be made of the declaration made by him thereof, without its being necessary in that case to increase the number of witnesses. Those who know not how or are not able to write or sign their names can not make dispositions in the form of a mystic testament. If any witness to the act of superscription knows not how to sign, express mention shall be made thereof. The following persons are absolutely incapable of being witnesses to testaments: 1. Women of whatever age to the testaments of their husbands. 2. Children who have not atttained the age of sixteen years complete. 3. Persons insane, deaf, dumb or blind. 4. Persons whom the criminal laws declare incapable of exercising civil functions. Neither can testaments be witnessed by those who are constituted heirs or named legatees, under whatsoever title it may be, provided that this qualification does not apply to the mystic testament. The olographic testament is that which is written by the testator himself. In order to be valid it must be entirely written, dated and signed by the testator without its being subject to any other formality, and may be made anywhere, even out of the state. A testament intended to be in one

form may be valid in another. Witnessses must reside in the parish where the testament is executed, when it is required that they reside in the place. The minor above the age of sixteen can dispose of property by donation mortis causa. Testaments made in other states or countries take effect in this state, provided they are clothed with all the formalities prescribed for the validity of testaments in the place where they are made. Soldiers' wills may be received by a commissioned officer before two witnesses or if sick or wounded, before a physician or surgeon attending him, assisted by two witnesses. Such wills need only be reduced to writing and signed by the testator or the person receiving them and by the witnesses. Such testament is null six months after the testator's return to a place where he can use the ordinary forms. The captain or master of a vessel in the presence of three witnesses may receive testaments at sea, the only formality being that they should be reduced to writing, signed by the testator, the receiver, and the witnesses, but such testament can pass nothing to any person employed on the vessel, unless a relative of the testator. It is not valid unless the testator die at sea or within three months after he landed in a place where he can use the ordinary forms. Donations inter vivos or mortis causa can not exceed two-thirds of the property of the disposer, if he leaves at his decease, a legitimate child, one-half if he leaves two children; and one-third if he leaves three or a greater number. Under the name of children are included descendants of whatever degree, it being understood that they are only counted for the child they represent. Donations inter vivos or causa mortis can not exceed two-thirds of the property if the disposer, having no children, leave a father, mother, or both. A disherison must be made by name expressly and for a just cause recognized by law. The following ten causes for the disherison of children are recognized: 1. If the child has raised his or her hand to strike the parent, or if he or she has actually struck the parent; but a mere threat is not sufficient. 2. If the child has been guilty, toward a parent, of cruelty, of a crime or grievous injury. 3. If the child has attempted to take the life of either parent. 4. If the child has accused a parent of any capital crime, except, however, that of high treason. 5. If the child has refused sustenance to a parent, having means to afford it. 6. If the child has neglected to take care of a parent become insane. 7. If the

child refused to ransom them, when detained in captivity. 8. If he used any act of violence or coercion to hinder a parent from making a will. 9. If the child has refused to become security for a parent, having the means in order to take him out of prison. 10. If the son or daughter, being a minor, marries without the consent of his or her parents. Ascendants other than parents may disinherit their descendants for the first nine causes above enumerated, when the acts there mentioned have been committed toward them instead of toward their parents. Legitimate children dying without issue and leaving a parent can not disinherit him or her unless for the following seven causes: 1. If the parent has accused the child of a capital crime, except, however, the crime of high treason. 2. If the parent has attempted to take the child's life. 3. If the parent has, by any violence or force, hindered the child from making a will. 4. If the parent has refused sustenance to the child in necessity, having the means of affording it. 5. If the parent has neglected to take care of the child while in a state of insanity. 6. If the parent has neglected to ransom the child in captivity. 7. If the father or mother have attempted the life, the one or the other, in which case the child or descendant who makes a will may disinherit the one who has attempted the life of the other. A disinherison to be valid must be made in one of the forms prescribed for testaments, and the testator must express for what reasons he disinherits the heir in question. And the other heirs of the testator are, moreover, obliged to prove the facts on which the disinherison is founded. A testament is annulled by operation of law by the birth of legitimate children prior to its date.[20]

§ 909. **Maine.** — A person of sound mind, twenty-one years old may dispose of his real and personal estate by will, in writing, signed by him or by some person for him at his request and subscribed in his presence by three credible witnesses not beneficially interested thereunder. Subsequently acquired real estate passes if such was the testator's intention, and a devise of land conveys all the estate of the testator. A nuncupative will may be made during the last sickness of the testator, if made at home, unless he is taken sick suddenly away from home. Such

[20] Merrick's Rev. Civ. Code, La. 1913, ch. 6, arts. 1570-1624; ch. 3, arts. 1493-1495.

will is effective only as to personal property under $300 in value, unless proved by the oath of three witnesses who were present at its making and requested by the testator to bear witness to his will. The nuncupative will must be proved within six months, unless reduced to writing within six days after they were spoken. Soldiers in service or mariners at sea, may dispose of personal estate and wages, by nuncupative will, without regard to the place of its making. An omitted or posthumous child takes as though there were no will. Wills executed and proved in another state according to its laws, may be proved in Maine, and one proved in another state may be allowed in Maine by producing an authenticated copy of the will and probate, and filing and recording after hearing.[21]

§ 910. **Maryland.** — No will can create a perpetuity. No will will pass real estate unless the testator was at the time of acknowledging or executing same of sound and disposing mind and capable of executing a valid deed or contract, and if a male, aged twenty-one, if a female, aged eighteen. By the common law males over fourteen and females over twelve years of age may make valid wills of personal property. Wills of real and of personal property must be in writing, signed by the testator or by some one for him, in his presence and by his express direction, and attested and subscribed in his presence by two or more credible witnesses. Although no nuncupative will is valid, a soldier in active service or mariner at sea, may by verbal will before witnesses, dispose of his wages, movables and personal property. A devise or legacy shall not fail because of the death of the legatee in the testator's lifetime, but shall pass as if the devisee or legatee survived the testator. A will made out of the state will be held valid in Maryland, if made according to the forms required by the law of the place where made, or by the law of the place where the testator was domiciled when made, or according to the forms required by the law of Maryland. A copy certified as prescribed by law of the record of a will recorded in a foreign country is good evidence to prove such will in Maryland.[22]

§ 911. **Massachusetts.**—A will may be made by any per-

[21] Maine Rev. Stat. 1916, title 7, ch. 79.

[22] Bagby Ann. Code, Md. 1911, art. 93, §§ 316-343.

son of sound mind of the legal age of twenty-one years. Wills must be in writing, signed by the testator or by some one in his presence and by his express direction and must be attested and subscribed in the testator's presence by three or more competent witnesses. A married woman may make a valid will. Soldiers in service or mariners at sea may dispose of personal property by a nuncupative will. Marriage acts as a revocation of a will, unless it appears from the will that it was made in contemplation of marriage, or unless it was made in the exercise of a power of appointment. A testator may keep a will in his custody or deposit it in that of the probate court. A person other than the register of probate, who has custody of a will, must produce it within thirty days from notice of the testator's death, and one who conceals or retains a will may be examined and imprisoned. Devises to witnesses or their husbands or wives are void unless there are three other competent witnesses. The surviving husband or widow may elect to take under the statute instead of under the will. Pretermitted or posthumous children take as if there were no will. The issue of a legatee who is a child or relative of the testator and dies before the testator, takes his share. A will which is made out of the commonwealth, valid according to the laws of the state or country in which it was made, may be proved and allowed in Massachusetts, and shall have the same effect as if it had been executed according to Massachusetts laws. A foreign will may be proved by producing an authenticated copy and a certificate of probate.[23]

§ 912. **Michigan.** — Any person of sound mind, over twenty-one, may make a will disposing of lands or personalty, and every devise conveys all the testator's interest, including after-acquired lands, unless a contrary intention appears. All wills made in the state must be in writing, signed by the testator, or by some person in his presence and by his express direction, and attested and subscribed in his presence by two or more competent witnesses. There is an exception as to nuncupative wills which are valid where the value of the estate does not exceed $300, or if made by a soldier in service or mariner on shipboard, relative to wages and personal property. Bequests to subscrib-

[23] 2 Rev. Laws of Mass., title 2, ch. 135, §§ 1, 6, 9, 5, 10, 14, 15, ch. 136, § 10.

ing witnesses are void unless there are two other competent witnesses, or unless such witness was entitled to a share by law, and a creditor secured by will is a competent witness. The provisions as to custody of a will are very similar to those of Massachusetts. A will may be placed in the custody of the judge of probate. Foreign wills may be proved by filing an exemplified copy of the will and the record of probate. Afterborn children take as if the parent had died intestate, their share first being taken from estate undisposed of by will, if any, then proportionally from all legatees and devisees. The widow may choose between dower and the provision for her in the will. A foreign will, made where probate is not required, may be proved in Michigan by producing the original or a full and complete copy. A will executed without the state, in the mode prescribed by law, is valid in Michigan if in writing and signed by the testator. The issue of a legatee, who is a child or other relation and dies before the testator, takes his share.[24]

§ 913. **Minnesota.** — Every person of full age (males twenty-one years, females eighteen years) and sound mind may make a will, including married women. Nuncupative wills are valid only as to personal estate, when made by a soldier in service, or mariner at sea. Other wills must be in writing, signed by the testator or by some person in his presence by his express direction, and must be attested and subscribed in his presence by two or more competent witnesses. A creditor whose debt is secured by the will is a competent witness. A legacy to a witness is void, unless there are two other competent subscribing witnesses who are not beneficiaries or unless the witness was entitled to share in the estate in absence of a will. Marriage of a testator revokes a will, and divorce of the testator revokes provisions in favor of the testator's spouse. Afterborn children take as if the testator had died intestate, first from an undisposed portion of the estate, then from the shares of all devisees and legatees proportionally. After-acquired property will pass by the will. A will may be deposited with the judge of the county where the testator lives. The surviving issue of a child or relative of the testator who was a devisee or legatee and died before the testator, take the parent's share. A will made out of the state valid

[24] Howell's Ann. Mich. Stats. §§ 10975-11015, 11025.

according to the laws of the state or country in which it was made, or of the testator's domicil, if in writing and signed by the testator, may be proved and allowed in Michigan, and have the same effect as if it had been executed according to the laws of Michigan. Every will proved outside of the state in accordance with law, may be allowed, filed and recorded in any county in this state where the testator left property. A duly authenticated copy of the will and of its probate must be presented to the court. A surviving spouse may elect between the provisions of one will and the statutory provisions for such spouse. Nuncupative wills must have two credible disinterested witnesses and must have been put in writing within thirty days after making.[25]

§ 914. **Mississippi.**—Every person of the age of twenty-one years, male or female, married or unmarried, has the power by will in writing to dispose of real and personal property, so as such will be signed by the testator or testatrix, or by some other person in his or her presence and by his or her express direction; and, if not wholly written and subscribed by himself or herself shall be attested by two or more credible witnesses in the presence of the testator or testatrix. A will is void if the testator had no child when it was made, and a child is later born to him. If the testator had children when the will was made, later-born children take as if he had died intestate, devisees and legatees contributing proportionally. Nuncupative wills are valid only when made in last sickness, at home, except where deceased was taken sick away from home, and died before return, nor are they valid to bequeath a value exceeding one hundred dollars unless it is proved by two witnesses that testator called them to bear witness to his will. Such will can not be proved after six months from making, unless reduced to writing within six days from speaking. Soldiers in actual service or mariners at sea, may dispose of goods and chattels in the manner permitted by common law. A wife or husband may renounce the provisions of the spouse's will and take under the law. Any provision in a will for a husband or wife is in bar of a statutory share. The statutes of mortmain are in force. One who kills another shall not take under his will. The issue of a child or descendant who dies before the testator take any gifts made to him in the will.

[25] Gen. Stats. Minn. 1913, §§ 7250- 7275, 7282.

Authenticated copies of foreign wills proved according to the laws of any foreign jurisdiction, may be admitted to probate in Mississippi, but are subject to contest as the original might have been.[26]

§ 915. **Missouri.**—Every male person, twenty-one years of age and upward, of sound mind, may by last will, devise all his estate, real, personal and mixed, and all interest therein, saving the widow her dower. And every male person over the age of eighteen years, and of sound mind, may, by last will, bequeath all his personal estate, saving the widow her dower. Any married or unmarried woman, of eighteen years of age and upward, of sound mind, may devise her land, tenements, or any descendable interests therein, or bequeath her personal property held in her own right, in possession or expectancy, by her last will and testament subject to the rights of the husband, if any, to his curtesy therein. Every will shall be in writing, signed by the testator, or by some person, by his direction, in his presence; and shall be attested by two or more competent witnesses subscribing their names to the will in the presence of the testator, and in the presence of each other. The husband's rights in the deceased wife's property are the same as those of a widow in the deceased husband's property. A will executed by an unmarried woman shall be deemed revoked by her subsequent marriage. If a testator after making a will disposing of his whole estate, marries and dies leaving issue of such marriage unprovided for, such will shall be deemed revoked. A testator is deemed to have died intestate as to children not named in the will. Where any estate shall be devised to any child or grandchild or other relative of the testator and such devisee shall die before the testator leaving lineal descendants, such descendants shall take the estate, real or personal, as such devisee would have done in case he had survived the testator. Nuncupative wills are not good where the estate exceeds two hundred dollars, or unless proved by two witnesses, and that the testator, in his last sickness, at his home, or taken sick away from home, called some person to witness the will. Proof of such will must be given within six months after speaking, or the substance reduced to writing within thirty days. Wills of mariners and soldiers, as to wages and personal prop-

[26] Miss. Code 1906, §§ 5078-5092, 2004.

erty, are governed by the common law. A legacy to an attesting witness is void unless there are sufficient other witnesses. A devise omitting the words "heirs and assigns" or "heirs and assigns forever," containing no words by which it appears a life estate was intended, passes a fee simple.[27]

§ 916. **Montana.**—Same as California, except no provision as to married woman and, "a will of real or personal property, or both, or a revocation thereof, made out of this state by a person not having his domicil in this state, is as valid when executed according to the law of the place in which the same was made, or in which the testator was at the time domiciled, as if it were made in this state, and according to the provisions of this chapter."[28]

§ 917. **Nebraska.** — Every person of full age (males, twenty-one; unmarried females, eighteen; married females, sixteen) may dispose of real and personal property by will. The will must be in writing signed by the testator, or by some person in his presence and by his express direction, attested and subscribed in the presence of the testator by two or more competent witnesses. Nuncupative wills are not good, where the value of the estate exceeds one hundred fifty dollars, and unless proved by three witnesses present at the making, and that the testator called them to bear witness it was his will, and that it was made during the testator's last sickness at his home, or while taken sick away from home. Unless reduced to writing within six days after speaking, proof of such wills will not be allowed after six months. These rules do not apply to wills by soldiers in service and mariners on ships, disposing of wages and personal estate. Bequests to subscribing witnesses are void, unless there are two others competent, or such witness would take by law without a will. A will may be deposited with the probate judge. After-acquired estate passes by will if such appears to have been the intention. Afterborn children take as if the testator had died intestate. All wills duly proved and allowed in a foreign state or country, according to law, may be filed in the probate court of any county where the testator has estate on which the will

[27] Rev. Stat. Mo. 1909, §§ 535-584. [28] Rev. Code Mont. 1907, §§ 4723-4762.

may operate, by producing a duly authenticated copy of the will and its probate.[29]

§ 918. **Nevada.**—Every person over eighteen years of age, of sound mind, may dispose of his or her estate, real or personal, by will. Married women may dispose of their separate property as though under no disability. No will except a holographic or nuncupative will is valid unless in writing "signed by the testator and sealed with his seal, or by some person in his presence and by his express direction, and attested by at least two competent witnesses subscribing their names to the will in the presence of the testator." A nuncupative or verbal will is valid where the estate bequeathed does not exceed in value one thousand dollars, when proved by the testimony of two witnesses who were present at the making thereof, and the testator at the making of the same bade some one present bear witness that such was his will, at the time of his last sickness. It must be proved not more than three months after it is made. Provisions in favor of subscribing witnesses are void unless there are sufficient other witnesses. Marriage of an unmarried woman revokes her will previously made, likewise marriage of a man, unless provision is made for his wife. Afterborn or unintentionally omitted chlidren take as if no will had been made. After-acquired property passes if such was the testator's intention. Property may be disposed of and taken under holographic wills. Such wills shall be valid and have full effect for the purpose for which they are intended. A holographic will is subject to no other form than that it be written entirely by the hand of the testator himself. It may be made in or out of this state, and need not be witnessed, and may be proved in the same manner as other private writings are proved. "All wills which shall have been duly proved and allowed in any other of the United States, or any territory thereof, or in any foreign country or state, may be admitted to probate by the district court of any county in which the deceased shall have left any estate, provided it has been executed in conformity with the laws of the place where made," and proceedings shall be had as in case of an original will for probate, with like force and effect.[30]

§ 919. **New Hampshire.**—Every person of sane mind aged

[29] Cobbey's Ann. Stats. Nebr. 1911, §§ 4988-5014.

[30] Rev. Laws Nev. 1912, §§ 5878, 6202-6222.

twenty-one may dispose by will of real and personal property. This includes a married woman. Wills must be made in writing, signed by the testator or some person in his presence and by his express direction, and attested and subscribed in his presence by three or more credible witnesses. A will not under seal is as effectual as though sealed. A legacy to a witness is void, unless there are three other subscribing witnesses, but a gift to a corporation of which witnesses are members, does not make the will void or disqualify the witnesses. Afterborn or omitted children take as if there were no will. The surviving spouse may waive provisions in the deceased spouse's will, and take under the statute. A soldier in actual service, or a seaman at sea, may dispose of movables or personal estate as at common law. A will may be deposited for safe-keeping with the register of probate. Nuncupative wills shall not be "valid where the personal estate bequeathed exceeds in value one hundred dollars, unless declared in the presence of three witnesses who are requested by the testator to bear witness thereto, in his last sickness and in his usual dwelling; except when he was taken sick from home and died before his return, nor unless a memorandum thereof was reduced to writing within six days, and presented to the probate court within six months after the making. A will made out of the state, valid according to the laws of the state or country where it was executed, may be proved and allowed in New Hampshire, and shall be as effective as it would have been if executed according to New Hampshire laws. No donatio causa mortis shall be valid unless the actual delivery of the property to the donee be proved by two indifferent witnesses upon proceedings in the probate court to establish such gift commenced within sixty days after the death of the donor.[31]

§ 920. **New Jersey.**—A will by a person under twenty-one, or idiot, lunatic, or person of unsound mind, is not good. A witness to a will can not take as devisee, except to pay debts, but may prove the will. Estates pur autre vie may be devised. A nuncupative will is not valid except where the estate does not exceed eighty dollars, unless proved by three witnesses present at the making, and unless the testator asked persons present to bear witness to the will, and unless made in time of last sickness,

[31] Pub. Stats. N. H. 1901, ch. 186, §§ 1-22.

at home, or taken sick while away from home, dying before returning, and unless reduced to writing within six days from making, such will must be proved within six months. These rules do not apply to soldiers in service or mariners at sea. A written will can not be altered by an oral will. Afterborn children make void a will made when the testator had no children. Where a testator had children when the will was made, afterborn children take as though he died intestate. All wills except nuncupative wills must be in writing signed by the testator, and the signature shall be made by the testator, or the making thereof acknowledged by him, and such writing declared to be his last will, in the presence of two witnesses present at the same time, who shall subscribe their names thereto, as witnesses, in the presence of the testator. Unless intended clearly to convey an estate for life, all devises in which the words "heirs and assigns" are omitted, pass an estate in fee simple. A foreign will may be admitted to probate, by presenting a copy of the will, or a record of it, and the certificate of probate, all properly attested, to the surrogate, if executed in conformity with New Jersey law, and shall have the same force as if executed in New Jersey.[32]

§ 921. **New Mexico.**—Any person of the age of twenty-one years or upward, in sound mind, may make a will, disposing of all property save what is sufficient to pay his debts, and what is given by law as privileged property to his wife or family. An agent may be empowered to make a will. A verbal will may be valid. A will in writing should be signed by the testator, who, if unable or not knowing how to sign, shall request some reliable person to sign for him, and attested by two or more able and qualified witnesses, who must be present and see the testator sign the will, or some one sign it for him at his request as and for his last will and testament, and must sign as witnesses at his request in his presence and in the presence of each other. Two witnesses to a will are sufficient, but in case of a verbal will there must also be two witnesses to testify as to the testator's soundness of mind. Heirs or beneficiaries can not be witnesses to a will. Charitable bequests must be in writing. Children not named or after-born take as if no will had been made. "Any will executed in any foreign jurisdiction, sufficient to convey the title of real estate

[32] Comp. Stats. N. J. 1910, pp. 5862-5871, §§ 1-27, p. 3820, § 23.

in such jurisdiction, shall be valid in this state to the same extent as in the jurisdiction where made."[33]

§ 922. **New York.**—All persons, except idiots, persons of unsound mind and infants, may devise real estate, and males of the age of eighteen or upward, and females of the age of sixteen or upward, if of sound mind, may bequeath personal estate by written wills. Only soldiers in service or mariners at sea may bequeath personal property by nuncupative will. Real property can not be devised to an alien, nor to a corporation unless it is empowered by charter or statute, to take by devise. No person having a husband, wife, child, or parent, can will more than half his property to a religious or charitable society or corporation. Every last will and testament shall be executed and attested in the following manner: "1. It shall be subscribed by the testator at the end of the will. 2. Such subscription shall be made by the testator in the presence of each of the attesting witnesses, or shall be acknowledged by him, to have been so made, to each of the attesting witnesses. 3. The testator, at the time of making such subscription, or at the time of acknowledging the same, shall declare the instrument so subscribed to be his last will and testament. 4. There shall be at least two attesting witnesses, each of whom shall sign his name as a witness, at the end of the will, at the request of the testator." "The witnesses to any will shall write opposite to their names their respective places of residence; and every person who shall sign the testator's name to any will, by his direction, shall write his own name as a witness to the will. Whoever shall neglect to comply with either of these provisions shall forfeit fifty dollars, to be recovered by any person interested in the property devised or bequeathed who will sue for the same. Such omission shall not affect the validity of any will; nor shall any person liable to the penalty aforesaid be excused or incapacitated on that account from testifying respecting the execution of such will." Devises or bequests to subscribing witnesses are void where the will can not be proved without them, unless such witness would have been entitled by law to share in the testator's estate. A will is revoked by marriage of the testator and the birth of issue, or by the marriage of an unmarried female testatrix. "A will of real or personal property, executed as pre-

[33] N. Mex. Stats. Ann. 1915, §§ 5857-5870.

scribed by the laws of the state, or a will of personal property executed without the state and within the United States, the Dominion of Canada, or the Kingdom of Great Britain and Ireland, as prescribed by the laws of the state or country where it is or was executed, or a will of personal property, executed by a person not a resident of the state, according to the laws of the testator's residence, may be proved as prescribed in this article. The right to have a will admitted to probate, the validity of the execution thereof, of the validity or construction of any provision contained therein, is not affected by a change of the testator's residence made since the execution of the will." A foreign will may be proved by filing a duly authenticated copy of the will and the proof with the surrogate of the county in New York where property disposed of by the will is situated. Wills may be deposited with the clerk of every county, the register of deeds in the city and county of New York, and the surrogate of every county. A testator, who is a citizen of the United States, wherever resident, may declare that he elects his disposition by his will to be construed and regulated by the laws of New York.[34]

§ 923. **North Carolina.** — No person under the age of twenty-one is capable of disposing of property by will. Married women may make wills. "No last will or testament shall be good or sufficient in law to convey or give any estate, real or personal, unless such last will shall have been written in the testator's lifetime and signed by him, or by some other person in his presence and by his direction, and subscribed in his presence by two witnesses at least. * * * Or, unless such last will and testament be found among the valuable papers and effects of any deceased person, or shall have been lodged in the hands of any person for safe-keeping, and the same shall be in the handwriting of such deceased person with his name subscribed thereto, or inserted in some part of such will, and if such handwriting shall be proved by three credible witnesses, who verily believe such will and every part thereof is in the handwriting of the person whose will it appears to be, then such will shall be sufficient to give and convey real and personal estate." Wills, unless made in exercise of a power of appointment, are revoked by the testator's

[34] Consol. Laws N. Y. 1909, D., ch. 244. E. Law, ch. 18, §§ 1048; Acts 1911.

subsequent marriage. "No person, on account of being an executor of a will, shall be incompetent to be admitted as a witness to prove the execution of such will, or to prove the validity or invalidity thereof. If any person shall attest the execution of any will, to whom or to whose wife or husband any beneficial devise, estate, interest, legacy or appointment of or affecting any real or personal estate shall be thereby given or made, such devise, estate, interest, legacy or appointment shall, so far as only concerns such person attesting the execution of such will, or the wife or husband of such person, or any person claiming under such person or wife or husband, be void; and such person so attesting shall be admitted as a witness to prove the execution of such will, or the validity or invalidity thereof." Any nuncupative will must be proved by at least two witnesses who were present when it was made, and who state that they were especially requested to bear witness thereto by the testator himself. It must also be proved that such will was made in the testator's last sickness in his own house, or where he had previously resided for at least ten days, unless he die on a journey or from home. No nuncupative will shall be proved by the witnesses after six months from the making thereof, unless it was put in writing within ten days from such making. Afterborn children, unprovided for, take as if there had been no will. A foreign will may be proved by exemplified copy, but will not pass real estate in North Carolina unless executed in conformity with its laws.[35]

§ 924. **North Dakota.**—Practically same as California except, no corporation can take by will, unless expressly authorized by statute, and no restrictions on devise for charitable use. After-acquired property passes by will. Foreign wills may be probated by filing in county court the duly authenticated copies of the will and the probate, and they are valid in North Dakota, if executed either according to the laws of the place where made, of the testator's domicil, or of North Dakota.[36]

§ 925. **Ohio.** — Males aged twenty-one, females aged eighteen, of sound mind and memory, under no restraint, may make wills. All except nuncupative wills must be in writing, but may be handwritten or typewritten, and must be signed at the

[35] Pell's Rev. N. Car. Stats. 1908, §§ 3111-3146.

[36] Comp. Laws N. Dak. 1913, §§ 5640-5684, 8672.

end by the party executing or some other person in his presence and by his express direction, and attested and subscribed in the testator's presence, by two or more competent witnesses, who saw him subscribe or heard him acknowledge it. A devise or bequest to a witness, without whose testimony the will can not be proved, is void, unless he was by law entitled to share in the estate. A widow or widower may elect to take under the will of a deceased consort or take under the provisions made by law for her or him. The will of an unmarried woman is not revoked by her marriage. The birth to a testator, who had no children, of a child unprovided for revokes the will. Subsequently acquired property passes if such was the testator's intention. A bequest to charity is void, unless executed at least one year prior to the testator's death. A verbal will, made in the last sickness, is valid as to personal estate, if reduced to writing, and subscribed by two competent disinterested witnesses within ten days after the speaking of the testamentary words; if it is also proved by such witnesses the testator was of sound mind and memory and not under any restraint, and called upon some person present to bear testimony to said deposition as his will, such a will must be offered for probate within six months after his death. A duly executed written will can not be revoked by a nuncupative will. Authenticated copies of wills, executed and proved according to the laws of any state or territory of the United States relative to any property in the state of Ohio, may be admitted to record in the probate court of a county where a part of such property is situated. Such authenticated copies so recorded shall have the same validity in law as wills duly made in Ohio, in conformity with the laws thereof, are declared to have. Foreign wills can not be contested in Ohio.[37]

§ 926. **Oklahoma.**—Same as North Dakota, except no married person can bequeath more than two-thirds of his or her property away from the other spouse, and no person who is incapable of alienating, conveying or incumbering real property while living may bequeath the same by will.[38]

§ 927. **Oregon.**—"Every person of twenty-one years of

[37] Ohio Gen. Code 1910, §§ 10503, 10504, 10515, 10536, 10560, 10561, 10566, 10577, 10579, 10601.

[38] Okla. Rev. Laws 1910, §§ 8317-8337.

age and upward, of sound mind, may, by last will, devise all his estate, real and personal, saving to the widow her dower. Every person over the age of eighteen years, of sound mind, may by last will, dispose of his goods and chattels. A married woman may, by will, dispose of any real estate held in her own right, subject to any rights which her husband may have as tenant by the curtesy. Every will shall be in writing, signed by the testator, or by some other person under his direction, in his presence, and shall be attested by two or more competent witnesses, subscribing their names to the will in the presence of the testator. Every person who shall sign the testator's name to any will by his direction shall subscribe his own name as a witness to such will, and state that he subscribed the testator's name at his request. If, after making a will disposing of the whole estate of the testator, such testator shall marry and die, leaving issue by such marriage living at the time of his death, or shall leave issue of such marriage born to him after his death, such will shall be deemed revoked, unless provisions shall have been made for such issue by some settlement, or unless such issue shall be provided for in the will, and no evidence shall be received to rebut the presumption of such revocation. A will made by an unmarried person shall be deemed revoked by subsequent marriage." Children unprovided for take as though no will had been made. A mariner at sea or soldier in service may dispose of wages or personal property as at common law. "No proof shall be received of any nuncupative will unless it be offered within six months after speaking the testamentary words, nor unless the words, or the substance thereof, were reduced to writing within thirty days after they were spoken." "No probate of any nuncupative will shall be granted for fourteen days after the death of the testator; nor shall any nuncupative will be at any time proved unless the testamentary words, or the substance thereof, be first committed to writing, and a citation issued, accompanied by a copy thereof, to call the widow or next of kin of the deceased, that they may contest the will if they think proper." "Any person not an inhabitant, but owning property, real or personal, in this state, may devise or bequeath such property by last will, executed and proved (if real estate be devised) according to the laws of this state, or (if personal estate be bequeathed) according to the laws of this state or of

the country, state or territory in which the will may be executed." If such will be probated in a foreign jurisdiction, duly certified copies of such will and the probate may be recorded, and be of the same effect as wills executed in Oregon, and if probate is not required in a foreign jurisdiction a will there made may be probated in Oregon. A foreign will may be contested in Oregon. A subscribing witness can not take unless there are sufficient other witnesses or he is entitled to a share by law. A legatee who has rejected a legacy or has been paid, is a competent witness.[39]

§ 928. **Pennsylvania.**—Every person of sound mind over twenty-one years of age may make a will of realty or personalty. A will must be in writing, and unless the person making the same shall be prevented by the extremity of his last sickness, must be signed by him at the end thereof, or by some person in his presence and by his express direction, and in all cases shall be proved by the oaths or affirmations of two or more competent witnesses. It is not necessary that the will be proved by subscribing witnesses, and acknowledgment by the testator before subscribing witnesses is not necessary except where there is a devise or bequest to a charitable or religious use, when the will must be attested by two credible and disinterested witnesses, and executed at least one calendar month before the death of the testator. The signature may be made by mark. Personal estate may be bequeathed by nuncupative wills, if made during the last sickness of the testator in the house of his habitation, or where he has resided for the space of ten days or more next before the making of such will; except where the testator was surprised by sickness, being from his own house, and shall die before returning. If a value of more than one hundred dollars is bequeathed by such will, it must be proved by some of the persons present, that he requested some of them to bear witness that such was his will, or to that effect, and the requisites of the will must be proved by two or more witnesses who were present at the making. Mariners at sea, or soldiers in actual military service, may dispose of movables, wages, and personal estate by a nuncupative will. After-acquired realty passes by a will unless a contrary intention appears. Words of inheritance are not

[39] Lord's Ore. Laws, §§ 7316-7341.

necessary to pass the testator's entire estate. The birth of children after the execution of wills, revokes the will pro tanto. Marriage of a single woman revokes her will. A will speaks as of the date of the death of the testator. Lapsed and void devises go to the residuary devisees, and not by the intestate law. A will may be written in pencil or typewritten. A will and codicil may be written on separate pieces of paper. A surviving husband or wife may elect to take under or contrary to the wills of decedents. Any person competent to make a will may by testament appoint a guardian for his or her minor child. Wills of personal property made by persons whose domicil is out of the state may be executed as required by the law of the state of their domicil. All wills offered for probate in Pennsylvania require the same evidence, no matter where executed; and should be proved and registered in the office of the register of wills in the country where the testator had his domicil. Copies of wills duly proved in any other state or country may be registered in Pennsylvania if duly authenticated, and letters testamentary or of administration granted thereon, as if the original had been produced; also there must be produced and filed a copy of the record of the probate of the original and the letters granted thereon, attested by the person having power to receive the probate of such original in the place where it was proved, with his seal of office, if any, annexed, together with the certificate of the chief judge or presiding magistrate of the state, country, county or district where the original was proved, that the same appears to have been duly proved and to be of force, and that the attestation is in due form.[40]

§ 929. **Philippine Islands.**—Every person, including married women, of age and sound mind may make a will of real and personal property, except that no person can by will deprive a husband, wife or heir, of his interest in an estate which appertains by law. After-acquired real estate may pass by will, if such was the intention. No will is valid unless it be in writing and signed by the testator, or by the testator's name written by some other person in his presence and by his express direction, and attested and subscribed by three or more credible witnesses in the presence of the testator and of each other. The attestation

[40] Purdon's Dig. Pa. Laws (13 ed.), vol. 4, pp. 5109-5151.

shall state the fact that the testator signed the will, or caused it to be signed by some other person at his express direction, in the presence of three witnesses, and that they attested and subscribed it in his presence and in the presence of each other. But the absence of such form of attestation shall not render the will invalid if it is proved that the will was in fact signed and attested as in this section provided. Any person of sound mind, not blind, aged eighteen or more, is a competent witness. A devise to a witness is void unless there are three other competent witnesses. "A will made out of the Philippine Islands which might be proved and allowed by the laws of the state or country in which it was made, may be proved, allowed, and recorded in the Philippine Islands, and shall have the same effect as if executed according to the law of these Islands." "A will made within the Philippine Islands by a citizen or subject of another state or country, which is executed in accordance with the law of the state or country of which he is a citizen or subject, and which might be proved and allowed by the law of his own state or country, may be proved, allowed, and recorded in the Philippine Islands, and shall have the same effect as if executed according to the laws of these islands." Wills proved and allowed in the United States, or any state or territory thereof, or in a foreign state or country according to the laws thereof, may be allowed, filed and recorded in the Court of First Instance of the Province in which the testator has estate on which it may operate. A duly authenticated copy of the will and of the probate and allowance, must be produced and a hearing had, and if allowed, the will has the same effect as if originally proved in the same court.[41]

§ 930. **Porto Rico.**—All persons over fourteen years of age, not permanently or temporarily of unsound mind, may make wills. A will is absolutely a personal act and can not be made through a third person, trustee or agent. There are ordinary and special wills. Military and maritime wills and those executed in foreign countries are special wills. Ordinary wills are holographic, open and closed. The two latter kinds must be executed before a local notary, with many formalities and witnesses, and are not of general interest. Foreigners can probably only make the holographic will with any practical effect. Holo-

[41] P. I. Code Proc. 1901, §§ 614-640.

graphic wills may be executed only by persons of full age and to be valid, must be written in entirety and signed by the testator, who shall state the year, month, and day in which it is executed. If it contains words erased, corrected, or interlined the testator shall make a note thereof under his signature. Holographic wills may be executed at any place, within or outside of Porto Rico and foreigners may execute such wills in their own language. Such wills must be placed in a protocol being presented for this purpose to the district court of the last domicil of the testator, or the court of the district in which the testator dies, if he dies in Porto Rico, within five years from the date of death. Citizens of Porto Rico may make wills abroad according to the laws of the country where they are sojourning, or wills on the high seas, in accordance with the laws of the state or nation to which the ship belongs, or holographic wills anywhere, but can not make a mutual will valid in Porto Rico even though it would be valid where made. Children and their descendants, or parents if there are no children, are forced heirs. The children are entitled as such to two-thirds of the property, the parents to one-half. There can be disinheritance of children, parents or spouses only for certain statutory causes, which must be mentioned in the will. The surviving spouse may take independently of the will.[42]

§ 931. Rhode Island.—Any person of sane mind aged twenty-one years may by will dispose of any real and personal estate to which in law or in equity, he shall be entitled at the time of his death, except an estate-tail. A minor eighteen years old or more may bequeath personal estate. Lapsed and void devises go to the residuary devisee. Wills must be signed by the testator, or by some other person for him in his presence and by his express direction, and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary and no other publication shall be necessary. "A will of real or personal property, or both, executed without the state and within the United States, if executed in the mode prescribed by the laws of the state or territory

[42] Rev. Stats. and Codes P. R. 1913, §§ 3748-3811.

or District of Columbia, where executed, or in which the testator was then domiciled, and any will of personal property executed in any other country, if executed according to the laws of such country, shall be deemed to be legally executed, and shall have the same force and effect as if executed in the mode prescribed by the laws of this state," provided it is in writing and susbcribed by the testator. The will of a married woman can not impair her husband's rights as tenant by curtesy. Marriage revokes a will, unless made in exercise of a power of appointment. Soldiers in service or seamen at sea, may dispose of personal estate as at common law. A child afterborn or unintentionally omitted takes as though there were no will. A devise or legacy to a witness is void, but he is competent to prove the will. An executor or trustee is a competent witness. An exemplified copy of a foreign will and probate may be presented for filing and record, and after notice and hearing will be of the same effect as if originally probated in Rhode Island. A foreign will operative without probate where made, may be proved in Rhode Island.[43]

§ 932. **South Carolina.**—"All wills and testaments of real and personal property shall be in writing and signed by the party so devising the same, or by some other person in his presence and by his express directions, and shall be attested and subscribed in the presence of the said devisor, and of each other, by three or more credible witnesses." Any person of sound mind of the age of twenty-one may devise real property by will. As at common law, males over fourteen and females over twelve may make a will of personalty.[44] Estates pur autre vie are devisable. Devises or bequests to subscribing witnesses are valid, so far as such legacy does not exceed the amount to which the witness would be entitled upon a failure of the will. A creditor secured by the will is a competent witness. Marriage of a testator revokes a will, if the wife and issue are not provided for. Words of limitation are unnecessary to convey a fee by devise. Posthumous or other afterborn children take equally with the other children, who must contribute to their share. Legacies to a bastard child or to a woman with whom the testator lives in adultery are, if the testator has a wife or lawful children, void

[43] Gen. Laws R. I. 1909, ch. 254, §§ 11-36; ch. 310, § 10-14.

[44] Posey v. Posey, 3 Strob. S. Car. 167; Major v. Hunt, 64 S. Car. 97, 41 S. E. 816.

if they exceed one-fourth of his estate. If a will has been regularly proved in a foreign court, an exemplification of such will may be admitted to probate in this state upon exemplification and certificate of the judge of the court of probate. Nuncupative wills where the estate exceeds fifty dollars are not valid unless proved by the oaths of three witnesses present at the making called upon by the testator to witness his will, and unless made in the house where the testator lived, and in his last sickness. If committed to writing within six days, such will may be proved in twelve months, otherwise only in six months. Soldiers and mariners may make wills as at common law. Typewritten wills are good. Wills may be probated either in common form or in due form of law.[45]

§ 933. **South Dakota.**—Same as North Dakota, which is practically same as California.[46]

§ 934. **Tennessee.**—Wills of real estate may be made only by persons aged twenty-one or more, but males aged fourteen and females aged twelve may make wills of personalty. "No last will or testament shall be good or sufficient to convey or give any estate in lands unless written in the testator's lifetime and signed by him, or by some other person in his presence and by his direction, and subscribed in his presence by two witnesses at least, neither of whom is interested in the devise of the said lands. But a paper writing appearing to be the will of a deceased person, written wholly by him, having his name subscribed to it or inserted in some part of it, and found after his death among his valuable papers or lodged in the hands of another for safekeeping, shall be good and sufficient to give and convey lands, if the handwriting is generally known by his acquaintances and is proved by at least three credible witnesses that they verily believe the writing to be in his hand." A nuncupative will is not good as to an estate exceeding two hundred fifty dollars, unless proved by two disinterested persons who were present when it was made. A written will may not be revoked by an oral will. No subscribing witnesses are necessary to a will of personalty. A married woman may dispose of her realty or personalty by will but not so as to affect her husband's right of curtesy. A

[45] S. Car. Code 1912, §§ 3563-3589.
[46] Civ. Code S. Dak. 1913, §§ 998-1035; Rev. Code S. Dak. 1903, pp. 735-739.

foreign will may be proved by presenting a duly authenticated copy to the county court. The certificate of a consul or any United States agent at the place of execution is sufficient authentication of a foreign will of personalty. A pretermitted child takes as though there were no will. The will speaks from the testator's death.[47]

§ 935. **Texas.**—Every person aged twenty-one years or upward, or who may be or may have been lawfully married, being of sound mind, shall have power to make a last will and testament. Every will, except where otherwise provided by law, shall be in writing and signed by the testator or by some other person by his direction and in his presence, and shall, if not wholly written by himself, be attested by two or more credible witnesses above the age of fourteen years, subscribing their names thereto in presence of the testator. In case of a holographic will, wholly written by the testator, attestation is unnecessary. A nuncupative will is valid if made in the time of the last sickness of the deceased, at his habitation, unless taken sick from home and he dies before returning; but not when the value exceeds $30, unless proved by three competent witnesses that the testator called on some person to take notice of his will. Such will can not be proved within fourteen days from the testator's death, and not after six months from date of speaking, unless committed to writing within six days therefrom. These provisions do not apply to mariners at sea or soldiers in service. Afterborn or posthumous children, unprovided for, take as if there were no will. If the testator had no child, when the will was made, his will is void if he die leaving a child. Bequests to subscribing witnesses are void, unless they were entitled to share under the law. When any will disposing of lands in this state has been duly probated according to the laws of any of the United States or territories, a copy thereof and its probate may be filed and recorded in the same manner as deeds and conveyances and will have the same force and effect, but the validity of such will may be contested within four years.[48]

§ 936. **Utah.**—Same as California, except no restrictions

[47] Shannon's Code Tenn. 1896, §§ 3895-3932; Supp. Shannon Code Tenn. 1897-1903, § 3921.

[48] Vernon's Sayles' Tex. Stats. Ann. 1914, §§ 7855-7878.

that devises to charity must be made thirty days before death and can not exceed one-third the estate. "A will of real or personal property, or both, or a revocation thereof, made out of this state by a person not having his domicil in this state, is as valid when executed according to the law of the place in which the same was made, or in which the testator was at the time domiciled, as if it were made in this state and according to the provisions of this chapter."[49]

§ 937. Vermont.—Every person of age (males twenty-one, females eighteen) and sound mind may devise, bequeath and dispose of real and personal property by will. After-acquired real estate passes by will if such was the testator's intention. No will, except nuncupative wills, is valid unless in writing, signed by the testator, or by the testator's name written by some other person in his presence and by his express direction, and attested and subscribed by three or more credible witnesses in the presence of the testator and of each other. No nuncupative will is valid where the estate exceeds two hundred dollars, nor unless a memorandum was made in writing by a person present within six days from the time of making, and presented for probate within six months. A soldier or seaman may make a will of wages or personal estate as at common law. A devise to witnesses is void unless there are three other competent witnesses. A secured creditor is a competent witness. "A will made out of the state, which might be proved and allowed by the laws of the state or country in which it was made, may be proved, allowed, and recorded in this state, and shall then have the same effect as if executed according to the laws of this state." Wills proved and allowed in any other state or in a foreign country may be allowed, filed and recorded in the probate court of a district in which the testator has property on which it may operate. A duly authenticated copy of such will and its probate is required.[50]

§ 938. Virginia.—No person of unsound mind, or under the age of twenty-one years, shall be capable of making a will, except that minors eighteen years of age or upward may, by will, dispose of personal estate. No will is valid unless in writing and signed by the testator, or by some other person in his presence and by his direction, in such manner as to make it mani-

[49] Comp. Laws Utah 1907, §§ 2731-2766.

[50] Pub. Stats. Vt. 1906, §§ 2731-2755.

fest that the name is intended as a signature; and, unless it be wholly written by the testator, the signature shall be made or the will acknowledged by him in the presence of at least two competent witnesses present at the same time, and such witnesses shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary. A soldier in actual service or seaman at sea may dispose of personal estate as at common law. The will of a person domiciled out of the state at the time of his death is valid as to personal property in the state, if executed according to the laws of the place of domicil. Wills made by either a man or woman are revoked by marriage, except where made in exercise of a power of appointment. A will speaks as of the date of testator's death. Lapsed devises are included in the residuary devise. If a child is born to a testator who had no child living when his will was made, the will is construed as if limited to take effect in the event the child shall die under the age of twenty-one, unmarried without issue. Afterborn or pretermitted children take as if no will had been made. Devisees and legatees are competent witnesses, but a bequest to them is void, except so far as entitled to a share in the absence of a will. A creditor secured by will, or an executor, is a competent witness. Where a will relative to estate within this state has been proved without the same, an authenticated copy thereof and the certificate of probate thereof may be offered for probate in this state. If valid as a will of personalty where executed, it is valid in Virginia, and if so executed as to be a valid will of lands by the law of Virginia, it may be admitted to probate as a will of real estate.[51]

§ 939. **Washington.**—Every person having attained majority (males, twenty-one years; females, eighteen years, or lawfully married with consent of parents or guardian) may by last will dispose of all his or her real and personal estate. Every will shall be in writing, signed by the testator or some other person under his direction in his presence, and shall be attested by two or more competent witnesses, subscribing their names to the will in the presence of the testator. Every person who shall sign the testator's name to any will by his direction shall subscribe his own name as a witness to such will, and state that he subscribed

[51] Pollard's Va. Code 1904, §§ 2513-2536.

the testator's name at his request. A subsequent marriage revokes a will, unless the spouse is provided for. Children unprovided for take as if the testator had died intestate. A nuncupative will is not good as to an estate of value exceeding two hundred dollars, unless proved by two witnesses who were present at its making, and unless the testator bid some person present to bear witness to his will, and unless made at the time of the testator's last sickness in his dwelling house or place of residence for ten days prior, unless he was taken sick from home and died before return. Any soldier in service or sailor at sea may dispose of wages or personal property by will without regard to these provisions. A nuncupative will must be committed to writing and offered for probate within six months after speaking. Devises to witnesses are void except as to a share which would have descended to them by law. A devise of land conveys the testator's entire estate therein, unless it clearly appears otherwise. After-acquired lands pass by will if such was the testator's intention. Probated foreign wills are admitted to probate on production of a copy of such will, and of the original probate record authenticated by the clerk of court, or if there be no such officer, of the judge, where probation was made. Such will is carried into effect after probate as a domestic will is. Where it is provided in the will that the estate shall be settled in a manner provided in such will and that letters testamentary or of administration shall not be required, and where it also duly appears to the court by the inventory filed and other proof, that the estate is fully solvent, which fact may be established by an order of the court in the coming in of the inventory, it shall not be necessary to take out letters testamentary or of administration, except to admit to probate such will and to file a true inventory of all property of such estate in the manner required by existing laws. After the probate of such will and the filing of such inventory all such estates may be managed and settled without the intervention of the court if the will so provide.[52]

§ 940. **West Virginia.**—Same as Virginia.[53]

§ 941. **Wisconsin.**—Every person of the age of twenty-

[52] Rem. & Bal. Code Wash. 1910, §§ 1319-1339, 1317, 1631, 1444.

[53] W. Va. Code 1916, pp. 968-973.

one and any married woman of the age of eighteen, of sound mind, may make a will of real or personal property. After-acquired estate passes by will if so intended. No wills made in the state after January 1, 1896, except nuncupative wills, shall be effectual unless in writing, signed by the testator, or by some person in his presence and by his express direction, and attested and subscribed in the presence of the testator by two or more competent witnesses in the presence of each other. "A last will and testament executed without this state in the mode prescribed by the law either of the place where executed or of the testator's domicil shall be deemed to be legally executed, and shall be of the same force and effect as if executed in the mode prescribed by the laws of this state, provided said last will and testament is in writing and subscribed by the testator." Devises or gifts to witnesses are void unless they were entitled to share in the estate without a will, or unless there are sufficient other competent witnesses. An afterborn child unprovided for and not intentionally omitted, or pretermitted children take as if the testator had died intestate. The issue of a legatee who is a child or relative and dies before the testator, take the parent's share. A nuncupative will where the estate exceeds one hundred fifty dollars is not good unless proved by the oath of three witnesses present at the making, and some of the persons present were bid by the testator to witness the will, and unless made at the time of last sickness, in the testator's habitation or dwelling house unless he was unexpectedly taken sick and died before return. Such will must be proved within six months unless reduced to writing within six days from making. These provisions are not applicable to a soldier in service or mariner at sea. A duly authenticated copy of a probated foreign will and of the probate thereof may be recorded in the office of the register of deeds of any county in which lands in this state devised by it are situated, and shall be as valid to pass title as if proved in this state.[54]

§ 942. **Wyoming.**—Any person of full age and sound mind may dispose by will of all his property, except what is sufficient to pay his debts, or is allowed by law to husband and family or wife and family. A married woman may make a will as if sole. After-acquired property passes by will, if such appears to have

[54] Wis. Stats. 1915, §§ 2277-2295.

been the intention. All wills to be valid must be in writing, or typewritten, witnessed by two competent witnesses and signed by the testator or by some person in his presence and by his express direction. No subscribing witness can derive any benefit from a will unless without the will he would have shared in the estate, or there are two other competent witnesses. All wills duly proved and allowed in any other state of the United States, or in any foreign country or state, may be allowed and recorded in the district court of any county in which the testator shall have left any estate. "If, on the hearing, it appears upon the face of the record that the last will has been proved, allowed and admitted to probate in any other of the United States, or in any foreign country, and that it was executed according to the law of the place in which the same was made, or in which the testator was at the time domiciled, or in conformity with the laws of this state, it must be admitted to probate, and have the same force and effect as a will first admitted to probate in this state and letters testamentary or of administration issued thereon." Nuncupative wills may be probated within six months from speaking, on petition and notice, as provided for other wills. They must have been reduced to writing within thirty days from speaking.[55]

[55] Wyo. Comp. Stats. 1910, §§ 3911, 5394-5422, 5436, 5437.

CHAPTER XXXV

REGISTRATION OF TITLE UNDER TORRENS SYSTEM

SEC.
950. Origin and adoption of Torrens System.
951. Miscellaneous provisions common to all statutes.
952. Provisions as to which statutes vary.
953. Purpose and advantages of title registration.
954. General principles of registration.
955. Procedure for registration.
956. Notice and hearing.
957. Decree and certificate of title and incumbrances.
958. Conclusiveness of certificates.
959. Subsequent dealings with the land appear on the registry.
960. Acquiring title to registered land by adverse possession.
961. Transmission of title on death of owner of registered land.
962. Constitutionality of acts.

§ 950. Origin and adoption of Torrens System.—The system of judicial registration of land titles commonly known as the Torrens System was formulated by Sir Robert Torrens, an Irish emigrant to Australia, where the system was first adopted in 1857. It is frequently said that the system was originated by Torrens, but records, showing systems of registration of title to lands in portions of Europe, are extant, dating back as far as 1836, and there is nothing new about the fundamental principles involved. It is clear, however, that the registration system, as applied in England and generally throughout British dependencies, is the result of the work of Torrens. His idea was to apply the principles of registration of ownership in ships to registration in titles to land—that is, to have land ownership conclusively evidenced by certificate and thereby made determinable and transferrable quickly, cheaply, and safely.

The Torrens law, as originally drawn, has been greatly modified in the statutes enacted in the United States, yet the salient features of registration have been retained and the law is usually referred to as the Torrens law wherever a statute providing for the registration of land has been enacted in this country. Acts embodying the basic principles of title registration by certificate have been passed in nineteen states of the United States, in Hawaii, the Philippine Islands, Guam and Porto Rico. The states

in which land title registration acts exist and the year of their passage are as follows: Illinois, 1897; California, 1897; Massachusetts, 1898; Minnesota, 1901; Oregon, 1901; Colorado, 1903; Washington, 1907; New York, 1908; North Carolina, 1913; Mississippi, 1913; Ohio, 1913; Nebraska, 1915; Virginia, 1916; South Carolina, 1916; Georgia, 1917; Tennessee, 1917; North Dakota, 1917; South Dakota, 1917; and Utah, 1917. While the principles involved in the acts of the several states and islands are the same and the objects to be accomplished by them are identical, such acts differ widely in many respects. Some such differences are due, of course, to the necessity of conforming to existing state laws of procedure or to the planning of or distribution of judicial and ministerial duties, and do not go to the merits of the system as such or its success in operation. There are other matters, however, as to which differences exist, which are more important.

§ 951. **Miscellaneous provisions common to all statutes.** —Among the provisions common to all the acts are: 1. A nonresident applicant shall appoint a resident agent upon whom process and notice shall be served. 2. Any number of adjoining parcels of land in the same county and owned by the same persons and in the same right, or any number of parcels in the same county having the same chain of title and belonging to the same person, may be included in the one application. 3. Registered lands shall be subject to the same rights and burdens, may be dealt with by the owner and shall be subject to jurisdiction of the courts in the same manner as if it had not been registered, but no voluntary or involuntary transactions shall affect title until registered. 4. No title to registered land in derogation of that of the registered owner shall be acquired by prescription or adverse possession, except under the act of Nebraska, in which no such exemption exists. 5. An owner of registered land may convey, mortgage, lease, charge, or otherwise deal with the same as fully as if it had not been registered. He may use any form of deed, mortgage, lease, or other voluntary instrument sufficient in law for the purpose intended. 6. Every voluntary or involuntary transaction, which, if recorded, filed, or entered in any clerk's office, would affect unregistered land, shall, if duly registered in the office of the proper registrar, and not otherwise, be

notice to all persons from the time of such registration, and operate in accordance with law and with the provisions of the act upon any registered land in the county or city of such registrar to which it relates.

§ 952. **Provisions as to which statutes vary.**—It is not to be understood that the procedure is uniform in all states; on the contrary it can not be said that the procedure in any one of the successive steps, from the form in which the proceeding is instituted until the final decree, is identical in all the acts. The general plan, however, is present in all. Matters more or less substantial as to which the several acts differ are embraced in a consideration of the following questions:

1. Should a proceeding to register title be maintainable by persons claiming to own the equitable estate as well as those claiming to own the legal estate in land? In Massachusetts and New York owners of the legal estate only may maintain a proceeding to register title. Illinois, California, and perhaps other states expressly or impliedly provide that the owner of the legal or equitable estate may maintain the proceeding.

2. Should persons out of possession before claiming to be owners of land in fee simple be permitted to apply to register title? The acts of Massachusetts and New York limit the right to owners in possession only, but the acts in all other states confer the right upon all owners in fee simple, whether in possession or not.

3. Should the application be made in the form of petition or complaint? In New York the proceeding is instituted by a complaint, whereas in all other states a petition is required as is done in the original and other Torrens laws in Australia and all other British dependencies.

4. Should all applicants be required to file an abstract of title? The Minnesota act requires the filing of an abstract of title, satisfactory to the title examiners; and a like provision is found in the acts of Washington, California, Colorado, Mississippi, North Carolina, South Carolina and Georgia. The Illinois act commits an examiner to an exercise of discretion as to the means to be employed by him in examining the title.

5. Is provision for trial by jury necessary? The Massachusetts act requires that the cause be tried by jury upon motion of

either party; likewise in New York, California, Georgia, Mississippi, Virginia, South Carolina and North Carolina. In Minnesota the act contains no provision for trial by jury, and it is held that there is no constitutional right to a trial by jury in such a proceeding, since it is a proceeding in equity of the nature of a suit to quiet title.[1]

Colorado, Illinois, Nebraska, Ohio, Oregon and Washington follow Minnesota in this regard.

6. Is notice served by mail only sufficient? The Massachusetts act provides that notice may be served by mail, and the Supreme Court of that state has held that such notice is sufficient.[2]

The acts of all other states require service to be made in the manner provided to apply in suits of a similar character, that is, by messenger.

7. Should posting upon the land be required? The acts of Minnesota, California, Colorado, Illinois and Washington do not require posting notice of the proceeding upon the land; the acts of other states require such posting.

8. Should it be provided that title once registered should forever remain registered? All statutes excepting those in Nebraska and Georgia provide that a title once registered shall forever remain registered. In the two states named land may be withdrawn from registration at any time by the owner.

§ 953. Purpose and advantages of title registration.— Torrens stated that the purposes of the law which he advocated are "to simplify, quicken, and cheapen the transfer of real estate and to render titles safe and indefeasible." These objects, he planned, should be accomplished by means of registration of title and the use of certificates which conclusively show the state of the title at all times; the effect of such registration being to make a certificate of title issued by the official designated in the statute conclusive as to the character of the title of the person to whom it is issued, and as to all the rights, liens and incumbrances of other persons, in connection with the title. The objects of the system are the creation of an indefeasible title in the registered owner, simplification in the transfer of land, certainty

[1] Peters v. Duluth, 119 Minn. 96, 137 N. W. 390, 41 L. R. A. (N. S.) 1044n.

[2] Tyler v. Judges, 175 Mass. 71, 55 N. E. 812, 51 L. R. A. 433.

and facility in the proof of title by reference to a certificate issued by a government official made conclusive by law and finally the saving to the community of the cost of a new examination of title in connection with each transfer or transaction affecting the land.

Among the advantages claimed for the system of registering the title itself, upon consummation of each transaction, over the prevailing system of recording instruments for the purpose of giving notice and perpetuating evidence of title, are the following: 1. It substitutes an official adjudication of titles for an unofficial examination and gives greater certainty. 2. It provides for insurance against loss by a registered owner from any cause except fraud to which such owner has been a party. 3. It avoids the necessity of repeated examinations of the same title, thus cheapening the cost of transfer. 4. It obviates the necessity of going back to the registry, since, it is claimed, each certificate is conclusive, it being made possible thereby to effect loans and transfers with ease and expedition. 5. It renders real estate assets more available, thereby causing them to become more useful and valuable. 6. Its advantages are effected without sacrifice of any advantage which the prevailing system offers and with stability of title and the utmost security to incumbrancers. 7. It provides against the time when the records of transactions affecting land titles under a continuance of the prevailing custom will have become so voluminous as to make the cost of determination of title prohibitive in real estate mortgages of small amounts. 8. And it will aim to correct a prevailing condition under which the public records affecting titles to land are, without regulation, coming into private control for all practical purposes.

§ 954. General principles of registration.—The details of American statutes vary, but the underlying principles are the same. The distinguishing feature of the Torrens System is the registration of the title itself instead of the evidence of title.[3] It provides not merely for the recording of deeds or instruments affecting the title, but for an official registration, under which the title to the land passes by entry of the transfer, and not by the execution and delivery of the deed. It is intended that the

[3] State v. Westfall, 85 Minn. 437, 89 N. W. 175, 57 L. R. A. 297, 89 Am. St. 571.

register shall show the exact condition of the title to real property upon a single page or folio, and all dealings with the land must be entered thereon. Registration under the Torrens System is a purely voluntary act on the part of the applicant,[4] and he may withdraw his application at any time before the final decree.[5] A formal document, called a certificate of title, is issued after a judicial proceeding in the nature of a suit to quiet title and all subsequent transactions affecting the title are noted on this certificate or on a new one substituted therefor. In the law of each of the states a decree entered in pursuance of such a proceeding becomes the foundation title, and upon the strength of such decree a title is entered in a book designated "Register of Titles," kept by an official called a registrar.

§ 955. Procedure for registration.—In order to meet the constitutional requirements of due process of law, and to establish a starting point binding upon all the world, the initial registration of a title, upon which the certificate is issued, must be the result of judicial proceedings.[6] There must be notice to all having interests adverse to those of the applicant for registration; and only judicial officers may exercise judicial functions, whether as to the initial registration or subsequent transactions concerning the title. The statutes usually provide all details of procedure for registration.[7]

Ordinarily the first step under the acts is a written application for registration by the person claiming ownership of the land in fee simple, fully describing the land and showing the source of title and the existence of adverse claims, liens and incumbrances.[8] Several lots of land included in one application must

[4] Tyler v. Judges, 175 Mass. 71, 55 N. E. 812, 51 L. R. A. 433.

[5] McQuesten v. Commonwealth, 198 Mass. 172, 83 N. E. 1037; Foss v. Atkins, 204 Mass. 337, 90 N. E. 578.

[6] State v. Westfall, 85 Minn. 437, 89 N. W. 175, 57 L. R. A. 297, 89 Am. St. 571. But see Loewenstein v. Page, 16 Philippine 84.

[7] Robinson v. Kerrigan, 151 Cal. 40, 90 Pac. 129, 121 Am. St. 90, 12 Ann. Cas. 829; People v. Crissman, 41 Colo. 450, 92 Pac. 949; People v. Simon, 176 Ill. 165, 52 N. E. 910, 44 L. R. A. 801, 68 Am. St. 175; Tyler v. Judges, 175 Mass. 71, 55 N. E. 812, 51 L. R. A. 433; McQuesten v. Commonwealth, 198 Mass. 172, 83 N. E. 1037; State v. Westfall, 85 Minn. 437, 89 N. W. 175, 57 L. R. A. 297, 89 Am. St. 571; Kuby v. Ryder, 114 Minn. 217, 130 N. W. 1100.

[8] Robinson v. Kerrigan, 151 Cal. 40, 90 Pac. 129, 121 Am. St. 90, 12 Ann. Cas. 829; People v. Crissman, 41 Colo. 450, 92 Pac. 949; Tyler v. Judges, 175 Mass. 71, 55 N. E. 812, 51 L. R. A. 433; State v. Westfall, 85 Minn. 437, 89 N. W. 175, 57 L. R. A. 297, 89 Am. St. 571; Baart v. Martin, 99 Minn. 197, 108 N. W. 945, 116 Am. St. 394; Duffy v. Shirden, 139

be contiguous or be related by chain of title.[9] The application is signed and sworn to by the applicant and addressed to the court having jurisdiction under the statute. In Illinois the application is addressed to the judges of the circuit court for the county in chancery. In Massachusetts it is addressed to the court of land registration, a court specially constituted by the registration act with exclusive jurisdiction of such applications. In Colorado and Minnesota it is made to the district court of the county in which the land is situated.

Upon the filing of the application it is referred to the official examiners of titles, who make a thorough examination and report to the court.[10] Under the Massachusetts statute the examiner deals with the application, merely as a conveyancer at common law examining a title;[11] but under the Illinois statute the examiner is analogous to a master in chancery.[12] The ordinary rules of evidence, and objection thereto, apply.[13] Ex parte examinations of abstracts are improper.[14] Objections to the report of the examiner, in the nature of a special demurrer, may be filed, and should specify the grounds therefor with clearness and certainty.[15] The court, however, may require further proof to determine the rights of the parties, and is not bound by the opinion of the examiner.[16]

§ 956. Notice and hearing.—The next step is the service of personal process, or notice by publication, upon all persons interested in the property,[17] and any one claiming an interest in

App. Div. 755, 124 N. Y. S. 529; Lachman v. People, 127 N. Y. S. 912.

[9] Culver v. Waters, 248 Ill. 163, 93 N. E. 747.

[10] People v. Crissman, 41 Colo. 450, 92 Pac. 949; Glos v. Holberg, 220 Ill. 167, 77 N. E. 80; Tyler v. Judges, 175 Mass. 71, 55 N. E. 812, 51 L. R. A. 433; McQuesten v. Commonwealth, 198 Mass. 172, 83 N. E. 1037; State v. Westfall, 85 Minn. 437, 89 N. W. 175, 57 L. R. A. 297, 89 Am. St. 571; Dewey v. Kimball, 89 Minn. 454, 95 N. W. 317, 895, 96 N. W. 704.

[11] McQuesten v. Commonwealth, 198 Mass. 172, 83 N. E. 1037.

[12] Gage v. Consumers' Elec. Light Co., 194 Ill. 30, 64 N. E. 653; Glos v. Holberg, 220 Ill. 167, 77 N. E. 80.

[13] Glos v. Cessna, 207 Ill. 69, 69 N. E. 634; Glos v. Holberg, 220 Ill. 167, 77 N. E. 80; Glos v. Grant Bldg. &c. Assn., 229 Ill. 387, 82 N. E. 304.

[14] Glos v. Holberg, 220 Ill. 167, 77 N. E. 80; Glos v. Grant Bldg. &c. Assn., 229 Ill. 387, 82 N. E. 304.

[15] Glos v. Hoban, 212 Ill. 222, 72 N. E. 1.

[16] People v. Crissman, 41 Colo. 450, 92 Pac. 949; Duffy v. Shirden, 139 App. Div. 755, 124 N. Y. S. 529.

[17] Robinson v. Kerrigan, 151 Cal. 40, 90 Pac. 129, 121 Am. St. 90, 12 Ann. Cas. 829; People v. Crissman, 41 Colo. 450, 92 Pac. 949; Tyler v. Judges, 175 Mass. 71, 55 N. E. 812, 51 L. R. A. 433; State v. Westfall, 85 Minn. 437, 89 N. W. 175, 57 L. R. A. 297, 89 Am. St. 571; Reed v. Siddall, 89 Minn. 417, 95 N. W. 303; Dewey

or lien upon the property may appear and answer, whether named in the summons or not.[18] All persons known to claim an interest in or lien upon the property must be made defendants,[19] but persons unknown who have such interests may be included under a general designation.[20] After due notice to all parties, the court orders and determines all transfers in regard to the property, and the existence and validity of all claims, liens and incumbrances.[21] The court may determine the existence and priority of conflicting liens, but a lien can not be foreclosed in a proceeding to register title.[22]

§ 957. Decree and certificate of title and incumbrances. —If the applicant for registration establishes a title entitled to registration, a decree is entered to that effect and the claims of defendants are set aside as mere clouds upon his title. If the applicant fails to prove a title, entitled to registration, the proceedings are dismissed and no decree is entered against the adverse claimants.[23]

The statutes usually provide for an appeal from the decree, as in other civil actions,[24] and only questions raised by objection and exception before the examiner or the lower court can be urged on appeal.[25] In Massachusetts the appeal is taken from

v. Kimball, 89 Minn. 454, 95 N. W. 317, 895, 96 N. W. 704; Baart v Martin, 99 Minn. 197, 108 N. W. 945, 116 Am. St. 394; Lachman v. People, 127 N. Y. S. 912.

[18] People v. Crissman, 41 Colo. 450, 92 Pac. 949; State v. Westfall, 85 Minn. 437, 89 N. W. 175, 57 L. R. A. 297, 89 Am. St. 571; Hawes v. United States Trust Co., 142 App. Div. 789, 127 N. Y. S. 632; Sundermann v. People, 148 App. Div. 124, 132 N. Y. S. 68.

[19] Dewey v. Kimball, 89 Minn. 454, 95 N. W. 317, 895, 96 N. W. 704; Baart v. Martin, 99 Minn. 197, 108 N. W. 945, 116 Am. St. 394; Duffy v. Shirden, 139 App. Div. 755, 124 N. Y. S. 529; Hawes v. United States Trust Co., 142 App. Div. 789, 127 N. Y. S. 632; Sundermann v. People, 148 App. Div. 124, 132 N. Y. S. 68.

[20] People v. Crissman, 41 Colo. 450, 92 Pac. 949; People v. Simon, 176 Ill. 165, 52 N. E. 910, 44 L. R. A. 801, 68 Am. St. 175; State v. Westfall, 85 Minn. 437, 89 N. W. 175, 57 L. R. A. 297, 89 Am. St. 571.

[21] First Nat. Bank v. Woburn, 192 Mass. 220, 78 N. E. 307; Reed v. Siddall, 94 Minn. 216, 102 N. W. 453; Crabbe v. Hardy, 77 Misc. 1, 135 N. Y. S. 119; Barkenthien v. People, 77 Misc. 395, 136 N. Y. S. 178.

[22] Reed v. Siddall, 94 Minn. 216, 102 N. W. 453.

[23] Glos v. Kingman, 207 Ill. 26, 69 N. E. 632; Glos v. Cessna, 207 Ill. 69, 69 N. E. 634; Magsocay v. Fernando, 17 Philippine 120.

[24] Robinson v. Kerrigan, 151 Cal. 40, 90 Pac. 129, 121 Am. St. 90, 12 Ann. Cas. 829; Luce v. Parsons, 192 Mass. 8, 77 N. E. 1032; State v. Westfall, 85 Minn. 437, 89 N. W. 175, 57 L. R. A. 297, 89 Am. St. 571; Peters v. Duluth, 119 Minn. 96, 137 N. W. 390, 41 L. R. A. (N. S.) 1044n; People v. O'Loughlin, 136 N. Y. S. 339; Lewis v. Chamberlain, 61 Ore. 150, 121 Pac. 430.

[25] McMahon v. Rowley, 238 Ill. 31, 87 N. E. 66.

the land court to the superior court with the right to claim a jury, or to the supreme judicial court upon questions of law.[26]

When the decree for registration has been entered and the record duly made, the certificate is issued, completing the registry,[27] and although the original registration was voluntary, the proceedings for registration constitute an agreement running with the land that it shall remain registered land subject to the provisions of the statute.[28]

The certificate of title is held conclusive that no outstanding interest or incumbrances exist in other persons, with certain exceptions specified in the statutes such as liens for taxes, short term leases and certain easements, ascertained by inspection of the premises.[29] All other existing liens and incumbrances, equitable or statutory, are noted upon the record and the certificate, and the holder thereof acquires an indefeasible title to the property, free from all incumbrances except those so noted.[30]

The statutes usually provide a short period within which persons having an adverse claim or lien upon the property, who were not served with process, may come in and assert their claims,[31] and contain special exceptions in regard to fraud.[32]

Where a conveyance is executed, a new certificate is generally issued to the grantee, the deed being considered merely as a contract between the parties conferring authority for the transfer of the registered title to the grantee.[33]

An indemnity fund provided by the statute is raised by a fee for registration based upon the assessed value of the property,[34] and set aside for compensation of parties having an interest or lien against the property, whose rights have been cut off by the decree without their fault.[35]

[26] Tyler v. Judges, 175 Mass. 71, 55 N. E. 812, 51 L. R. A. 433; Weeks v. Brooks, 205 Mass. 458, 92 N. E. 45.

[27] Robinson v. Kerrigan, 151 Cal. 40, 90 Pac. 129, 121 Am. St. 90, 12 Ann. Cas. 829.

[28] Tyler v. Judges, 175 Mass. 71, 55 N. E. 812, 51 L. R. A. 433.

[29] Baart v. Martin, 99 Minn. 197, 108 N. W. 945, 116 Am. St. 394.

[30] Robinson v. Kerrigan, 151 Cal. 40, 90 Pac. 129, 121 Am. St. 90, 12 Ann. Cas. 829; State v. Westfall, 85 Minn. 437, 89 N. W. 175, 57 L. R. A. 297, 89 Am. St. 571.

[31] Robinson v. Kerrigan, 151 Cal. 40, 90 Pac. 129, 121 Am. St. 90, 12 Ann. Cas. 829; Reed v. Siddall, 89 Minn. 417, 95 N. W. 303.

[32] Baart v. Martin, 99 Minn. 198, 108 N. W. 945, 116 Am. St. 394.

[33] Buzon v. Licauco, 13 Philippine 354.

[34] State v. Westfall, 85 Minn. 437, 89 N. W. 175, 57 L. R. A. 297, 89 Am. St. 571.

[35] People v. Simon, 176 Ill. 165, 52 N. E. 910, 44 L. R. A. 801, 68 Am. St. 175.

§ 958. Conclusiveness of certificates.—In all states the statutory proceeding leading to initial registration seems clearly sufficient to support a decree which becomes conclusive against the whole world upon expiration of the time within which an appeal may be taken, provided the statute has been followed. It does not result, however, that such decrees or certificates based upon them may be accepted as conclusive, for conclusiveness depends upon whether in the proceeding the statute has been followed. In the event of a failure to follow the statute in respect to a jurisdictional requirement or to serve with process all parties entitled to actual notice, the authorities show that such a decree would not be conclusive, notwithstanding the acts provide that it shall be so; hence the registry of such decree can not immediately be accepted as conclusive of the state of the title or at all in the absence of a statute of limitations, running for a reasonable length of time after entry of the decree of registration. Such statutes of limitations are provided in a majority of the states and range in duration from thirty days to two years. But it is most doubtful whether the time required from the filing of the petition for registration to obtaining a conclusive decree can be made shorter than the time provided in these acts. Since the registration system contemplates no examination of records, and certificates do not disclose through what proceedings the title has passed or in what manner it has devolved, thereby affording no opportunity to discover irregularities, whether in judicial proceedings or construction of deeds, trust instruments or other writings, it follows that no certificate involving transactions subsequent to the original registration can be accepted as immediately conclusive, or at all in the absence of a statute of limitations running for a reasonable period of time after entry of such subsequent transactions. In a bulletin recently issued by the Federal Farm Loan Bureau the subject of land title registration by certificate is ably discussed, and valuable suggestions are made for simplifying the Torrens System and adapting it to constitutional requirements, along lines approved by the United States Supreme Court decisions.

§ 959. Subsequent dealings with the land appear on the registry.—The acts uniformly provide that the obtaining of a decree of registration and the entry of the certificate of title

shall be recorded as an agreement running with the land, and binding upon the applicant and all his successors in title, that the land shall be and always remain registered land, and subject to the provisions of the act and all amendments thereof. An owner of registered land may convey or mortgage or lease it as if it were not registered, and he may use for these purposes the same forms of instruments that he would use had his land not been registered; but none of these instruments (except a lease for a short term) shall take effect as conveyances, but shall operate only as a contract between the parties and as evidence of authority to the recorder to make registration, when accompanied by the owner's certificate of title. This certificate on a conveyance of an estate in fee is surrendered and canceled, though not necessarily always so when a lesser estate is conveyed. The act of registration is the operative act to convey or effect a title, not the delivery of the deed, as is now the case.

These features are all important and are essential to the proper working of the system. The subsequent dealing with the land in this way is one of the fundamental principles upon which registration of title is based. Provision is made in the acts for notification to the recorder by the owner of loss or theft of his certificate, and for the issuance of a certificate in place of the one lost, on proper proof.

§ 960. **Acquiring title to registered land by adverse possession.**—In adherence to the principle that title shall be acquired to registered land only through the transfer on the books, is a provision of each act relating to adverse possession: that no title to registered land in derogation to that of the registered owner shall be acquired by prescription or adverse possession. Mere possession, therefore, becomes no notice of rights, and all rights appear as entered on the original certificate of title. No adverse possession can ever ripen into title.

This feature is considered by the advocates of the system as one of the most admirable features—for, they say, the more wrongful the "squatter's" acts are in gaining and keeping possession, the more sure he is to acquire the title in fee simple under our present recording system. Its opponents, on the other hand, argue that title by limitation of time is a most reasonable and proper basis of ownership, and that a law which abolishes it is

opposed to the best interests of society. That when we surrender our present recording system we surrender the right to acquire and perfect title by adverse possession, of such proved value in giving security to titles and in doing justice to those who have improved and developed the land.

It will be noticed that the provisions of these acts will work a radical change in the law in this respect, and if all land should be registered the owners might remain out of possession and leave the land unimproved for any length of time, without the possibility of any one's acquiring the title. Statutes of limitation have been said to rest on the policy of compelling those who have the right of entry to take possession of the land and settle the country, at the peril of being ousted by those who will settle the land and improve the country.[36] This provision of these acts, therefore, not only makes a radical change in our present law, but opens up an important question of public policy.

§ 961. Transmission of title on death of owner of registered land.—Under our present recording system certain difficulties arise when title to real property is transmitted on the death of the owner in fee. Uncertainty and doubt must exist in many cases because of the difficulties of ascertaining who are the successors to the title. Many difficulties would be removed by letting the property pass at the owner's death to his executor or administrator, to be dealt with in the manner in which personal estate is dealt with under such circumstances.

Under the Illinois Torrens Law, and perhaps some others, provision is made that in case of the death of the owner of registered land the title thereto goes to the personal representative of such deceased owner in like manner as personal estate, whether the owner dies testate or intestate, and is subject to the same rules of administration as if the same were personalty, except that the rule of division shall be the same as in the descent of real property, or as shall be provided by will; and the acts usually provide for filing in the registration office proof of heirship before the distribution of undevised registered land, which shall be conclusive evidence in favor of all persons subsequently dealing with the land that certain persons named as the only heirs at law of the deceased owner are such heirs. That is, the ex-

[36] Kinney v. Vinson, 32 Tex. 125.

ecutor or administrator will be registered on production of evidence of his authority, and the rights of those beneficially interested will be ascertained and enforced, and it may be settled definitely and without great delay what persons are the successors to the title. Questions concerning ownership, dower, homestead, and creditors' rights, may be conclusively settled once and for all, and can not arise some time afterwards, as possible defects of title, needing investigation at each later transfer.

It seems that a reform of this nature should be made without adopting the whole plan of registering title, and it further seems desirable whether or not the general plan is adopted. If, however, the general scheme of registering titles is adopted, this part of it appears almost essential to the proper working of the system.

Provision is made in the later acts for more direct transmission to the heirs or devisees, who themselves may make application for the entry of a new certificate; upon which application the court issues notice to the executor or administrator and others interested, and, after hearing, directs the entry of a new certificate or certificates, to the persons entitled as heirs or devisees. These later acts do not, it seems, expressly provide for conclusively establishing the matter of heirship, but the provisions as to transfer on death are such that they will probably be construed to have that effect.

§ 962. **Constitutionality of acts.**—Objections have been raised on constitutional grounds to the methods of giving notice to all who may have interest in the land adverse to those of the applicant. Under our constitutional provisions that no man shall be deprived of his property without due process of law, it has been maintained by many that each American statute is unconstitutional in that there is no sufficient notice required to be given to, and no sufficient process against, persons having claims adverse to the applicant. It appears to be further claimed by some that no scheme can be devised which will fully meet this constitutional objection. In this connection it is well to keep in mind that the constitutionality of statutes will be tested by what may be done under them and not by what has been done in a specific case. If a statute authorizes in any manner a procedure that does not constitute due process of law, it is to that

extent at least unconstitutional. The specific objection made to the various American acts is that they do not provide for due process of law. The United States Supreme Court has held that the phrase "due process of law" does not always mean proceedings in court. That this fundamental requirement is an opportunity for a hearing and defense, but no fixed procedure is demanded.[37] In another case the same court said: "Due process requires that the court which assumes to determine the rights of parties shall have jurisdiction; and that there shall be notice and opportunity for hearing given the parties. Subject to these two fundamental conditions which seem to be universally prescribed in all systems of law established by civilized countries, this court has, up to this time, sustained all state laws, statutory or judicially declared, regulating procedure, evidence, and methods of trials, and held them to be consistent with due process of law."[38] While the manner of service of process is found to differ, it is at least required in all statutes that notice of the proceeding be served upon all resident and nonresident known defendants in a manner customary in other civil actions in the state and held to be sufficient by the Supreme Court of the state involved; and the same is true of all known resident defendants who can not be found. The most serious question arising in this connection is, can binding service be made upon unknown persons, whether in being or not, whether minor or under other disability, and whether residents or nonresidents of the state? All states providing for registration of title require that notice be given to such persons by publication. A review of the decisions bearing upon this question leads us to conclude that proceedings in which a decree may be made confirming the title to land against the whole world, without exception, may be provided by statute.[39]

[37] Ballard v. Hunter, 204 U. S. 241, 27 Sup. Ct. 261, 51 L. ed. 461.

[38] Twining v. New Jersey, 211 U. S. 78, 29 Sup. Ct. 14, 53 L. ed. 97.

[39] Arndt v. Griggs, 134 U. S. 316, 10 Sup. Ct. 557, 33 L. ed. 918. See Ballard v. Hunter, 204 U. S. 241, 27 Sup. Ct. 261, 51 L. ed. 461; American Land Co. v. Zeiss, 219 U. S. 47, 31 Sup. Ct. 200, 55 L. ed. 95; Title &c. Co. v. Kerrigan, 150 Cal. 289, 88 Pac. 356, 8 L. R. A. (N. S.) 682, 119 Am. St. 199.

INDEX

[*References are to Sections.*]

A

ABANDONMENT,
acquisition of title, elements, 108.
affecting right to convey property in New Jersey, 810.
as divestiture of title, 699.
title by, 92.

ABATEMENT,
death of party pending judgment, 570.

ABBREVIATIONS,
measurements, 251.
use in books and compiling, 172.

ABSENCE,
proof of death of ancestor, 739.

ABSTRACT BOOKS,
should preserve copy of abstract, 173.
taxation, 36.

ABSTRACT COMPANY,
implied warranty of competent employés, 9.

ABSTRACTERS,
bond, 14.
book abbreviations used, 174.
certificate, 174.
compensation, 13.
determination of formal parts of deed, 260.
duties in examination of wills, 487–490.
examination of certificates, 722.
judgment record, 569.
indexes and reference books, 145–154.
limiting liability, 20.
measure of damages against, 18.
nature of liability, 15.
negligence or mistake, liability, 16, 17, 20, 22.
damages, 19.
pleadings in actions against, 24.
qualifications, 9.
relation of trust and confidence, 11.
right to use public records, 137.
scope of undertaking limited by contract, 10.
should attach certificate to abstract, 174.
to whom liable, 22.
tract indexes and reference books, 145.
when right of action for damages accrues, 23.
work not guaranteed, 10.

[*References are to Sections.*]

ABSTRACTS,
abstracters' certificates, 174.
acknowledgment of deed, 285.
administrator's deed, 360.
adoption of Torrens' system, 2.
affidavits, 509.
agreements to furnish, 25.
American and English methods distinguished, 4.
arrangement, 165.
attachment, 553.
bankruptcy proceedings, 383.
caption, 164.
certificate of proof of death of ancestor, 739.
release or waiver of homestead in Illinois, 793.
sale on execution, 621.
tax sale, 641.
commissioner's deed, 353.
compilation, 160–174.
condemnation proceedings, 677.
contents should be full, 3.
contract for conveyances, 396.
declarations of trust, 339.
decree, 579.
rescission or cancellation, 673.
deed by attorney in fact, 335.
corporation, 332.
trustee in bankruptcy, 384.
defined, 1.
descent, 741.
discharge in bankruptcy, 385.
distinguished from examinations, 4.
divorce and alimony, 676.
duty to furnish, irrespective of agreement, 26.
ejectment, 668.
equitable proceedings, 666.
estates of title where records are destroyed 29.
examination and opinion of title, 745–773.
execution sale, 616.
filing, on application for registry of title, 952.
foreclosure in equity, 674.
of mortgage, 444.
forfeiture for nonpayment of taxes, 637.
formal parts, 163.
general requisites, 5.
injunction, 667.
interpretation of contract for abstract, 6.
judgment, 568.
language of synopsis of instruments, 167.
lease, 406.
legislative grant, 188.
lien, 519.
mortgage and assignment, 440.
mortgage of homestead, 431.
mortgagee's deed, 358.
notation of appearance, 663.
of verdict or findings of jury, 665.
notice of lis pendens, 550.
object, 3.

[*References are to Sections.*]

ABSTRACTS—*Continued.*
official certificate, 505.
origin and history, 2.
partition, 670.
party wall agreement, 507.
patents, 230.
period for which title may be shown, 8.
plat and subdivision, 242.
power of attorney, 336.
printed copy, 750.
private entry, 198.
probate proceedings, 494.
sales, 603.
proof of probate of will, 489, 490.
publication, 617.
property therein, 30.
purchase-money mortgage, 430.
quitclaim deeds, 302.
receipt from land office, 195.
registration of title under Torrens System, 950-962.
release of mortgage, 443.
report of master in chancery, 664.
revocation of power of attorney, 337.
satisfaction of judgment, 573.
sheriff's deed, 351.
should designate nature and kind of conveyance, 264.
showing good title, 7.
showing of mortgages, 520.
special assessments, 647.
specific performance, 666.
sufficiency between vendor and vendee, 6.
tax deed, 643.
tax liens, 632.
tax sale, 636.
title bond, 400.
trust deeds, 441.
trustee's deeds, 357.
use in foreign countries, 2.
vacation of plats, 243.
property, 501.
warranty deeds, 300.
who may make, 12.
wills, 488, 489.

ACCRETION,
title by, 92.
elements, 103.

ACKNOWLEDGMENT,
deeds, 283–285.
corporate deeds, 330.
in different states, 780–830.
essential to record of assignment, 438.
examination in abstract, 755.
married women, 324.
necessity of statute in New Mexico, 811.
prerequisite to recording, 120.
omitted may be legalized in Alabama, 780.
requisites, 284.

[References are to Sections.]

ACQUISITION OF TITLE,
abandonment, 108.
accretion and alluvion, 103.
adverse possession, 92.
condemnation, 110.
confirmation, elements, 106.
confiscation, 112.
consanguinity and affinity, 89.
dedication, elements, 105.
descent and inheritance, 86, 87, 88.
descent and purchase, 85.
devise, 96.
eminent domain, 109.
escheat, 111.
estoppel, 97–100.
fact of death, 90.
fact of intestacy, 91.
forfeiture, 113.
occupancy, 107.
official grants, 94.
prescription and limitation, 102.
public grants, 95.
purchase, classified, 92.
relation, 101.
riparian lands, 104.

ACTIONS,
See ATTACHMENT; EJECTMENT; EVIDENCE; EXECUTION; JUDGMENTS; JURISDICTION; LIS PENDENS; PARTIES; PLEADING; PROCESS; AND LIKE TITLES.
against abstracter for damages, accrual, 23.
for negligence, 15.
commenced by process, 658.
foreclosure of mechanics' liens, 538.
judgments, 560.
jurisdiction of specific actions, 656.
lis pendens, 546.
local, 656.
parties to real actions to furnish abstract, 28.
pleading in action against abstracter, 24.
to quiet title, defined, 669.
jurisdiction, 656.
transitory, 656.

ACTS OF CONGRESS,
source of title, 181.

ADMINISTRATION,
of estate, necessary, 705.

ADMINISTRATORS,
See EXECUTORS.
application of doctrine of caveat emptor to sales, 364.
deeds, 361.
examination of deed in abstract, 756.
sales in abstract, 764.
jurisdiction of action to set aside sale, 656.

[*References are to Sections.*]

ADMINISTRATORS—*Continued.*
limitation of rights upon death of intestate, 723.
proof of death of intestate, 739.
with will annexed, deed, 361.

ADOPTED CHILDREN,
adults adopted as heirs in Pennsylvania, 872.
heirs, 718.
included in word "issue," 712.
inheritance of property in various states, 835–884.

ADULTERY,
legacies to one living in adultery with testator void in South Carolina, 932.

ADVANCEMENTS,
deductions in various states, 835–884.
effect in construction of wills in various states, 890–942.
essential characteristics, 737.

ADVERSE POSSESSION,
acquisition of title adverse to registered owner, 951.
affecting title to property, 687.
under deed, 314.
affidavits, 509.
elements in general, 685–700.
evidence, 687.
general considerations, 685.
title by, 92.

ADVERTISEMENT,
execution sale, 616.

AFFIDAVITS,
affecting title, 509.
attachment, 553.
inclusion in abstract, 500.
marriage to prove birth and legitimacy of children, 740.
service of process, 662.
proof of death of ancestor, 739.
required as proof of deed in South Carolina, 820.

AFFINITY,
computing degrees of kindred, 726.
defined, 89.

AFTER-ACQUIRED PROPERTY,
construction of mortgage, 432.
mortgage, 432.
subject to judgment lien, 566.
transfer by will, 460.

AGE,
capacity to bequeath personalty in various states, 890–942.
devise lands in various states, 890–942.
witnesses to wills in various states, 890–942.

[*References are to Sections.*]

AGREEMENT,
tender of abstract after expiration of agreed time, 32.
to furnish abstract, extension of time, 25.
interpretation, 25.

ALABAMA,
statutes of descent, 835.
statutes governing execution of wills, 890.
execution and acknowledgment of deeds, 780.

ALASKA,
statutes of descent, 836.
execution of wills, 891.
execution and acknowledgment of deeds, 781.

ALDERMEN,
acknowledgment of deed in Pennsylvania, 818.

ALIENATION,
conditions against, in wills, 478.
perpetuities, 482.
restrictions upon, 47.
title by, 92.

ALIENS,
acquisition of title by adverse possession, 694.
to public lands, 183.
capacity to make will, 457.
to take under will, 458.
incapacity to take under devise in New York, 922.
inheritance by and through, 732.
of lands in Alaska, 836.
of property in various states, 835-884.

ALIMONY,
in divorce proceedings affecting title, 676.

ALLUVIUM,
acquisition of title, elements, 103.

ALTERATION,
effect to revoke will, 486.

AMBASSADOR,
acknowledgment of foreign deed accredited in Connecticut, 786.
Illinois, 793.
Iowa, 795.
Louisiana, 798.
Massachusetts, 801.
Mississippi, 804.
New Jersey, 810.
New York, 812.
North Carolina, 813.
Pennsylvania, 818.
Rhode Island, 819.
South Carolina, 820.
South Dakota, 821.
Tennessee, 822.
Utah, 824.
Virginia, 826.

[*References are to Sections.*]

AMERICAN METHODS,
distinguished from English, 4.

ANCESTORS,
ancestral estate defined, 708.
defined, 707.
included in next of kin, 729.
proof of death, 739.
seisin essential to estate by inheritance, 709.

ANCIENT DEEDS,
presumption of genuineness, 289.

AUXILIARY PROBATE,
wills, 493.

ANNUITIES,
devise, charged with payment, 473.

ANTENUPTIAL AGREEMENT,
affecting title, 676.

APPEAL,
from decree in proceeding to register title, 957.

APPEARANCE,
without service of process, 663.

APPRAISEMENT,
affecting validity of execution sale, 611, 613.

APPROVAL,
ordinances, 502.

AREAS,
computation of land areas and distances, 250.

ARIZONA,
statutes governing execution of wills, 892.
descent, 837.
execution and acknowledgment of deeds, 782.

ARKANSAS,
statutes governing execution of wills, 893.
descent, 838.
execution and acknowledgment of deeds, 783.

ARMY OFFICERS,
acknowledgment of deed in Pennsylvania, 818.
Wisconsin, 829.
Rhode Island, 819.
acknowledgment of foreign deed in Pennsylvania, 818.

ASCENDANTS,
brothers and sisters in collateral line, 728.
computing degrees of kindred, 726.
inheritance from intestate, 731.

[*References are to Sections.*]

ASSESSMENT ROLL,
description of land, 634, 635.

ASSESSMENTS,
municipal as liens, 527.
not within covenant against incumbrances, 632.
taxes, 634.

ASSIGNEE,
examination of deed in abstract, 756.

ASSIGNMENTS,
as transfer of title. 370.
can not be amended, 375.
certificate of execution sale, 622.
purchase at tax sale, 641.
construction, operation and effect, 375.
contract for conveyances. 397.
conveyances as equitable mortgage, 417.
deed must be recorded, 119.
defined, 370.
dower affecting title, 675.
equitable assignment of mortgage, 439.
formal requisites, 373.
leases, 408.
mechanics' liens, 537, 538.
pre-emption rights, 198.
property or estate included, 375.
purchase-money notes must be recorded, 119.
requisites and effect, 374–376.
title of assignee, 374.
validity, 372.
unrecorded contract for sale of land not necessary to be recorded, 119.
voluntary for benefit of creditors, 371.
what law governs, 376.

ATTACHMENT,
bond, 553.
defined, 552.
effect upon property, 553.
essentials of affidavit, 553.
jurisdiction to enter orders with reference to property, 552.
levy, 553.
liability of abstracter for failure to show, 17.
lien, 517, 523.
priority of lien with reference to mechanics' liens, 535.
other liens, 552.
proceedings to procure, 553.
property affected, 552.
record, 133.
service of process by publication, 661.
writ, 553.

ATTESTATION,
deeds, 282.
formal part of deed, 260.

[*References are to Sections.*]

ATTORNEYS,
acknowledgment of deed in Delaware by attorney, 787.
acknowledgment of deed in New Jersey, 810.
conveyances by attorney in fact, 335.
duties in examination of wills, 486.

AUDITOR,
acknowledgment of deed in Indiana, 794.
Iowa, 795.

AUTHENTICATION,
See CERTIFICATES.
of deed by officer without seal required in District of Columbia, 788.
of deed executed in Guam, Samoa, or Canal Zone, 788.
of deed executed without the state accredited in Georgia, 790.
of official acknowledgment of deed in Arkansas, 783.
in Delaware, 787.
in Idaho, 792.
in Iowa, 795.
in Kansas, 796.
in Louisiana, 798.
in Maine, 799.
in Maryland, 800.
in Massachusetts, 801.
in Minnesota, 803.
in Montana, 806.
in New Jersey, 810.
in New York, 812.
in North Carolina, 813.
in North Dakota, 814.
in Oklahoma, 816.
in Pennsylvania, 818.
of official acknowledgment of foreign deed accredited in Illinois, 793.
in Massachusetts, 911.
in Mississippi, 914.
in North Dakota, 924.
in Ohio, 925.
in Philippine Islands, 929.
in Tennessee, 934.
in Vermont, 937.
in Wisconsin, 941.
in Wyoming, 830.
of will proved without the state of Connecticut, 896.

B

BANK DEPOSITS,
form of will, 487.

BANKRUPTCY,
abstracting, 383.
appointment of trustee, 382.
deed of trustee, 384.
discharge, 385.
effect of adjudication, 381.
judicial sales, 590.
jurisdiction and procedure prior to adjudication, 378.
laws governing, 377.

[*References are to Sections.*]

BANKRUPTCY—*Continued.*
meeting of creditors, 382.
nature of proceedings, 378.
petition, process, etc., 380.
procedure after adjudication, 382.
provisions and effect, 377–385.
sale by trustee, 382.
voluntary and involuntary, 379.
who may be declared voluntary or involuntary bankrupt, 379.

BASTARDS,
See ILLEGITIMATE CHILDREN.

BENEFICIARIES,
capacity to take under will, 458.
forfeiture of devise when acting as witness, 891.

BILL,
See EQUITY; PLEADING.
in equity for redemption of mortgages, 672.

BIRTH,
affidavits of fact, 509.
effect to revoke will, 486, 720.
posthumous children right to inherit, 721.
pretermitted children, right to inherit under will, 720.
proof of birth or legitimacy of children, 740.
subsequent to execution of will as revocation, 890-942.

BLINDNESS,
grantor making three witnesses necessary in Louisiana, 798.

BOND,
abstracters, 14.
attachment, 553.
judicial sale in probate court, 602.
jurisdiction of action to enforce, 656.
purchase bond for land, 656.
officers creating lien, 528.
support of mortgagee not necessary to be recorded, 119.

BOND FOR DEED,
See CONTRACT FOR CONVEYANCES.
interest of vendor subject to descent, 722.

BOND FOR TITLE,
writings assigning it not necessary to be recorded, 119.

BOOKS OF ORIGINAL ENTRIES,
kept in abstract office, 143.

BOUNDARIES,
control description of premises in mortgage, 423.
in deeds, 269.
priority over description, 272.

[*References are to Sections.*]

BOUNTY LAND CLAIMS,
method of transfer of public lands, 182.

BROKER,
contract to furnish abstract, 27.

BROTHERS,
in collateral line of kindred, 728.
inheritance of property in different states, 835–884.

BUILDINGS,
title acquired by adverse possession, 693.

C

CALIFORNIA,
statutes governing execution of wills, 894.
descent, 839.
execution and acknowledgment of deeds, 784.

CALLS,
priority, 272.

CANAL ZONE,
deeds acknowledged therein accredited in District of Columbia, 788.

CANCELLATION,
effect to revoke will, 486.
requirements of decree, 673.

CANON LAW,
determining degrees of heirs in Georgia, 845.

CANONS OF DESCENT,
distinguished from degrees of kindred, 726.

CAPACITY,
to make will, 457.
laws of various states, 890–942.
to take under will, 458.

CAVEAT EMPTOR,
applied to judicial deed on execution sale, 364.
purchaser at tax sale, 639.
sales under decrees of probate court, 601.

CERTIFICATE,
acknowledgment of deed in other county in Indiana, 794.
deed under seal in Florida, 789.
assignment of certificate of sale on execution, 622.
authority of magistrate in execution of deed in Connecticut, 786.
clerk of court authenticating official acknowledgment in North Carolina, 813.
conclusiveness on registry of title, 958.
evidence of registration of title, 954.
examination of abstracter's certificate, 722.
nature of official, 505

[*References are to Sections.*]

CERTIFICATE—*Continued.*
official acknowledgment of foreign deed accredited in Arizona, 782.
Colorado, 785.
Illinois, 793.
New York, 812.
Vermont, 825.
Wisconsin, 829.
official acknowledgment of deeds in Alabama, 780.
Alaska, 781.
Arkansas, 783.
Delaware, 787.
Georgia, 790.
Idaho, 792.
Indiana, 794.
Iowa, 795.
Kansas, 796.
Kentucky, 797.
Michigan, 802.
Montana, 806.
Nevada, 808.
North Dakota, 814.
Ohio, 815.
Pennsylvania, 818.
Texas, 823.
Utah, 824.
Wyoming, 830.
purchase at execution sale, 621.
judicial sale, 598.
tax sale, 641.
record of certificate of title, 959.
registration of title under Torrens System, 950-962.
release of dower in South Carolina, 820.
requirements in conveyance of properay in Florida, 789.
sale at execution or foreclosure sale must be recorded, 119.
satisfaction of judgment, 573.
secretary of state authenticating official acknowledgment in Massachusetts, 801.
authenticating unsealed instruments in Illinois, 793.
official acknowledgment in Minnesota, 803.

CERTIFICATE OF SALE,
title acquired thereby, 185.

CHANCELLOR,
acknowledgment of deeds in Alabama, 780.
Delaware, 787.
District of Columbia, 788.
Mississippi, 804.
New Jersey, 810.
Virginia, 826.

CHARGE D'AFFAIRS,
acknowledgment of foreign deed accredited in Alaska, 781.
California, 784.
Connecticut, 786.
Florida, 789.
Idaho, 792.
Indiana, 794.

[*References are to Sections.*]

CHARGE D'AFFAIRS—*Continued.*
Iowa, 795.
Louisiana, 798.
Massachusetts, 801.
Minnesota, 803.
Montana, 806.
Nebraska, 807.
New Jersey, 810.
New Mexico, 811.
New York, 812.
North Dakota, 814.
Oregon, 817.
Pennsylvania, 818.
Rhode Island, 819.
South Dakota, 821.
Texas, 823.
Vermont, 825.
Virginia, 826.
Washington, 827.
West Virginia, 828.
Wisconsin, 829.

CHARGES,
support in will, 473.

CHARITABLE ASSOCIATIONS,
devise limited in California, 894.
Georgia, 900.
New York, 922.
Ohio, 925.

CHARITIES,
designation as beneficiaries in wills, 481.

CHARTERS,
inclusion of municipal in abstract, 500.

CHIEF MAGISTRATE,
acknowledgment of deeds in Alabama, 780.
Colorado, 785.
Delaware, 787,
New Jersey, 810.
North Carolina, 813.
acknowledgment of foreign deed accredited in Illinois, 793.
Mississippi, 804.
Missouri, 805.
New Jersey, 810.
New York, 812.
Washington, 827.
West Virginia, 828.

CHILDREN,
birth after execution of will as revocation in various states, 890–942.
brothers and sisters in collateral line of inheritance, 728.
illegitimate as heirs, 719.
inheritance of property in different states, 835–884.
natural children as forced heirs, 715.
omission from will results in intestacy in Alaska, 891.

[*References are to Sections.*]

CHILDREN—*Continued.*
posthumous, right to inherit, 721.
proof of birth and legitimacy, 740.
rights of pretermitted children, 720.
what included as descendants, 717–721.

CHINESE,
nonresident prohibited from right of inheritance in Nevada, 862.

CHURCHES,
mechanics' liens, 536.

CITIES,
See MUNICIPAL CORPORATIONS.

CITY CLERK,
acknowledgment of deed in Kansas, 796.
Minnesota, 803.

CITY RECORDER,
acknowledgment of deed in Minnesota, 803.
New York, 812.
Pennsylvania, 818.

CIVIL DEATH,
defined, 706.
effect upon title by descent, 706.

CIVIL LAW,
application to wills in Louisiana, 908.
computation of degrees of kindred, 836.
heirs, 714.
inheritance by one causing death of intestate, 733.
method of computing degrees of kindred, 726.
rules of descent, 88.

CLERKS OF COURTS,
acknowledgment of deeds in Alabama, 780.
Alaska, 781.
Arizona, 781.
Arkansas, 783.
California, 784.
Connecticut, 786.
District of Columbia, 788.
Florida, 789.
Georgia, 790.
Idaho, 792.
Illinois, 793.
Indiana, 794.
Iowa, 795.
Kansas, 796.
Kentucky, 797.
Louisiana, 798.
Maine, 799.
Michigan, 802.
Minnesota, 803.
Mississippi, 804.
Missouri, 805.

[*References are to Sections.*]

CLERKS OF COURTS—*Continued.*
Montana, 806.
Nebraska, 807.
Nevada, 808.
New Jersey, 810.
New Mexico, 811.
New York, 812.
North Carolina, 813.
North Dakota, 814.
Ohio, 815.
Oklahoma, 816.
South Carolina, 820.
South Dakota, 821.
Tennessee, 822.
Texas, 823.
Utah, 824.
Virginia, 826.
Washington, 827.
West Virginia, 828.
Wisconsin, 829.
Wyoming, 830.
acknowledgment of foreign deed accredited in North Dakota, 814.
Oklahoma, 816.
South Dakota, 821.
Utah, 824.

CODICILS,
See WILLS.
effect to revoke will, 486.
included in term "will", 455.
probate, 491.

COLLATERAL HEIRS,
computing degrees of kindred, 726.
inheritance of property in various states, 835–884.

COLLEGES,
mechanics' liens, 536.

COLORADO,
statutes governing execution of wills, 895.
execution and acknowledgment of deeds, 785.
statutes of descent, 840.

COLOR OF TITLE,
adverse occupant holding under, 687.
defined, 73.
what constitutes, 688.

COMMERCIAL AGENTS,
acknowledgment of foreign deed accredited in Alaska, 781.
Alabama, 780.
Connecticut, 786.
Delaware, 787.
Florida, 789.
Illinois, 793.
Louisiana, 798.

[*Refcrences are to Sections.*]

COMMERCIAL AGENTS—*Continued.*
Minnesota, 803.
Nebraska, 807.
New York, 812.
North Carolina, 813.
Ohio, 815.
Pennsylvania, 818.
Rhode Island, 819.
Texas, 823.
Virginia, 826.
Washington, 827.
West Virginia, 828.

COMMISSIONERS,
acknowledgment of deeds in Alabama, 780.
Alaska, 781.
Arizona, 781.
California, 784.
Connecticut, 786.
Delaware, 787.
Idaho, 792.
Indiana, 794.
Iowa, 795.
Kansas, 796.
Massachusetts, 801.
Montana, 806.
New Hampshire, 809.
North Dakota, 814.
Ohio, 815.
Rhode Island, 819.
South Carolina, 820.
South Dakota, 821.
acknowledgment of foreign deed accredited in Alaska, 781.
California, 784.
Florida, 789.
Hawaii, 791.
Idaho, 792.
Louisiana, 798.
Maine, 799.
Massachusetts, 801.
Minnesota, 803.
Mississippi, 804.
Montana, 806.
Nebraska, 807.
Nevada, 808.
New Mexico, 811.
New York, 812.
North Dakota, 814.
Oregon, 817.
South Dakota, 821.
Texas, 823.
deed by, 353.
to assess benefits and damages in condemnation proceedings, 677.
to effect partition, 670.

COMMISSIONERS IN CHANCERY,
acknowledgment of deed in Virginia, 826.
foreign deed in Pennsylvania, 818.

[*References are to Sections.*]

COMMISSIONERS OF DEEDS,
acknowledgment of deed in Illinois, 793.
Kentucky, 797.
Missouri, 805.
Nebraska, 807.
Nevada, 808.
New Jersey, 810.
New Mexico, 811.
New York, 812.
Oklahoma, 816.
Oregon, 817.
Pennsylvania, 818.
South Dakota, 821.
Tennessee, 822.
Texas, 823.
Utah, 824.
Washington, 827.
West Virginia, 828.
Wisconsin, 829.
Wyoming, 830.
acknowledgment of foreign deeds accredited in Maryland, 800.
Michigan, 802.
Pennsylvania, 818.
Tennessee, 822.
Utah, 824.
Vermont, 825.
use of seal in acknowledgment of deed in Maine, 799.

COMMON FORM,
probate of will, 491.

COMMON LAW,
adopted children, 718.
canon of descent, 87.
exclusion of lineal ascendants, 731.
heirs, 714.
inheritance of aliens, 732.
method of computing degrees of kindred, 726.

COMMUNITY PROPERTY,
controlled by husband in Nevada, 808.
conveyance in California, 784.
conveyance of husband or wife in Idaho, 792.
mechanics' liens, 536.
what included in Washington, 827.

COMPETENCY,
witnesses to wills in various states, 890-942.

COMPILATION,
abbreviations used, 172.
abstracters' notes, 168.
abstracts, 160-174.
arrangement of abstract, 165.
caption of abstract, 164.
executing an instrument for reference, 169.

[*References are to Sections.*]

COMPILATION—*Continued.*
following irregular instrument, 170.
formal parts of abstract, 163.
form of abstracters' certificate, 174.
introductory remarks, 160.
preliminary sketch of chain, 162.
scope and extent of examination, 161.
showing mistakes made in transcribing instrument, 171.
synopsis of instruments and proceedings, 166, 167.

COMPLAINT,
registration of title, 952.

CONCEALMENT,
affecting validity of deeds, 298.

CONCLUSION,
formal part of deed, 260.

CONDEMNATION,
acquisition of title, elements, 110.
proceedings affecting title, 677.

CONDITIONAL DEVISES,
liens, 526.

CONDITIONAL ESTATES,
defined and classified, 41.

CONDITIONAL FEES,
at common law defined and construed, 44.
not subject to descent, 722.

CONDITIONAL LIMITATIONS,
in wills, 475.
words essential to creation, 475.

CONDITIONS,
against alienation in wills, 478.
conveyances with restrictive conditions, 313.
devise on conditions precedent or subsequent, 474.
formal part of deed, 260.
in deed, construction, 297.
in mortgages, 426.
precedent and subsequent in deeds, 276.
repugnant or void in wills, 461, 462.
restraining marriage in wills, 477.

CONDITIONS PRECEDENT,
affidavits of performance, 509.
devises, 474.

CONDITIONS SUBSEQUENT,
affidavits of performance, 509.
devises, 474.
restraint of alienation in wills, 478.

[*References are to Sections.*]

CONFIRMATION,
common-law deeds of confirmation, 307.
effect to cure defects in judicial sales, 597.
judicial sales, 591, 596, 597.

CONFIRMATION ACTS,
by United States, 189.

CONFISCATION,
acquisition of title, elements, 112.

CONFLICTING DESCRIPTIONS,
property in wills, 460.

CONGRESS,
power to dispose of public lands, 184.
power to make direct grants of lands, 186.

CONNECTICUT,
statutes governing execution of wills, 896.
descent, 841.
execution and acknowledgment of deeds, 786.

CONSANGUINITY,
computing degrees of kindred, 726.
defined, 89.
next of kin, 729.

CONSENT,
husband or wife to devise or bequest of the other in Colorado, 895.

CONSIDERATION,
affecting validity of deeds, 298.
agreement to devise real estate, 401.
deeds, 266.

CONSTRUCTION,
See WILLS.
designation of devisee in will, 481.
devisees in wills, 481.
erroneous and conflicting descriptions in wills, 460.
repugnant clauses, 291.
provisions and conditions in wills, 461.
wills, 459-482.
words and phrases in wills, 466.
words in will passing real estate, 467.

CONSTRUCTIVE SERVICE,
See SERVICE; PROCESS.
affecting decree, 576.
Alabama, 780.

CONSULAR OFFICERS,
acknowledgment of foreign deed accredited in Alaska, 781.
California, 784.
Colorado, 785.

[*References are to Sections.*]

CONSULAR OFFICERS—*Continued.*
Connecticut, 786.
Delaware, 787.
District of Columbia, 788.
Florida, 789.
Hawaii, 791.
Idaho, 792.
Illinois, 793.
Indiana, 794.
Iowa, 795.
Kansas, 796.
Kentucky, 797.
Louisiana, 798.
Maine, 799.
Maryland, 800.
Massachusetts, 801.
Minnesota, 803.
Mississippi, 804.
Missouri, 805.
Montana, 806.
Nebraska, 807.
Nevada, 808.
New Hampshire, 809.
New Jersey, 810.
New Mexico, 811.
New York, 812.
North Carolina, 813.
North Dakota, 814.
Ohio, 815.
Oklahoma, 816.
Oregon, 817.
Pennsylvania, 818.
Rhode Island, 819.
South Carolina, 820.
South Dakota, 821.
Tennessee, 822.
Texas, 823.
Utah, 824.
Vermont, 825.
Virginia, 826.
Washington, 827.
West Virginia, 828.
Wisconsin, 829.
Wyoming, 830.

CONTEST,
foreign will in Oregon, 927.
right to contest not subject to descent, 722.

CONTRACTS,
action against abstracter founded on, 15, 16.
basis of mechanics' lien, 533.
broker to furnish abstract, 27.
good title, interpretation, 7.
necessary to establish a mechanics' lien, 534.
to deliver abstract merged in deed and mortgage, 33.

[*References are to Sections.*]

CONTRACTS FOR CONVEYANCES,
abstracting, 396.
agreement as to title, 398.
to devise real estate, 401.
assignment, 397.
construction and validity, 395.
forfeiture, 399.
formal requisites, 393.
jurisdiction of action for specific performance, 656.
land contract and bond for deed, 390.
merger with deed, 390.
mortgage of after-acquired property, 432.
registration, 394.
relation of vendor and vendee, 391.
requisites and affect, 390-401.
suit for specific performance, 671.
title bond, 400.
title of vendor and vendee, 392.

CONTRACTS FOR SALE,
actions to set aside, lis pendens, 546.
delivery of abstract while executory, 31.
enforceable by specific performance, 671.
examination in abstract, 767.
interest of vendor subject to descent, 722.
must be recorded, 119.
property in abstract under contract and after rescission, 30.

CONVERSION,
equitable conversion of property devised, 484.

CONVEYANCES,
See DEEDS; MORTGAGES.
acknowledgment by married women, 324.
between husband and wife, 323.
by attorney in fact, 335.
by charitable or religious corporations, 333.
by married women, 322.
by municipal corporations, 501-505.
by private corporations, 332.
by public and quasi-public corporations, 331.
creating estates in common and in joint tenancy, 326.
easement affecting title, 506.
for sole and separate use of married women, 320.
in trust, 338.
material or operative parts should appear in abstracts, 5.
of an expectancy, 334.
of registered land, 951.
powers of attorney, 336.
primed by judgment lien, 565.
release of dower, 325.
requiring new certificate of registry of title, 957.
special classes of private conveyance, 320-341.
testamentary trusts distinguished, 356.
to and by partnerships, 328.

[*References are to Sections.*]

CONVEYANCES—*Continued.*
to husband and wife, 321.
to private corporations, 329.
voluntary partition, 327.

CONVICT,
capacity to make will, 457.

CORPORATION COURT,
acknowledgment of deed in Virginia, 826.

CORPORATIONS,
acknowledgment of deed in Montana, 806.
foreign deed accredited in Mississippi, 804.
instrument in Maryland, 800.
instrument in Michigan, 802.
instrument in Minnesota, 803.
authentication of conveyance of property in Florida, 789.
capacity to take under will, 458.
conveyances by charitable or religious corporations, 333.
private corporations, 332.
conveyances by public and quasi-public corporations, 331.
conveyances to, 329.
designation as beneficiaries in wills, 481.
incapacity to take under devise in New York, 922.
inclusion of charter in abstract, 500.
may acquire title by adverse possession, 694.
name and description, 329.
right to acquire title to public lands, 183.
signature to deed, 280.

COTENANTS,
title by adverse possession between, 696.

COUNTY AUDITOR,
acknowledgment of deed in Minnesota, 803.
North Dakota, 814.
Ohio, 815.
South Dakota, 821.
Washington, 827.

COUNTY CLERK,
See CLERKS OF COURT.

acknowledgment of deed in Oklahoma, 816.
Utah, 824.
Vermont, 825.
Wyoming, 830.

COUNTY COMMISSIONERS,
acknowledgment of deed in Minnesota, 803.

COUNTY COURT,
acknowledgment of deed in Wisconsin, 829.

[*References are to Sections.*]

COUNTY RECORDER,
See RECORDER OF DEEDS.
acknowledgment of deed in Arizona, 781.
California, 784.
Utah, 824.

COUNTY SURVEYOR,
acknowledgment of deed in Ohio, 815.

COURSES AND DISTANCES,
priority over description, 272.

COURTS,
See JUDICIAL SALES.
jurisdiction of bankruptcy proceedings, 378.
to hear and determine suits concerning real estate, 650.

COURT COMMISSIONERS,
acknowledgment of deed in Minnesota, 803.
Wisconsin, 829.

COURTS OF RECORD,
acknowledgment of deed by clerk of court in Alabama, 780.
Alaska, 781.
Arizona, 781.
Arkansas, 783.
California, 784.
Colorado, 785.
Connecticut, 786.
Delaware, 787.
District of Columbia, 788.
Florida, 789.
Georgia, 790.
Hawaii, 791.
Idaho, 792.
Illinois, 793.
Indiana, 794.
Iowa, 795.
Kansas, 796.
Kentucky, 797.
Maine, 799.
Maryland, 800.
Michigan, 802.
Minnesota, 803.
Mississippi, 804.
Missouri, 805.
Montana, 806.
New Mexico, 811.
North Dakota, 814.
Ohio, 815.
Oregon, 817.
Rhode Island, 819.
South Carolina, 820.
South Dakota, 821.
Tennessee, 822.
Texas, 823.
Virginia, 826.

[*References are to Sections.*]

COURTS OF RECORD—*Continued.*
acknowledgment of foreign deed accredited in Illinois, 793.
Colorado, 785.
Idaho, 792.
Michigan, 802.
Mississippi, 804.
Missouri, 805.
New Jersey, 810.
New York, 812.
Oklahoma, 816.

COVENANTS,
against incumbrances include taxes, 526, 527.
availability to purchaser at judicial sale, 593.
available under judicial sale, 592, 593.
clauses construed as covenants rather than as conditions, 297.
conveyances with restrictive covenants, 313.
formal parts of deed, 260.
general and special in mortgage, 425, 426.
in joint deed does not bind wife in Nebraska, 807.
in leases, 407, 408.
may be enforced by injunction, 667.
nonclaim equivalent to special covenant of warranty, 303.
not implied from recitals, 273.
party-wall agreement affecting title, 507.
taxes as incumbrances, 632.
title, in deeds, 278, 279.

CREDITOR,
competency as witness to will in Vermont, 937.

CROPS,
jurisdiction of action for destruction, 656.

CURATIVE LAWS,
See LEGALIZING ACTS.

CURTESY,
abolished in Connecticut, 786.
Maine, 799.
Ohio, 815.
bar of curtesy by joinder in deed in Oregon, 817.
charge upon estates of inheritance in various states, 835-884.
defined and construed, 64.
in what states right exists, 64.
may not be devised in Alaska, 891.
release by conveyance in Massachusetts, 801.
release by joinder in conveyance in New Hampshire, 809.
right which can not be disinherited, 715, 716.
transfer by deed in Arkansas, 783.
when husband is entitled, 64.
when husband's right may be excluded, 64.

[*References are to Sections.*]

D

DAMAGES,
action against abstracter for negligence, 15, 16, 18.
compensatory, awarded in equity action for injunction, 667.
liability of abstracter for failure or neglect, 16.
when right of action against abstracter accrues, 23.

DATE,
subscription of witnesses to deed in Arkansas, 783.

DEATH,
affidavit to establish, 509.
effect of death of party pending judgment, 570.
effect to lapse devise, 483.
establishing fact, 90.
gifts over on death of beneficiary in will, 476.
judgment plaintiff or defendant pending execution sale, 618.
proof of death of ancestor, 739.
terminating power of attorney, 337.
terminating trust, 341.
vests title in heirs instanter, 723.

DEBTS,
affecting title to real estate of decedent, 705.
charge upon estate of decedent in various states, 835-884.
decedent creating lien, 524.
devise, charged with payment, 473.
inheritance liable for debts of decedent, 736.
right of administrator to sell land for debts, 723.

DECEDENTS,
debts creating lien, 524.
judgment against, 571.
proceedings for sale in probate courts, 602.

DECREES,
See JUDGMENTS.
abstracting, 579.
assignment of dower, 675.
classification, 574.
conclusiveness, 575.
conformity to pleadings, 578.
defined, 560.
distinctions, 560.
divorce proceedings affecting title, 676.
effect, 561.
effect of decree in the absence of personal service, 576.
misnomer of parties, 580-582.
entry, 578.
evidence of descent in abstract, 741.
extraterritorial operation, 584.
finality, 574.
foreclosure of mortgage in equity, 447.
foreclosure without provision for deficiency, 575.
foreign judgment and decree, 584.
form, 578.

[*References are to Sections.*]

DECREES—*Continued.*
foundation of title registry, 954.
jurisdiction dependent on service, 576.
liens, 577.
necessity of findings, 578.
operation and effect, 575.
decrees of probate courts, 583.
probate of wills, 492.
proof of heirship, 738.
relief dependent on prayer, 575.
rescission and cancellation, 673.
sheriff's deed in execution of decree, 352.
signing, 578.
title and incumbrances, 957.

DEDICATION,
acquisition of title, elements, 105.
deeds of dedication, 317.
examination in abstract, 760.
maps or plats, 244.

DEED OF TRUST,
See MORTGAGES.

assignment, 436, 437.

DEEDS,
See ANCIENT DEEDS; CONVEYANCES; TAXATION.

absolute deed, when considered mortgage, 419.
acknowledgment by corporation, 330.
acknowledgment of sheriff's deed, 349.
actions to set aside, lis pendens, 546.
administrator with the will annexed, 361.
affecting title adversely, 686.
application of lis pendens to set aside, 546.
assignment, 309.
at common law, 305.
by administrator, 360.
by guardian, 362.
by masters, commissioners and referees, 353.
classification, 295–318.
common-law deed of assignment, 309.
confirmation, 307.
consideration, 266.
construction, 297.
sheriff's deed, 350, 351.
conveyance of land in the adverse possession of another, 314.
conveyances to take effect in future, 311.
conveyances with restrictive conditions and covenants, 313.
conveying base, qualified and conditional estates, 312.
creating resulting trusts, 318.
creation of fee-simple estates, 45.
date, 265.
declaration of trust, 339.
dedicatory, 317.
description of deed in mortgage, 424.
descriptions and boundaries, 269.

[*References are to Sections.*]

DEEDS—*Continued.*
examination of deed executed under power of attorney in abstract, 759.
official deeds in abstract, 756.
feoffment, gift, grant, exchange and partition, 305.
fiduciaries purchasing at their own sales, 363.
formal parts enumerated and described, 258.
form of deeds of surrender, 308.
fraudulent conveyances, 315.
indentures, defined, 296.
mortgagee's deed under power of sale, 358.
of defeasance, 310.
of executor, 359.
of sheriff, 350–352.
of surrender, 308.
of trustee in bankruptcy, 384.
operative words, 267.
original and derivative defined, 305.
poll, defined, 296.
power and duties of trustee to make, 354.
power of sale in deed of trust, 442.
private deeds, examination in abstract, 754.
quitclaim, defined and requisites, 295, 301.
recitals in deeds by officials, 346.
release, 306.
release, surrender, confirmation, assignment and defeasance, 305.
requisites, 93.
sheriff's deed on execution sale, 347.
statutes of different states pertaining to execution and acknowledgment, 780–830.
statutory forms, 304.
subject to incumbrance, 316.
tax deeds, 642–644.
title by, 92.
trust deeds, 441.
validity, 298.
void and voidable, 298.
warranty defined, and requisites, 295, 299.
will distinguished, 453.
with special warranties, 303.
words of inheritance, 268.

DEFEASANCE,
common-law deed of defeasance, 310.

DEFECTS,
cure by judicial sale, 591.

DEGREES,
computing degrees of kindred, 726.
according to civil law in Alabama, 835.

DELAWARE,
statutes governing execution of wills, 897.
statutes of descent, 842.
statutes pertaining to execution and acknowledgment of deeds, 787.

DELIVERY,
abstract, 31.
deeds, 286.

[*References are to Sections.*]

DEPUTIES,
See RECORDER OF DEEDS.
acknowledgment of deed in Colorado, 785.
Florida, 789.
Idaho, 792.
Iowa, 795.
Kentucky, 797.
Minnesota, 803.
Mississippi, 804.
New Jersey, 810.
New York, 812
Tennessee, 822
Virginia, 826.
Washington, 827.
acknowledgment of foreign deed accredited in California, 784.
Minnesota, 803.
North Dakota, 814.
South Dakota, 821.
Texas, 823.
Utah, 824.

DESCENDANTS,
brothers and sisters in collateral lines, 728.
children and children's children, 717.
common-law canon, 87.

DESCENT AND DISTRIBUTION,
computing degrees of kindred, 726.
descendants entitled to property in various states, 835–884.
included in next of kin, 729.
included in word issue, 712.
what included, 713.
estates of minors unmarried, 727.
examination in abstract, 766.
general consideration of title by descent, 705.
inheritance of property in various states, 835–884.
laws determining interest subject to descent, 722.
lines of descent defined, 725.
mode of acquisition of title, 85, 86, 88.
next of kin defined, 729.
omission from will results in intestacy in Alaska, 891.
proof of heirship, 738.
property subject to descent, 722.
regulation by statutes, 732.
rules of descent under civil law, 88.
statutes governing, 724.
statutes governing heirs, 714.
statutes of descent in various states, 835–884.
title by descent, 705–741.

DESCRIPTION,
construed, 272.
devisees in wills, 481.
effect of false, erroneous and conflicting descriptions in wills, 461.
in contract for conveyances, 393.
in deed, 269–272.
general description, constructive notice, 129.
land in assessment roll, 635.

[*References are to Sections.*]

DESCRIPTION—*Continued.*
must be accurate in abstract, 5.
parties and premises in mortgage, 422–424.
referred to in maps or plats, 241.
DESERT LANDS,
entries as source of title, 204.

DEVISES,
See WILLS.
constituting estate subject to inheritance in various states, 835–884.
descent of estate on death of devisee before testator, 734.
liens, 525.
title by, 92.

DISCHARGE,
judgments, 573.
mortgage, 429.

DISCOVERY,
proclamation of, source of title, 181.

DISINHERITANCE,
causes in Louisiana, 908.
children in Porto Rico, 930.
prohibited in some states, 715.

DISTRIBUTIVE GIFTS,
in wills, 471.

DISTRICT OF COLUMBIA,
statutes governing execution of wills, 898
statutes of descent, 843.
statutes pertaining to execution and acknowledgment of deeds, 788.

DIVORCE,
abstracting action for divorce and alimony, 676.
affecting title, 676.

DOCKETS,
judgments, 567.
necessary to make judgment a lien, 562.

DOMICIL,
determining heritable status of child and father, 719.
law, governing wills, 456.
testator determining probate, 491.

DONATIONS,
by congress, source of title, 202.

DOWER,
abolished in Connecticut, 786.
Iowa, 795.
Maine, 799.
adverse possession acquired, 693.
affected by vendors' lien, 530.
assignment affecting title, 675.

[*References are to Sections.*]

DOWER—*Continued.*
bar by joint deed in Missouri, 805.
New Hampshire, 809.
Oregon, 817.
Pennsylvania, 818.
Rhode Island, 819.
Tennessee, 822.
bar of right by conveyance of property in Arkansas, 783.
Georgia, 790.
Hawaii, 791.
Kentucky, 797.
Maryland, 800.
Massachusetts, 801.
Michigan, 802.
Minnesota, 803.
Montana, 806.
New Jersey, 810.
New York, 812.
West Virginia, 828.
Wisconsin, 829.
charge upon estate of decedent in various states, 835–884.
construed and defined, 65.
conveyance by joint deed in North Carolina, 813.
effect of execution sale, 620.
form of relinquishment on conveyance of property in Florida, 789.
how barred or forfeited, 65.
in what states exists, 65.
lien, 521.
may not be devised in Alaska, 891.
release, 325.
release by acknowledgment on conveyance in South Carolina, 820.
release by married women in conveyance in Alabama, 780.
District of Columbia, 788.
Illinois, 793.
right which can not be disinherited, 715, 716.
to what estates attached, 65.
what constitutes in Alabama, 835.

DRUNKARDS,
examination of sales thereby in abstract, 764.

DURESS,
affecting validity of deeds, 298.

DUE PROCESS,
Torrens System of title registration, 962.

DWELLING HOUSE,
included in homestead in California, 784.

E

EASEMENTS,
acquired by adverse possession, 693.
affecting title, 506.
defined and construed, 61.

[*References are to Sections.*]

EASEMENTS—*Continued.*
distinguished from licenses, 61.
profits a prendre, 61.
servitude, 506.
grant must be recorded, 119.
inclusion in abstract, 500.
words of creation, 506.

EDUCATION,
provision by testamentary trust, 480.

EDUCATIONAL ASSOCIATIONS,
devise thereto limited in Georgia, 900.

EJECTMENT,
abstracting, 668.
defined, 668.
form of foreclosure of mortgage, 445.
judgment, 668.
production of abstracts in actions therefor, 28.
right of action descends to heir and not to administrator, 723.

ELECTION,
laws to govern construction of will in New York, 922.
survivor to take under will of deceased spouse in Ohio, 925.
to take dower bars inheritance in Georgia, 845.

EMINENT DOMAIN,
abstracting condemnation proceedings, 677.
acquisition of title, elements, 109.
assessment of benefits and damages, 677.
condemnation proceedings affecting title, 677.

ENGLISH LANGUAGE,
sufficient authentication of acknowledgment of foreign deed accredited in Indiana, 794.

ENGLISH METHODS,
distinguished from American, 4.

ENGRAVING,
use in will, 487.

ENTRIES,
transfer of public lands, 182, 191.

ENTRY,
land subject thereto, 193.
statements included, 194.

ENTRY AND POSSESSION,
after foreclosure of mortgage, 444.

EQUALITY,
taxes, 631.

EQUITABLE CONVERSION,
under wills, 484.

[*References are to Sections.*]

EQUITABLE ESTATES,
defined and classified, 41.
judgment liens, 566.
mechanics' liens, 536.

EQUITABLE LIENS,
creation by agreement, 516.
possession as an essential, 516.
priority with reference to judgment liens, 565.
resulting trusts, 532.

EQUITABLE TITLE,
defined, 74.
should appear in abstract, 5.

EQUITY,
See JUDICIAL SALES.
abstracting equitable proceedings, 666.
adequacy of legal remedy, 651.
application for registration of equitable interest, 952.
construction of assignment of mortgage, 439.
construction of mortgage of after-acquired property, 432.
construction of wills, 678.
conversion or constructive alteration of property devised, 484.
decrees, 560.
equitable liens, 516.
foreclosure of mortgage, 447, 674.
jurisdiction to quiet title, 669.
suits concerning real estate, 651.
power to decree specific performance, 671.
record of equitable proceedings as notice, 657.
redemption of mortgage by bill in equity, 672.

EQUITY OF REDEMPTION,
interest subject to descent, 722.

ERRONEOUS DESCRIPTIONS,
property in wills, 460.

ESCHEAT,
acquisition of title, 111.
property in Alaska, 836.
property in various states in the absence of kindred, 835-884.
title by, 92.

ESCROW,
interest of vendor subject to descent, 722.

ESTATES,
See REMAINDERS.
acquisition by foreclosure of mortgage, 444.
allodial titles, 72.
ancestral estate defined, 708.
at sufferance, 41, 52, 71.
at will, 41, 51, 71.
base fee, 41.

[*References are to Sections.*]

ESTATES—*Continued.*
by entirety, created by deed to husband and wife, 321.
capacity to take under will, 458.
classification, 41.
construction of estate created by will, 459.
contingent uses, 71.
conventional life estates, 41.
created by conveyances and trusts, 338.
curtesy, 41, 71.
deeds conveying base, qualified and conditional estates, 312.
defined, 40.
determinable fee, 41.
distinguished from powers, 60.
doctrine of survivorship contrary to public policy, 326.
dower, 41, 71.
during coverture, 71.
equitable, 41.
executory devises, 71.
fee conditional, 41.
fee simple, 41, 71.
fee tail, 41, 71.
nature of, 48.
for years, 41, 71.
nature of, 50.
freehold, 41, 71.
from year to year, 41, 71.
nature, 53.
future, 71.
homestead, 41.
in common, conveyances creating, 326.
in expectancy, 41.
release of expectant share to ancestor, 735.
subject of contract, 735.
in joint tenancy, conveyances creating, 326.
in possession, 41.
in severalty, 71.
joint, 71.
joint tenancy, 71.
legal, 41.
legal and equitable, nature, 57.
legal life estates, 41.
less than freehold, 71.
liability to judgment lien, 566.
life estates, 41, 71.
limited by habendum clause in deed, 274.
modified fees, 41.
present, 71.
pur autre vie, 41, 71.
qualified fee, 41.
registration of legal and equitable estates, 952.
remainders, 71.
reservations, 71.
shifting uses, 71.
subject to adverse possession, 693.
subject to mechanics' liens, 536.
tenancy in common, 71.
tenancy in coparcenary, 71.

[*References are to Sections.*]

ESTATES—*Continued.*
tenancy in entirety, 71.
tenancy in tail, after possibility of issue extinct, 41, 71.
upon condition, 41.
nature, 54.
upon conditional limitation, 41.
nature, 56.
upon limitation, 41.
nature, 55.

ESTATES OF INHERITANCE,
defined and classified, 41.

ESTOPPEL,
by deed, effect, 99.
recitals, 99.
who are bound, 99.
decrees, 575.
in pais, municipality, 100.
requisites, 100.
who may be bound, 100.
married women by deed without covenants, 322.
mortgagor subsequently acquiring title, 427.
requisites of estoppel by deed, 99.
requisites of estoppel by record, 98.
title by, 92.
requisites, 97.

EVIDENCE,
birth or legitimacy of children, 740.
maps and plats as evidence, 240.
payment of mortgage, 429.
proof of death of ancestor, 739.
heirship, 738.
of title under execution sale, 623.
title under judicial sale, 599.
public records as evidence of title, 118.
service of process, 662.
signature of grantor in Illinois, 793.
title, 78.
title by adverse possession, 700.
tax deeds, 644.
title not registered under Torrens System, 954.
unrecorded affecting title, 510.
where records are destroyed, 29.

EXAMINATION,
abstract, 745–773.
abstract should begin at original sources, 749.
distinguished from abstract, 4.
scope and extent, 161.
separate examination not required in District of Columbia, 788.
Maine, 799.
Maryland, 800.
Massachusetts, 801.
Minnesota, 803.
Mississippi, 804.
Missouri, 805.

[*References are to Sections.*]

EXAMINATION—*Continued.*
Nebraska, 807.
New Mexico, 811.
Ohio, 815.
Oregon, 817.
Texas, 823.
Vermont, 825.
Virginia, 826.
separate examination of wife in New Jersey, 810.
North Carolina, 813.
South Carolina, 820.
Tennessee, 822.
time must be given for examination of abstract, 35.
verdict of jury in action of title, 665.

EXAMINERS,
perusal of abstract and opinion of title, 745–773.

EXCEPTIONS,
in deeds, 275.

EXECUTION,
See Execution Sales; Judicial Sales.
against estate of decedent for debts, 736.
as lien, 522.
deed in proper form prerequisite to recording, 120.
deeds in different states, 780–830.
effect upon title to land in Michigan, 802.
form of will in New York, 922.
patents or grants from government, 752.
sales contrasted with judicial sales, 590.
sheriff's deed thereon, 347.
title thereunder, 612, 613.
writ, levy and return, 614, 615.

EXECUTION SALES,
application of doctrine of caveat emptor, 364.
assignment of officers' certificate, 622.
certificate of purchase, 621.
deed as essential to pass title, 621.
deed to heirs of purchaser, 622.
defined and distinguished, 610.
effect of death of judgment plaintiff or defendant before execution, 618.
effect of irregularities, 611.
effect of irregularities in appraisement, 611.
effect of want of title by execution defendant, 611.
effect on dower rights, 620.
essentials of writ, 614.
exemption of real estate, 619.
functions of officer making sale, 610.
levy and return of execution, 615.
necessity of conveyance to purchaser, 613.
necessity of strict compliance with law, 610.
notice of sale, 616.
place of sale, 611.
proof of publication of notice, 617.
proof of title, 623.

[*References are to Sections.*]

EXECUTION SALES—*Continued.*
status pending expiration of time for redemption, 613.
validity and effect, 611.
when title vests in purchaser, 613.
writ, 614.

EXECUTORS,
application of doctrine of caveat emptor to dealings, 364.
deeds by, 359.
devises to, 480.
examination of deed by, in abstract, 756.
examination of sales thereby in abstract, 764.
trustees, 480.

EXEMPTION,
homestead, conveyance in Colorado, 785.
homestead, from execution or forced sale in Idaho, 792.
homestead from mortgage foreclosure in Kentucky, 797.
homestead property in Louisiana, 798.
of homestead from judicial sale in Iowa, 795.
real estate from execution, 619.
real estate from judgments, 572.
taxation, 631.

EXPECTANCY,
conveyances, invalid, 334.
estates defined and classified, 41.

F

FALSE DESCRIPTIONS,
property in wills, 460.

FEDERAL COURTS,
application of state lis pendens statutes, 550.
duration of lien of judgments, 564.
lien of judgments, 563.

FEE SIMPLE,
estate created by will, 46.
estate passed by omission of words "heirs and assigns" from will, 915–520.
estate defined and construed, 41, 42.
limitations and restrictions in transfers, 47.

FEES,
registry under Torrens System, 957.

FEE TAIL,
estate defined, 48.

FEUDAL SYSTEM,
affecting mortgage of land, 415.
allodial titles, 72.
military service, 87.

FIDUCIARIES,
purchasing at their own sales, 363.

[*References are to Sections.*]

FILING,
account as essential to validity of mechanics' lien, 538.

FINDINGS,
basis of decrees, 578.

FIRE INSURANCE,
plaintiff in action on policy can not be required to furnish abstract, 28.

FIXTURES,
right of purchaser at judicial sale, 593.

FLORIDA,
statutes, governing execution of wills, 899.
of descent, 844.
pertaining to execution and acknowledgment of deeds, 789.

FLORIDA DONATION ACT,
source of title, 202.

FORCED HEIRS,
See HEIRS.
in Porto Rico, 930.

FORECLOSURE,
by entry and possession, 444, 445.
requisites, 445.
by equitable suit, 447, 674.
by power of sale, 446.
essentials of decree, 578.
examination of sale thereunder in abstract, 761.
extra-state jurisdiction, 655.
jurisdiction, 654, 656.
mechanics' liens, 538.
service of process by publication, 661.

FOREIGN DEEDS,
full faith and credit, in Alaska, 781.
in Arizona, 782.
in Arkansas, 783.
in California, 784.
in Colorado, 785.
in Connecticut, 786.
in Delaware, 787.
in District of Columbia, 788.
in Florida, 789.
in Idaho, 792.
in Illinois, 793.
in Iowa, 795.
in Kansas, 796.
in Maine, 799.
in Maryland, 800.
in Massachusetts, 801.
in Michigan, 802.
in Minnesota, 803.
in Mississippi, 804.
in Missouri, 805.
in Montana, 806.

[*References are to Sections.*]

FOREIGN DEEDS—*Continued.*
in Nebraska, 807.
in Nevada, 808.
in New Jersey, 810.
in New Mexico, 811.
in North Dakota, 814.
in Ohio, 815.
in Rhode Island, 819.

FOREIGN JUDGMENTS,
liens, 584.

FOREIGN WILLS,
accredited in various states, 890–942.
probate, 493.
transcript of probate, 493.

FORFEITURE,
acquisition of title, 92, 113.
collection of taxes, 637.
contract for conveyances, 399.

FORMS,
abstracting decrees, 579.
acknowledgment of deeds, 285.
action for divorce and alimony, 676.
affidavits, 509.
attachment, 553.
bankruptcy proceding, 383.
certificate, of abstracter, 174.
of entry on foreclosure, 444.
of proof of death of ancestor, 739.
of sale on execution, 621.
of tax sale, 641.
condemnation proceedings, 677.
contract for conveyance, 396.
declaration of trusts, 339.
decree, 578.
deeds, administrator's 360.
by attorney in fact, 335.
by corporation, 332.
commissioners, 353.
of surrender, 308.
of trustee in bankruptcy, 384.
statutory form, 304.
trust, 441.
trustees, 357.
warranty, 299, 300.
discharge in bankruptcy, 385.
execution sale, 616.
forfeiture for nonpayment of taxes, 637.
general index, 131.
index of judgments, 153.
index of tax sales, 152.
instrument number index, 149.
judgments, 568.
leases, 406.
legislative grant, 188.

[*References are to Sections.*]

FORMS—*Continued.*
mortgage and assignment, 440.
notice of lis pendens, 550.
official certificate, 505.
original entries, 143.
partition deeds, 327.
partitions, 670.
party-wall agreement affecting title, 507.
patents, 230.
plat and subdivision, 242.
powers of attorney, 336.
probate of will, 490.
probate sales, 603.
proof of publication, 617.
receipt of local land office, 195.
release of dower, 325.
release of mortgage, 443.
re-record, 288.
revocation of power of attorney, 337.
satisfaction of judgment, 573.
sheriff's deed, 351.
special assessments, 647.
statement for grant for internal improvement, 211.
of private entry, 194.
of town-site entry, 216.
suit for specific performances, 666.
tax deed, 643.
tax sale, 636.
title bond, 400.
tract index, 150.
vacation of plat, 243.
vacation of streets, 501.
wills, 487, 490.

FRANCHISE,
subject to descent, 722.

FRAUD,
affecting validity of deeds, 298.
jurisdiction to cancel mortgage for fraud, 656.

FRAUDULENT CONVEYANCES,
what constitutes, 315.

FREE FROM INCUMBRANCES,
requisites of title, 6.

FREEHOLD ESTATES,
defined and classified, 41.

FRENCH GRANTS,
source of title, 214.

FULL FAITH AND CREDIT,
foreign deeds in various states, 781-819.
foreign judgments and decrees, 584.
given to defective acknowledgment after registry in Arizona, 782.

[*References are to Sections.*]

FURTHER ASSURANCE,
covenant of, in deed, 278.

FUTURE ESTATES,
common-law estates in futuro, 311.

G

GENERAL LAND OFFICE,
right of officers, clerks and employés to acquire title to public lands, 183.

GEORGIA,
statutes governing execution of wills, 900.
statutes of descent, 845.
statutes pertaining to execution and acknowledgment of deeds, 790.

GIFTS,
affecting validity of deeds, 298.
constituting advancement, 737.
constituting estate subject to inheritance in various states, 835–884.
construction of gifts created by will, 459.
deed of must be recorded, 119.
dependent on death of beneficiary, 476.
descent of estate to beneficiary dying before testator, 734.
disposition of gifts by will at death of donee in various states, 890–942.
to trustees by will, 463.
use of words of general description in wills, 460.
use, possession, rents, profits and income under will, 470.

GOOD FAITH,
in entry of adverse possession, 687.

GOOD TITLE OF RECORD,
requisites, 6.

GRAMMATICAL CONSTRUCTION,
wills, 487.

GRANDCHILDREN,
inclusion as children, 717.

GRANTEE,
at tax sale, caveat emptor, 639.
description of corporations, 329.
name and description in deed, 263.
of purchaser at judicial sale, title, 594.

GRANTOR,
liens, 530.
name and description in deed, 262.

GRANTS,
abstracting legislative grants, 188.
abstract should contain full summary, 5.
acquisition of profits a prendre by grant, 63.
by king of England, source of title, 181.
direct legislative grants by congress, 186, 187.

[*References are to Sections.*]

GRANTS—*Continued.*
form for abstracting, 188.
official by state or federal officers, 94.
public, from state or federal government, 95.
title by, 92.

GUAM,
deeds acknowledged therein accredited in District of Columbia, 788.

GUARDIAN,
deed by, 362.
examination of deed in abstract, 756.
examination of sales thereby in abstract, 764.

GUARDIAN AD LITEM,
appointment for incapacitated parties, 571.

H

HABENDUM,
can not defeat premises in deeds, 274.
formal part of deed, 260.
office, in creating estates, 45.
in creating conditional estate, 312.

HALF-BLOOD,
inheritance by collaterals of the half-blood, 708.
inheritance of property in various states, 835–884.
kindred, 730.

HAWAII,
statutes governing execution of wills, 901.
statutes pertaining to execution and acknowledgment of deeds, 791.

HEIRS,
See HALF-BLOOD.
declaration by decedent properly acknowledged constituting heir in Arkansas, 838.
effect of use of word in will, 464, 465.
entitled to inherit property in different states, 835–884.
father as heir of legitimate child, 719.
forced heirs, 715.
parties to sales of decedent's property, 602.
proof of birth and legitimacy, 740.
proof of heirship, 738.
survivor and spouse, 716.
use of word to create estate, 45, 46, 48.
what included, 714.

HOMESTEAD,
bar by conveyance of property in Ohio, 815.
bar of homestead right by joint deed in New Hampshire, 809.
conveyance by deed in Arkansas, 783.
conveyance by husband and wife in Georgia, 790.
in Idaho, 792.
in Iowa, 795.

[*References are to Sections.*]

HOMESTEAD—*Continued.*
in Kansas, 796.
in Minnesota, 803.
in Mississippi, 804.
in Missouri, 805.
in Montana, 806.
in New Jersey, 810.
in North Carolina, 813.
in North Dakota, 814.
in Oklahoma, 816.
in South Carolina, 820.
in South Dakota, 821.
in Tennessee, 822.
in Texas, 823.
in Utah, 824.
conveyance in Arizona, 782.
in California, 784.
in Colorado, 785.
in Florida, 789.
in Nebraska, 807.
conveyance must be joint in Vermont, 825.
in Virginia, 826.
in Washington, 827.
in Wisconsin, 829.
in Wyoming, 830.
conveyance or incumbrance in Nebraska, 807.
in Nevada, 808.
in New Mexico, 811.
decreed as alimony in divorce proceedings, 676.
defined and construed, 66.
essentials of conveyance in Alabama, 780.
estates on which homestead exemptions may be claimed,66.
exemption, 572.
in Louisiana, 798.
force of statutes creating homesteads, 66.
includes dwelling house and appurtenances in Kentucky, 797.
land and dwelling house thereon in California, 784.
method of transfer of public lands, 182.
mortgage, 431.
persons who may claim homestead, 66.
release by conveyance of property in Illinois, 793.
joinder in conveyance in Massachusetts, 801.
release of waiver in conveyance of property in Kentucky, 797.
requirements, 200.
source of title, 200, 201.
validity of conveyance in Michigan, 802.
waiver by conveyance in Louisiana, 798.

HOMICIDE,
inheritance by person causing death of intestate, 733.
in Indiana, 848.

HOTCHPOT,
advancements to heir must be brought in hotchpot, 849, 854, 856, 859, 869, 874, 875, 876, 880, 882.

[*References are to Sections.*]

HUSBAND AND WIFE,
See MARRIED WOMEN.
adoption of child by one without consent of the other, 718.
capacity to take under will, 458.
conveyances between, 323.
in New Hampshire, 809.
in New York, 812.
in North Dakota, 814.
in Utah, 824.
conveyance to, estates by entireties, 321.
estate of intestate wife not liable for husband's debts, 736.
heirs of each other, 716.
inheritance as next of kin, 729.
joinder in conveyance of property in Alabama, 780.
in Alaska, 781.
in Arizona, 782.
in Arkansas, 783.
in California, 784.
in Colorado, 785.
in Connecticut, 786.
in Delaware, 787.
in District of Columbia, 788.
in Florida, 789.
in Georgia, 790.
in Hawaii, 791.
in Idaho, 792.
in Illinois, 793.
in Indiana, 794.
in Iowa, 795.
in Kentucky, 797.
in Maryland, 800.
in Michigan, 802.
in Minnesota, 803.
in Missouri, 805.
in Montana, 806.
in New Jersey, 810.
in New Mexico, 811.
in New York, 812.
in North Carolina, 813.
in Oklahoma, 816.
in Oregon, 817.
in Pennsylvania, 818.
in Texas, 823.
in Vermont, 825.
in Virginia, 826.
in Washington, 827.
in West Virginia, 828.
in Wyoming, 830.
not descendants of each other, 713.
property may be conveyed without joinder of the other in South Dakota, 821.

I

IDAHO,
statutes governing execution and acknowledgment of deeds, 792.
governing execution of wills, 902.
statutes of descent, 846.

[*References are to Sections.*]

IDEM SONANS,
in decree, 580–582.

ILLEGITIMATE CHILDREN,
capacity to take under will, 458.
heirs, 719.
inheritance of property in various states, 835–884.
right to inherit from legitimate brothers and sisters, 719.

ILLINOIS,
statutes governing execution and acknowledgment of deeds, 793.
execution of wills, 903.
statutes of descent, 847.

IMPOSSIBLE CONDITIONS,
effect in wills, 462.

IMPRISONMENT,
affecting descent, 706.

INCOME,
transfer by will, 470.

INCUMBRANCES,
See LIENS; MORTGAGES.
assessment and levy of tax, 632.
certificate under Torrens System, 957.
conveyances subject to, 316.
covenant against, in deeds, 278.
easements, 61.
examination in abstract, 770.
liability of abstracter for failure to show, 17.
registered land under Torrens System, 951.
restriction on use constituting, 277.
should appear in abstract, 5.

INDEX,
as part of record, 132.
bondsmen, 528.
form of tract index, 150.
general index of records, requirements and form, 131.
instrument numbers, 149.
instruments deemed recorded when noted in index, 131.
irregular conveyances, 151.
judgment, 134, 153, 567.
as essential to lien, 522.
miscellaneous index and reference books, 154.
tax sales, 152.
tract index of abstracter, 145, 150.

INDIANA,
statutes governing execution and acknowledgment of deeds, 794.
execution of wills, 904.
statutes of descent, 848.

INDIANS,
acknowledgment of deeds by agent or superintendent accredited in South Dakota, 821.

[*References are to Sections.*]

INDORSEMENTS,
form of will, 487.

INFANTS,
capacity to make will, 457.
examination of sales in abstract, 764.
judgments against, 571.
judicial sale of property, 590.
may acquire title by adverse possession, 694.
personal service of process upon, 660.
setting aside judgment after attaining majority, 571.

INHERITANCE,
See DESCENT AND DISTRIBUTION.

advancements, 737.
by adopted children, 718.
by and through aliens, 732.
by heir through murderer, 733.
by parents of intestate, 731.
by person causing death of intestate, 733.
computing degrees of kindred, 726.
devolution of real property on death of ancestor, 723.
estate of devisee dying before testator, 734.
estates of minors not married, 727.
forced heirs, 715.
from ancestors, 707.
illegitimate from legitimate children, 719.
issue defined, 712.
kindred of the half-blood, 730.
laws determining title by descent, 86.
liability for debts of decedent, 736.
lines of descent defined, 725.
next of kin defined, 729.
per stirpes and per capita, 710.
pretermitted children, 720.
proof of heirship, 738.
release of expectant share to ancestor, 735.
statutes governing descent of property, 724.
taken by representatives, 711.
title by descent, 705–741.
words of, in deed, 268.

INITIALS,
effect of omission in judgment or decree, 581.

INJUNCTIONS,
defined, 667.

INSANE PERSONS,
examination of sales thereby in abstracts, 764.
husband or wife affecting form of conveyance in Arkansas, 783.
Connecticut, 786.
Delaware, 787.
judgment against, 571.
judicial sale of property, 590.

INSANITY,
terminating power of attorney, 337.

[*References are to Sections.*]

INSOLVENCY,
laws governing, 377.

INSTRUMENT NUMBERS,
form of index, 149.
inserted in books of original entries, 149.
separate index should be kept, 149.

INSTRUMENTS,
affecting title adversely, 686.
description in operative part should appear in abstract, 5.
required to be recorded, 118, 119.
rescission and cancellation, affecting title, 673.

INSURANCE,
of title, 79.

INTENT,
consideration in construction of wills as to description of property, 460.
determining construction of wills, 459.
equitable liens, 516.
shown by operative words of will, 463.
testator as to devisee, 481.

INTEREST,
in property transferred by wills in various states, 890–942.
synonymous with estate, 40.
subject to descent, 722.
vendee's lien, 531.

INTERNAL IMPROVEMENT GRANTS,
method of transfer of public lands, 182.
source of titles, 210.

INTESTACY,
advancements, 737.
descent of estate by death of devisee before testator, 734.
establishment of fact, 91.
inheritance by parents, 731.
result of incapacity of devisee to hold property in various states, 890–942.
right of posthumous children, 721.

IOWA,
statutes governing execution and acknowledgment of deeds, 795.
execution of wills, 905.
statutes of descent, 849.

IRREGULAR CONVEYANCES,
index, 151

ISSUE,
"child of the body", 712.
substitution for heirs, 48.
what included in the term, 712.

[*References are to Sections.*]

J

JOINDER,
See HUSBAND AND WIFE.
of husband in deed by wife, 322.

JOINT ESTATES,
defined and classified, 41.

JOINT OWNERS,
title by adverse possession between, 696.

JOINT TENANCY,
action of partition, 670.

JOINTURE,
acceptance, bar of dower in Michigan, 802.
New York, 812.
Oregon, 817.
bar of interest by descent in husband's land in Maine, 799.

JUDGES,
acknowledgment of deeds in Alabama, 780.
Alaska, 781.
Arkansas, 783.
California, 784.
Colorado, 785.
Connecticut, 786.
Delaware, 787.
District of Columbia, 788.
Florida, 789.
Georgia, 790.
Hawaii, 791.
Idaho, 792.
Illinois, 793.
Indiana, 794.
Iowa, 795.
Kansas, 796.
Kentucky, 797.
Maryland, 800.
Michigan, 802.
Minnesota, 803.
Mississippi, 804.
Missouri, 805.
Montana, 806.
Nebraska, 807.
Nevada, 808.
New Jersey, 810.
New Mexico, 811.
New York, 812.
North Carolina, 813.
North Dakota, 814.
Ohio, 815.
Oklahoma, 816.
Oregon, 817.
Pennsylvania, 818.
Rhode Island, 819.

[*References are to Sections.*]

JUDGES—*Continued.*
South Dakota, 821.
Texas, 823.
Utah, 824.
Vermont, 825.
Virginia, 826.
Washington, 827.
Wisconsin, 829.
Wyoming, 830.
acknowledgment of foreign deeds accredited in District of Columbia, 788.
Illinois, 793.
Nevada, 808.
North Dakota, 814.
South Dakota, 821.
Utah, 824.

JUDGMENTS,
See DEGREES.
abstracting, 569.
against deceased party, 570.
against infants and insane persons, 571.
annulment by infant party attaining majority, 571.
as lien, 522.
assignment of dower, 675.
collateral attack on judgment for taxes, 646.
conformity to issues, 561.
defined, 560.
docketing as essential to lien, 522.
docketing, recording and indexing, 567.
duration of lien, 564.
effect, 561.
examination of liens in abstract, 768.
exemptions of real estate, 571.
finality, 561.
for taxes, 646.
foreign judgments and decrees, 584.
formal requisites, 568.
form of index, 153.
in attachment, 553.
index, 153.
judgment records, 134.
issuance of execution as essential to lien, 562.
jurisdiction to vacate, 656.
liability of abstracter for failure to show, 17.
lien of federal court judgments, 563.
liens, 562.
priority of lien with reference to mechanics' lien, 535.
property covered by lien, 562.
property or interest liable to lien, 566.
rank and priority of liens, 565.
record constructive notice, 580–582.
satisfaction and discharge, 573.
statutory liens, 517.
territorial extent of lien, 563.
transcripts to other counties for purposes of lien, 563.

[*References are to Sections.*]

JUDICIAL PROCEEDINGS,
See EXECUTION.
abstract should contain full summary, 5.

JUDICIAL SALES,
application of doctrine of caveat emptor, 364.
certificate of purchase, 598.
defined and distinguished, 590.
distinguished from execution sales, 590.
effect of confirmation, 591.
effect to discharge liens, 593.
effect to transfer land, 590.
examination in abstract, 762.
not within statute of frauds, 595.
order confirming, 596, 597.
presumptions pertaining to, 600.
proceedings for possession on confirmation, 598.
proof of title, 599.
purchasers' title, 592.
refusal to complete purchase, 595.
registered land, 951.
resale for failure of purchaser to comply with bid, 595.
right of bidder to withdraw bid, 595.
right of grantee of purchaser, 594.
right to possession on confirmation, 597.
rights conferred by acceptance of bid, 595.
rights of purchaser, 593.
title to fixtures, 593.
under orders and decrees of probate court, 601, 602.
validity and effect, 591.

JURISDICTION,
action for assignment of dower, 675.
affecting validity of execution sale, 611, 613.
appearance without process, 663.
bankruptcy courts, 378.
extra state jurisdiction, 655.
in rem and in personam, 652.
lands in another state, 655.
local actions, 656.
necessity that record show fact, 653.
not conferred by consent of parties, 650.
notice as basis, 652.
particular actions, 656.
particular actions affecting real estate, 656.
probate courts, 653.
probate of wills, 491.
foreign wills, 493.
suit for foreclosure of mortgage in equity, 674.
to hear and determine cases affecting real estate, 650–656.
transitory actions, 656.

JURY,
submission of equitable action involving legal issues, 665.
to assess benefits and damages in condemnation proceedings, 677.
trial on registration of title, 952.

[*References are to Sections.*]

JUSTICES OF THE PEACE,
acknowledgment of deeds in Alabama, 780.
Arizona, 781.
Arkansas, 783.
California, 784.
Colorado, 785.
Connecticut, 786.
Delaware, 787.
District of Columbia, 788.
Florida, 789.
Georgia, 790.
Idaho, 792.
Illinois, 793.
Indiana, 794.
Iowa, 795.
Kansas, 796.
Maryland, 800.
Maine, 799.
Massachusetts, 801.
Michigan, 802.
Minnesota, 803.
Mississippi, 804.
Missouri, 805.
Montana, 806.
Nebraska, 807.
Nevada, 808.
New Hampshire, 809.
New Mexico, 811.
New York, 812.
North Dakota, 814.
Ohio, 815.
Oklahoma, 816.
Oregon, 817.
Pennsylvania, 818.
Rhode Island, 819.
Vermont, 825.
Virginia, 826.
Washington, 827.
West Virginia, 828.
Wisconsin, 829.
Wyoming, 830.
acknowledgment of foreign deed accredited in Connecticut, 786.
Massachusetts, 801.
duration of lien of judgments, 564.
lien of judgments, 562, 564.

K

KANSAS,
statutes of descent, 850.
statutes pertaining to execution and acknowledgment of deeds, 796.
execution of wills, 906.

KENTUCKY,
statutes of descent, 851.
execution and acknowledgment of deeds, 797.
governing execution of wills, 907.

[*References are to Sections.*]

KINDRED,
brothers and sisters in collateral line, 728.
canon of descent distinguished from degrees of kindred, 726.
computing degree, 726.
half-blood, 730.
inheritance from ancestor, 708.
next of kin defined, 729.

KNOWLEDGE,
constituting notice, 127.

L

LACHES,
loss of exemption from execution, 619.

LAND,
See Real Property.
ascertainment of quantity, 250–257.
conveyance or incumbrance of registered land, 959.
joinder in application for registration under Torrens System, 951.

LAND CERTIFICATE,
assignment not necessary to be recorded, 119.

LAND CONTRACTS,
See Contracts for Conveyances.

LAND DEPARTMENT,
authority as to entry of public lands, 191.
power to dispose of public lands, 184.

LANDLORD AND TENANT,
See Leases.

LANDLORD'S LIEN,
priorities with reference to attachments, 552.

LAND WARRANTS,
interest of intestate therein subject to descent, 722.
source of title, 203.

LANGUAGE,
wills, 487.

LAPSED DEVISE,
inclusion in residuary devise, 485.

LEAD PENCIL,
use in writing will, 487.

LEASEHOLD ESTATES,
mortgage and assignment thereof must be recorded, 119.

[*References are to Sections.*]

LEASES,
affected by mechanics' liens, 536.
assignments, 408.
covenants, 407.
defined and distinguished, 405.
estates liable to judgment lien, 566.
formal parts, 406.
inclusion in abstract, 529.
leases as liens, 529.
mechanics' liens, 536.
tenant as purchaser at tax sale, 638.
unexpired term not subject to descent, 722.
whether liens, 529.

LEGACIES,
devise, charged with payment, 473.
lapse, 483.
by death of devisee, 483.

LEGAL DISABILITY,
title of persons thereunder may not be acquired adversely, 697.

LEGAL ESTATES,
defined and classified, 41.

LEGAL HEIRS,
who were heirs of deceased owner under foreign administration not necessary to appear in abstract, 5.

LEGALIZING ACTS,
acknowledgment before clerks legalized in Michigan, 802.
acknowledgment of corporations by interested officer validated in North Carolina, 813.
acknowledgment of deed in New York, 812.
Oklahoma, 816.
acknowledgments of notary in Indiana, 794.
Iowa, 795.
North Dakota, 814.
certificates of justice of the peace validated in North Carolina, 813.
conveyances without witnesses validated in Washington, 827.
deed in Alabama, 780.
Connecticut, 786.
Delaware, 787.
deeds acknowledged before registrar of deeds validated in Wisconsin, 829.
defective assessment, 634.
validating, irregularities, 289
unsealed instruments validated in Wisconsin, 829

LEGAL TITLE,
defined, 74.

LEGISLATIVE ENACTMENTS,
inclusion in abstract, 500.

LETTERS,
affecting title, 508.
inclusion in abstract, 500.
probate as wills, 487.

[*References are to Sections.*]

LEVY,
attachment, 553.
execution, 615.
local assessments, 647.

LEX REI SITAE,
affecting validity of execution sale, 611, 613.
governing descent and distribution, 724.
governing devise of real property, 456.
jurisdiction of suits concerning real estate, 650-654.

LIABILITY,
of abstracter for negligence, 15-20.
public officers searching titles, 21.

LICENSES,
defined and construed, 62.
distinguished from easements, 61.

LIENS,
abstracting, 519.
action to enforce, 656.
arising under devises, 526.
under trusts, 532.
assignment of mechanics' liens, 537, 538.
attachment, 523.
decedents' debts, 523.
decrees, 577.
defined and classified, 515.
discharge by judicial sale, 593.
dower right, 521.
duration of judgment lien, 564.
enforcement of mechanics' liens, 538.
equitable, 516.
estate or property subject to mechanics' liens, 536.
formal requisites of judgments to operate as liens, 568.
grantor's or vendor's, 530.
holder of judgment lien as purchaser at tax sale, 638.
in divorce proceedings, 676.
in proceedings to register title under Torrens System, 956.
judgment, 562.
judgment and execution, 522.
judgments dependent upon docketing, indexing and recording, 567.
judgments for taxes, 646.
leases, 529.
liability of abstracter for failure to show, 17.
mechanics', 533.
mortgage, 520.
municipal taxes, 526, 527.
official bonds, 528.
of record should appear in abstract, 5.
operation and effect, 518.
persons bound, 518.
priority of attachment liens, 552.
priority of mechanics' liens, 535.
property covered by judgment, 562.
property or interest liable to judgment lien, 566.
rank and priority of judgment liens, 565.

[*References are to Sections.*]

LIENS—*Continued.*
statutory, 517, 526, 528.
subcontractor's mechanics' lien, 534.
taxes, 632.
territorial extent of judgment lien, 563.
vendee's lien for purchase-money, 531.
when equitable lien arises, 516.

LIFE ESTATES,
charge upon estate of inheritance in various states, 835-884.
conveyance by married women without husbands joining in New Jersey, 810.
interest of grantor subject to descent, 722.
judgment liens, 566.
nature, 49.
with power of disposition devised by will, 472.

LIMITATION OF ACTIONS,
conditional in wills, 475.
effect on adverse possession, 699.
statute does not run against government, 752.
words essential to conditional, 475.
words of purchase and limitations in wills, 464.

LINES OF DESCENT,
defined, 725.

LIS PENDENS,
attachment, 553.
commencement and duration, 547.
doctrine explained, 545.
effect of dismissal of action, 547.
elements necessary, 548.
persons charged with notice, 551.
proceedings to which doctrine applies, 546.
recording, 133.
requisites of valid notice, 550.
statutory provisions for record, 549.

LITHOGRAPHY,
use in will, 487.

LOCAL ACTIONS,
jurisdiction, 656.

LOCAL ASSESSMENTS,
collection by summary methods, 647.
distinguished from taxes, 647.
liens and enforcement, 647.

LOCAL IMPROVEMENTS,
assessments as liens, 527.

LOCAL LAND OFFICE,
form of receipt, 195.
receipt from receiver evidence of title, 195.

LOST INSTRUMENTS,
certificates of registration of title, 959.

[*References are to Sections.*]

LOUISIANA,
statutes governing execution and acknowledgment of deeds, 798.
execution of wills, 908.
statutes of descent, 852.

LOUISIANA PURCHASE,
sources of title, 214.

M

MAGISTRATE,
acknowledgment of deed in Pennsylvania, 818.
Vermont, 825.
acknowledgment of foreign deed accredited in Massachusetts, 801.

MAGNA CHARTA,
provisions as to dower, 65.

MAINE,
statutes governing execution and acknowledgment of deeds, 799.
wills, 909.
statutes of descent, 853.

MAPS,
dedication by maps or plats, 244.
examination of dedications in abstracts, 760.
required to be recorded in some states, 119.

MARITIME WILLS,
in Porto Rico, 930.
witnesses of wills not required of mariners at sea, 890-942.

MARK,
attestation of witness by mark in Georgia, 900.
signature of deeds, 280.
signature of will by mark in Pennsylvania, 928.

MARKETABLE TITLE,
defined, 77.
must appear in abstract, 6.

MARRIAGE,
affidavits to establish, 508.
certificates as proof of birth and legitimacy of children, 740.
conditions in wills restraining marriage, 477.
division of property in suit to annul, 676.
effect to revoke will, 486.
heirs at common law includes only those born in lawful wedlock, 714.
issue of marriage declared null shall be legitimate, 883.
legitimatizing children, 719.
merged interests of mortgagor and mortgagee, 428.
subsequent to execution of will as revocation, 890–942.
Alaska, 891.
terminating power of attorney, 337.

MARRIAGE CONTRACT,
limiting estate by inheritance in Nevada, 862.
Oklahoma, 870.

[*References are to Sections.*]

MARRIED WOMEN,

See COMMUNITY PROPERTY; HUSBAND AND WIFE.

adverse possession acquired of property thereof, 693.
acknowledgment by, 324.
acknowledgment of deed, 284.
capacity to dispose of estate by will in various states, 890–942.
capacity to make will, 457.
capacity to take under will, 458.
conveyances by, 322.
Alabama, 780.
Arizona, 782.
Arkansas, 783.
California, 784.
Colorado, 785.
Connecticut, 786.
Delaware, 787.
District of Columbia, 788.
Florida, 789.
Hawaii, 791.
Idaho, 792.
Illinois, 793.
Indiana, 794.
Iowa, 795.
Kansas, 796.
Kentucky, 797.
Louisiana, 798.
Maine, 799.
Maryland, 800.
Massachusetts, 801.
Michigan, 802.
Minnesota, 803.
Mississippi, 804.
Montana, 806.
Nevada, 808.
New Hampshire, 809.
New Jersey, 810.
New York, 812.
North Dakota, 814.
Ohio, 815.
Oklahoma, 816.
Oregon, 817.
Rhode Island, 819.
South Carolina, 820.
Tennessee, 822.
Utah, 824.
Wisconsin, 829.
conveyances for sole and separate use, 320.
devises to separate use, 479.
dower rights as liens, 521.
effect of execution sale on dower rights, 620.
liability on covenants in joint deed, 322.
lis pendens affecting debt of separate estate, 546.
may acquire title by adverse possession, 694, 697.
may convey property without husband's consent in South Dakota, 821.

[*References are to Sections.*]

MARYLAND,
statutes governing execution and acknowledgment of deeds, 800.
execution of wills, 910.
statutes of descent, 854.

MASSACHUSETTS,
statutes governing execution and acknowledgment of deeds, 801.
execution of wills, 911.
statutes of descent, 855.

MASTER IN CHANCERY,
acknowledgment of deed in Illinois, 793.
Michigan, 802.
New Jersey, 810.
Vermont, 825.
Wisconsin, 829.
acknowledgment of foreign deed accredited in Michigan, 802.
New Jersey, 810.
deed by, 353.
examination of deed in abstract, 756.
report, 664.

MATTER IN PAIS,
examination in abstracts, 771.

MAYOR,
acknowledgment of deeds in Alabama, 780.
Colorado, 785.
Delaware, 787.
Illinois, 893.
Indiana, 794.
Kansas, 796.
Mississippi, 804.
New Jersey, 810.
New York, 812.
North Carolina, 813.
North Dakota, 814.
Ohio, 815.
Pennsylvania, 818.
Rhode Island, 819.
South Dakota, 821.
acknowledgment of foreign deed accredited in Illinois, 793.
Mississippi, 804.
Missouri, 805.
New Jersey, 810.
New York, 812.
Washington, 827.
West Virginia, 828.

MEASUREMENTS,
computation of land areas and distances, 250.
effect of use of words "more or less," 257.
tables of measures and abbreviations, 251.

MECHANICS' LIENS,
See LIENS.

analogy to mortgages, 533.
assertion and enforcement, 538.
assignment, 537.

[*References are to Sections.*]

MECHANICS' LIENS—*Continued.*
contract as basis, 533.
estates or property subject, 536.
examination in abstract, 769.
lapse, 538.
priorities, 535.
priorities with reference to attachments, 552.
statutory, 517.

MEMBER OF LEGISLATURE,
acknowledgment of deed in Indiana, 794.
Minnesota, 803.

MEMORANDA,
affecting title, 508.
inclusion in abstract, 500.

MERGER,
contract for conveyances and deed, 390.
contract to deliver abstract in deed and mortgage, 33.
interests in mortgage, 428.
equitable and legal estate united subject to descent, 722.

MEXICAN GRANTS,
source of title, 214.

MICHIGAN,
statutes governing execution and acknowledgment of deeds, 802.
execution of wills, 912.
statutes of descent, 856.

MILITARY WILLS,
in Porto Rico, 930.

MINERAL LAND GRANTS,
method of transfer of public lands, 182.

MINING CLAIMS,
interest of locater subject to descent, 722.

MINISTERS,
acknowledgment of foreign deed accredited in Alaska, 781.
California, 784.
Connecticut, 786.
Florida, 789.
Hawaii, 791.
Idaho, 792.
Illinois, 793.
Indiana, 794.
Iowa, 795.
Kentucky, 797.
Louisiana, 798.
Maine, 799.
Maryland, 800.
Massachusetts, 801.
Minnesota, 803.
Mississippi, 804.

[*References are to Sections.*]

MINISTERS—*Continued.*
Missouri, 805.
Montana, 806.
Nevada, 808.
New Hampshire, 809.
New Jersey, 810.
New Mexico, 811.
North Carolina, 813.
North Dakota, 814.
Rhode Island, 819.
South Carolina, 820.
South Dakota, 821.
Tennessee, 822.
Texas, 823.
Utah, 824.
Vermont, 825.

MINISTERS EXTRAORDINARY,
acknowledgment of foreign deed accredited in Alaska, 781.
Nebraska, 807.
New York, 812.
Oregon, 817.
Wisconsin, 829.

MINISTERS PLENIPOTENTIARY,
acknowledgment of foreign deed accredited in Alaska, 781.
Nebraska, 807.
New York, 812.
Oregon, 817.
Pennsylvania, 818.
Virginia, 826.
Washington, 827.
West Virginia, 828.
Wisconsin, 829.

MINISTERS RESIDENT,
acknowledgment of foreign deed accredited in Alaska, 781.
Nebraska, 807.
New York, 812.
Oregon, 817.
Virginia, 826.
Wisconsin, 829.

MINNESOTA,
statutes governing execution and acknowledgment of deeds, 803.
execution of wills, 913.
statutes of descent, 857.

MINORS,
See INFANTS.
capacity of married women though minor to execute will in Florida, 899.
descent of estates, 727.

MISNOMER,
devisees in wills, 481.
effect in judgments or decrees, 580.
in summons, waived by appearance, 663.

[*References are to Sections.*]

MISREPRESENTATION,
affecting validity of deeds, 298.

MISSISSIPPI,
statutes governing execution and acknowledgment of deeds, 804.
execution of wills, 914.
statutes of descent, 858.

MISSOURI,
statutes governing execution and acknowledgment of deeds, 805.
execution of wills, 915.
statutes of descent, 859.

MISSOURI DONATION ACT,
source of title, 202.

MISTAKE,
affecting validity of deeds, 298.
in instruments affecting title adversely, 686.

MODIFIED FEES,
defined and construed, 43.

MONTANA,
statutes governing execution and acknowledgment of deeds, 806.
execution of wills, 916.
statutes of descent, 860.

MONUMENTS,
prevail over description, 272.

MORTGAGES,
absolute deed considered, 419.
abstracting mortgage and assignment, 440.
actions to set aside foreclosure, lis pendens, 546.
after-acquired property, 432.
assignment, 436, 437.
assignment and extensions must be recorded, 119.
deed under power of sale, 358.
definition, origin and nature, 415.
description of debt secured or obligation to be performed, 424.
description of parties, 422.
description of premises, 423.
distinguished from other transactions, 418.
constituting waiver of vendors' lien, 530.
conveyances subject to, 316.
correction of errors in record, 435.
covenants, 425, 426.
effect of feudal system, 415.
equitable, 417.
equitable assignments, 439.
equity of redemption, 420.
essentials of decree of foreclosure, 578.
estoppel of mortgagor subsequently acquiring title, 427.
examination of abstract, 757.
extra state foreclosure, 655.
foreclosure by entry and possession, 444.

[*References are to Sections.*]

MORTGAGES—*Continued.*
foreclosure in equity, 447, 674.
foreclosure by power of sale, 446.
foreclosure by writ of entry, 445.
formal requisites, 421.
homestead, 431.
judicial sales under foreclosure, 590.
jurisdiction of actions to foreclose or cancel, 656.
jurisdiction of foreclosure, 654.
legal and equitable theory, 416.
liability of abstracter for failure to show, 17.
liens, 520.
merger of interest, 428.
notice of unrecorded mortgage, 535.
parties as purchasers at tax sale, 638.
payment or discharge, 429.
power of sale contained therein, 442.
precedence with reference to mechanics' liens, 535.
primed by judgment lien, 565.
priority of purchase-money mortgage, 430.
purchase money, 430.
record of certificate of entry on foreclosure, 444.
redemption by bill in equity, 672.
registration, 433.
registration of assignments, 438.
release of record, 443.
termination of lien, 520.
who may enter satisfaction, 443.

MUNICIPAL CORPORATIONS,
adverse title against, 698.
approval and publication of ordinances, 502.
may acquire title by adverse possession, 694.
operations and effect of ordinances, 503.
ordinances affecting title, 501.
power to levy taxes, 630.
resolutions affecting title, 504.
seals on conveyances, 504.
taxes constituting lien, 527.
without inherent power to tax, 630.

MUNIMENTS OF TITLE,
examination in abstracts, 748.
tax deeds, 636.
wills, 678.

MURDER,
capacity of murderer of testator to take under will, 458.

MUTILATION,
effect to revoke will, 486.

MUTUAL WILLS,
validity in California, 894.
Georgia, 900.
Porto Rico, 930.

MYSTIC TESTAMENT,
in Louisiana, 908.

[*References are to Sections.*]

N

NAMES,
abstract must show everything pertaining to names affecting title, 5.
corporation as grantee, 329.
devisees in wills, 481.
effect of error or omission of middle name or initial in judgment, 581.
essentials in deed, 261–263.
parties in decree, 580–582.

NATURALIZATION,
affecting inheritance from aliens, 732.

NEBRASKA,
statutes governing execution of wills, 917.
statutes of descent, 861.
statutes pertaining to execution and acknowledgment of deeds, 807.

NEGROES,
children of negro legitimated, 867.

NEVADA,
statutes governing execution of wills, 918.
statutes of descent, 862.
statutes pertaining to execution and acknowledgment of deeds, 808.

NEW ENGLAND ABSTRACTS,
form followed by English abstracters, 166.

NEW HAMPSHIRE,
statutes governing execution of wills, 919.
statutes of descent, 863.
statutes pertaining to execution and acknowledgment of deeds, 809.

NEW JERSEY,
statutes governing execution of wills, 920.
statutes of descent, 864.
statutes pertaining to execution and acknowledgment of deeds, 810.

NEW MEXICO,
statutes governing execution of wills, 921.
statutes of descent, 865.
statutes pertaining to execution and acknowledgment of deeds, 811.

NEW MEXICO DONATION ACT,
source of title, 202.

NEW YORK,
statutes governing execution of wills, 922.
statutes of descent, 866.
statutes pertaining to execution and acknowledgment of deeds, 812.

NEXT OF KIN,
defined, 729.
inheritance of property in various states, 835–884.
not included in descendant, 713.

[*References are to Sections.*]

NONRESIDENT,
acquisition of title, by adverse possession, 694.
by descent in Iowa, 849.
Montana, 860.

NORTH CAROLINA,
statutes governing execution of wills, 923.
statutes of descent, 867.
statutes pertaining to execution and acknowledgment of deeds, 813.

NORTH CAROLINA GRANTS,
source of title, 202.

NORTH DAKOTA,
statutes governing execution of wills, 924.
statutes of descent, 868.
statutes pertaining to execution and acknowledgment of deeds, 814.

NORTHWEST TERRITORY,
source of title, 180, 181, 202.

NOTARY PUBLIC,
acknowledgment after expiration of commission legalized in Indiana, 794.
acknowledgment of deeds in Alabama, 780.
in Alaska, 781.
in Arizona, 782.
in Arkansas, 783.
in California, 784.
in Colorado, 785.
in Connecticut, 786.
in Delaware, 787,
in District of Columbia, 788.
in Florida, 789.
in Georgia, 790.
in Hawaii, 791.
in Idaho, 792.
in Illinois, 793.
in Indiana, 794.
in Iowa, 795.
in Kansas, 796.
in Kentucky, 797.
in Louisiana, 798.
in Maine, 799.
in Maryland, 800.
in Massachusetts, 801.
in Michigan, 802.
in Minnesota, 803.
in Mississippi, 804.
in Missouri, 805.
in Montana, 806.
in Nebraska, 807.
in Nevada, 808.
in New Hampshire, 809.
in New Mexico, 811.
in New York, 812.
in North Carolina, 813.
in North Dakota, 814.

[*References are to Sections.*]

NOTARY PUBLIC—*Continued.*
in Ohio, 815.
in Oklahoma, 816.
in Oregon, 817.
in Pennsylvania, 818.
in Rhode Island, 819.
in South Carolina, 820.
in South Dakota, 821.
in Tennessee, 822.
in Texas, 823.
in Utah, 824.
in Vermont, 825.
in Virginia, 826.
in Washington, 827.
in West Virginia, 828.
in Wisconsin, 829.
in Wyoming, 830.
acknowledgment of foreign deed accredited in Alaska, 781.
in California, 784.
in Connecticut, 786.
in District of Columbia, 788.
in Florida, 789.
in Idaho, 792.
in Illinois, 793.
in Massachusetts, 801.
in Maryland, 800.
in Michigan, 802.
in Minnesota, 803.
in Missouri, 805.
in Nebraska, 807.
in Nevada, 808.
in New Mexico, 811.
in New Jersey, 810.
in North Dakota, 814.
in Oregon, 817.
in South Dakota, 821.
in Tennessee, 822.
in Texas, 823.
in Utah, 824.
in Washington, 827.
in Wisconsin, 829.

NOTES,
inclusion in abstract, 500.

NOTICE,
actual, 127.
in second degree, 127.
application for order of sale in probate court, 602.
application for registry of title, 952.
under Torrens system, 956.
basis of jurisdiction, 652.
constructive, 129.
not affected by destruction of records, 138.
of contents of judgments, 580.
doctrine defined, 126.
effect of record of conveyance duly made, 125–129.

[*References are to Sections.*]

NOTICE—*Continued.*
essential of mechanics' lien, 538.
filing for record as notice, 118.
implied, 128.
of assignment of mortgage, 438.
of attachment, 553.
of authority of trustee, 338.
of equitable proceedings, 657.
of execution sale, 616.
of lis pendens, 545, 549, 550.
of purchaser under state patents, 753.
persons charged with notice of lis pendens, 551.
possession, 692.
of mortgaged property, 434.
probate of foreign wills, 493.
proceedings for registration of title, 962.
proof of publication and notice, 617.
purchaser at judicial sale, 592.
record of mortgage constituting, 433.
registration of transaction as notice, 951.
to agent, 128.
to corporation, 128.
to husband or wife, 128.
to partnership, 128.
unrecorded mortgages, 127, 535.
when lis pendens operative, 547.

NUNCUPATIVE WILLS,
by public act and private signature in Louisiana, 908.
in various states, 890–942.

NUISANCES,
municipal lien for removal, 527.

O

OCCUPANCY,
acquisition of title, elements, 92, 107.

OFFICERS,
acknowledgment of deed in Delaware, 787.
bond creating lien, 528.
in military service may acknowledge deeds accredited in Illinois, 793.

OFFICIAL BONDS,
lien, 528.
necessity of filing, 528.

OFFICIAL CERTIFICATE,
defined, 505.
inclusion in abstract, 500.

OFFICIAL CONVEYANCES,
transfers constituting, 345–364.

OHIO,
statutes governing execution of wills, 925.
statutes of descent, 869.
statutes pertaining to execution and acknowledgment of deeds, 815.

[*References are to Sections.*]

OKLAHOMA,
statutes governing execution of wills, 926.
statutes of descent, 870.
statutes pertaining to execution and acknowledgment of deeds, 816.

OLOGRAPHIC TESTAMENT,
in Louisiana, 908.

OLOGRAPHIC WILLS,
in various state, 890–942.

OPEN TESTAMENT,
in Louisiana, 908.

OPERATIVE WORDS,
of deed described, 267.
of will, 463.
priority, in deed, 273.

OPINIONS,
as to legal effect of instruments not necessary to appear in abstract, 5.
of title by examiner, 773.

ORDERS,
confirmation of judicial sales, 596.

ORDINANCE OF 1787,
source of title, 181.

ORDINANCES,
approval and publication, 502.
essentials to validity, 501.
inclusion in abstract, 501.

OREGON,
statutes governing execution of wills, 927.
statutes of descent, 871.
statutes pertaining to execution and acknowledgment of deeds, 817.

OREGON DONATION ACT,
source of title, 202.

ORIGINAL WRIT,
See PROCESS, 658.

P

PARCHMENT,
deed may be written upon in Alabama, 780.

PARENTS,
inheritance, estate of intestate, 731.
property in different states, 835–884.

PARISH RECORDER,
acknowledgment of deed in Louisiana, 798.

[*References are to Sections.*]

PAROL EVIDENCE,
inadmissible to remove cloud from title, 6.

PARTIES,
description in mortgage, 422.
hearing on application for registration under Torrens system, 956.
lis pendens as notice, 551.
names and description in deed, 261.
proceedings for sale in probate court, 602.
guardians ad litem, 571.
registration of title, 952.
suit for rescission or cancellation, 673.
to foreclose suit, 674.

PARTITION,
elements of action for, 670.
judicial sale to effectuate, 590.
jurisdiction where land in other counties, 654.
voluntary partition deeds, 327.

PARTNERSHIPS,
conveyances to and by, 328.
interest of deceased therein subject to descent, 722.
right to acquire title to public lands, 183.

PARTY WALLS,
agreements affecting title, 507.
inclusion in abstract, 500.
record, 507.
contracts must be recorded, 119.

PATENTS,
construction, operation and effect, 226–228.
defined and requisites, 220–222.
delivery, acceptance and recording, 223.
effect, 182, 185.
from federal government, form and effect, 752.
from government source of title, 181.
from king of England, source of title, 181.
from state government, 753.
issued after death of claimant, 225.
rescission, cancellation and correction, 229.
source of title, 220–230.
validity, 224.

PAYMENT,
indebtedness to principal, defeat of sub-contractors' lien, 534.
of mortgage, 429.

PENNSYLVANIA,
statutes governing execution of wills, 928.
statutes of descent, 872.
statutes pertaining to execution and acknowledgment of deeds, 818.

PER CAPITA,
distribution of estate by inheritance, 710, 717.
inheritance of property in various states, 835–884.

[*References are to Sections.*]

PERPETUITIES,
created by wills, 482.

PERSONS,
capacity to execute wills in various states, 890–942.
capacity to hold under wills in various states, 890–942.
devisee in will, how named, 481.
who may acquire title by adverse possession, 694.

PERSONAL PROPERTY,
interest transferred by wills in various states, 890–942.
subject to descent, 722.

PERSONAL SERVICE,
See SERVICE.
affecting decree, 576.

PER STIRPES,
descent of real property in Alabama, 835.
distribution of estate by inheritance, 710, 717.
inheritance of next of kin in certain states, 729.

PETITION,
judicial sales in probate courts, 602.

PHILIPPINE ISLANDS,
statutes governing execution of wills, 929.

PLATS,
dedication by maps or plats, 244.
examination of dedications in abstracts, 760.
of public lands, 235–244.
of subdivisions, 239–244.
required to be recorded in some states, 119.
vacation, 243.

PLEADING,
in action of partition, 670.

POLICE JUSTICE,
acknowledgment of deed in Mississippi, 804.
in Wisconsin, 829.

POLICE POWER,
municipality in levy of taxes, 631.

PORTO RICO,
statutes governing execution of wills, 930.

POSSESSION,
actual, necessary to affect title, 689.
adverse to owner, 685, 687.
affecting right to register titles, 952.
constituting notice, affecting title, 692.
constructive, may affect title, 690.
estates in possession defined and classified, 41.
necessary to action of ejectment, 668.
necessary to action of partition, 670.

[*References are to Sections.*]

POSSESSION—*Continued.*
necessary in ancestor to transmit lands by inheritance, 707.
of mortgaged property as notice, 434.
plaintiff in action therefore can not be required to furnish abstract, 28.
possessor not necessary to appear in abstract, 5.
taking possession to perfect title, 691.
transferred by will, 470.
waiver of objection to title by taking possession, 34.

POSTHUMOUS CHILDREN,
birth operating as revocation of will in various states, 890–942.
inheritance, 721, 728.
in various states, 835–884.

POWERS,
defined, construed and classified, 60.
distinguished from estate, 60.
distinguished from trust, 60.

POWER OF ATTORNEY,
conditions operating as revocation, 337.
effect on title, 500.
examination of deed executed thereunder, 759.
ratification and revocation, 337.
registered in county where land is located, 124.
revocation must be recorded, 119.
to convey land, 336.
to husband or wife to execute deed in Oregon, 817.

POWER OF SALE,
contained in mortgage or deed of trust, 442.
form of foreclosure of mortgage, 446.

PRAYER,
measure of relief granted by decree, 575.

PREAMBLE,
omission of preamble of will from abstract, 489.

PRECATORY WORDS,
effect to create testamentary trust, 480.
in wills, 463.

PRE-EMPTION,
contracts and conveyances before entry, 198.
method of transfer of public lands, 182.
source of title, 196, 197.

PREMISES,
defined and construed, 45.
formal parts of deed, 260.
priority over habendum in deeds, 274.

PRESCRIPTION,
acquisition of profits a prendre by prescription, 63.
acquisition of title, elements, 92, 102.
acquisition of title adverse to registered owner, 951.

[*References are to Sections.*]

PRESIDENT OF COMMON PLEAS,
acknowledgment of deed in Pennsylvania, 818.

PRESIDENT OF COUNTY COURT,
acknowledgment of deed in West Virginia, 828.

PRESUMPTION,
compliance with law in making execution sale, 611.
existence of vendors' lien, 530.
jurisdiction, 650.
payment of mortgage, 429.
pertaining to judicial sale, 600.
proper execution of municipal conveyance, 504.

PRETERMITTED CHILDREN,
right to inherit, 720.

PRIME MERIDIANS,
located, 236.

PRINCIPAL AND AGENT,
agent as purchaser at tax sale, 638.

PRINTING,
of wills, 487.
requirement of deed in Alabama, 780.

PRIORITY,
attachment liens, 552.
judgment liens, 565.
jurisdiction of action to declare a prior lien, 656.
liability of abstracter for failure to show prior deeds, 17.
mechanics' liens, 535.
purchase-money mortgage, 430.

PRIVATE LAND CLAIMS,
source of title, 214.

PRIVILEGES,
easements and servitudes, 506.

PROBATE,
abstracting, 494.
actions to set aside, lis pendens, 546.
decree, 492, 583.
effect as notice of liens, 525.
effect on title, 492.
effect on will, 486.
ex parte probate, 492.
foreign probate, 584.
foreign wills, 493.
jurisdiction, 491.
meaning of term, 491.
necessity, 491.
proof of probate of will in abstract, 489.
steps in proceeding, 493.
wills, 491.
in various states, 890–942.
not required by common law, 491.

[*References are to Sections.*]

PROBATE COURTS,
jurisdiction of partition of land in other counties, 654.
jurisdiction of suits concerning real estate, 653.
operation and effect of decree, 583.
presumption pertaining to judicial sale, 600.
sales under orders and decrees thereof, 601.

PROCEDURE,
attachment, 553.
judicial sales in probate courts, 602.

PROCESS,
affidavits for publication, 576.
constructive service, 576.
defined, 658.
effect of appearance without process, 663.
effect of misnomer, 659.
form and purpose of summons, 659.
return and proof of service, 662.
service, 660, 661.
in proceedings for registration of title, 962.
style and contents, 659.
summons used in place of original writ and subpœna, 658.
validity of decree dependent upon service, 576.
waiver by appearance, 671.

PROFITS,
transferred by will, 470.

PROFITS A PRENDRE,
defined and construed, 63.
distinguished from easement, 61.

PROOF,
See EVIDENCE.
of birth or legitimacy of children, 740.
of death of ancestor, 739.
of heirship, 738.
service of process, 662.

PROPERTY,
right of, created by lien, 518.
subject to descent, 722.
subject to mechanics' liens, 536.
subject to taxation, 631.

PROTHONOTARY,
acknowledgment of deed in West Virginia, 828.

PROVOST,
acknowledgment of foreign deed accredited in New York, 812.

PUBLICATION,
notice of execution sale, 616.
of process, 661.
ordinance, 502.
proof in execution sales, 617.

[*References are to Sections.*]

PUBLIC HIGHWAY GRANTS,
method of transfer of public lands, 182.
source of title, 213.

PUBLIC LANDS,
acts of congress grading prices, 199.
ceded to confederation, source of title, 180.
interest in settlement claims subject to descent, 722.
methods of transfer under government land laws, 182.
receivers' receipt not necessary in abstract, 751.
source of title, 180.
subject to private entry, 193.
who may acquire title to, 183.

PUBLIC LAND OFFICE,
certificate of receiver source of title, 181.

PUBLIC OFFICER,
liability for searching titles, 21.

PUBLIC POLICY,
conditions in wills against alienation, 478.
gifts in restraint of marriage, 477.
void conditions in wills, 462.

PUBLIC PROPERTY,
mechanics' liens, 536.

PUBLIC RECORDS,
abstractors use thereof, 137.
books in which instruments must be recorded, 121.
constitute notice, 118.
defined and requirements, 115.
delivery to proper officer deemed record, 117.
effect of record duly made, 125.
effect of recording instrument not required to be recorded, 118.
filing deemed record, 117.
general index, 131.
as part of record, 132.
index of judgment records, 134.
instruments which may be recorded, 119.
loss or destruction, 138.
object of recording acts, 118.
of attachment and lis pendens, 133.
officer to receive instrument for recording, 116.
official tract index, 130.
of tax deeds, 135.
place of recording, 124.
power of attorney must be registered in county where land is located, 124.
proper execution and acknowledgment prerequisite, 120.
style of office under which recording was done, 116.
time allowed for recording deed and other instruments, 123.
time of recording, 122.
what constitutes recording, 117.
who may record deed, 119.

PUBLIC SALE,
transfer by, 190.
public lands, 182.

[*References are to Sections.*]

PURCHASE,
mode of acquiring title, 85.
title by purchase classified, 92.
words of purchase and limitation in wills, 464.

PURCHASE-MONEY,
liens, 516, 530.
created by contract, 530.
vendees' implied lien, 531.

PURCHASER,
of land adversely held, 692.
rights at judicial sale, 593.
refusal to complete purchase, 595.
title under judicial sale, 592.

Q

QUIA EMPTOR,
affecting transfer of land, 415.

QUIET ENJOYMENT,
covenant of, in deed, 278.

QUIETING TITLE,
jurisdiction of action, 656.
service of process by publication, 661.

QUITCLAIM,
may create fee simple estates, 45.

R

RAILROAD GRANTS,
method of transfer of public lands, 182.
source of title, 212.

RAILROADS,
acquisition of adverse title to right of way, 693.

RATIFICATION,
of conveyance must be recorded, 119.
of power of attorney, 337.

REAL ESTATE,
actions and proceedings affecting titles, 650-678.
affected by judgment or decree of foreign court, 584.
doctrine of lis pendens affecting actions and suits, 546.
estates defined and distinguished, 40.
exemption from judgments, 572.
interest transferred by wills in various states, 890-942.
location determining jurisdiction of suits concerning, 650-656.
probate procedure to sell, 602.
sale for taxes, 646.
subject to descent, 722.
in various states, 835-884.
words used to pass, in wills, 467.

[*References are to Sections.*]

RECEIVER OF LAND OFFICE,
See Local Land Office.

RECEIPTS,
affecting title, 508.

RECEIVERS,
in bankruptcy, 382.

RECITALS,
in deeds, 273.
in deeds by officials, 346.
by sheriffs, 347, 348.
priority, in deeds, 273.

RECORDER,
acknowledgment of deed in Colorado, 785.
in District of Columbia, 788.
in Idaho, 792.
in Indiana, 794.
in Rhode Island, 819.
in West Virginia, 828.

RECORDING INSTRUMENTS,
deed in English language admitted to record in Indiana, 794.

RECORDS,
abstract should contain full summary, 5.
abstracts where records destroyed, 29.
correcting errors and re-record, 288.
correction of errors in record of mortgage, 435.
judgment, 567.
of assignment of mortgages, 438.
of certificate of entry on foreclosure, 444.
of contract for conveyances, 394.
of equitable proceedings as notice, 657.
of mortgages, 433.
of official bonds, 528.
of vendors' lien, 530.
of wills in various states, 890-942.
party wall agreements, 507.
priority of record, 287.
proof of death of ancestor, 739.
proof of heirship, 738.
registration and certificate of title, 969.
release of mortgage, 443.
statutory provisions concerning lis pendens, 549.
vendee's lien, 531.

REDEMPTION,
from tax sale, 640.
of mortgages, 420.

REDDENDUM,
formal part of deed, 260.

[*References are to Sections.*]

REFEREES,
See MASTER IN CHANCERY.
appointment and jurisdiction, 664.
deed by, 353.
verdict, 665.

REGISTER IN CHANCERY,
acknowledgment of deeds in Alabama, 780.

REGISTER OF DEEDS,
acknowledgment of deed in Kansas, 796.
in Minnesota, 803.
in New Jersey, 810.
in North Dakota, 814.
in Pennsylvania, 818.
in South Dakota, 821.
acknowledgment of foreign deed accredited in North Dakota, 814.
in South Dakota, 821.

REGISTER OF LAND OFFICE,
See LOCAL LAND OFFICE.

REGISTER OF PROBATE,
acknowledgment of deed in Vermont, 825.

REGISTRAR,
acknowledgment of deed in Illinois, 893.
title under Torrens system, 954.

REGISTRATION,
See PUBLIC RECORDS.
adverse possession of registered land, 960.
conclusiveness of certificate of registration of title, 958.
constitutionality of laws for registration under Torrens system, 962.
general principles of registration of title, 954.
notice of application under Torrens system, 956.
of deed, 287, 288.
in Alabama, 780.
of title under Torrens system, 950–962.
purpose and advantage, 953.
subsequent conveyances appearing on registry, 959.
withdrawal of land from registration, 952.

RELATION,
effect upon deeds or title, 101.

RELEASE,
common-law deed of release, 306.
examination of deed of release in abstract, 758.
inclusion in abstracts, 500.
of dower form, 325.
of instrument by partner must be recorded, 119.
of mortgage of record, 443.

RELIGIOUS SOCIETIES,
devises thereto limited in Georgia, 900.
in New York, 922.

[*References are to Sections.*]

REMAINDER,
adverse title against remaindermen, 695.
elements of estate, 468.
interest of remaindermen subject to descent, 722.

RENTS,
transferred by will, 470.

REPRESENTATION,
distribution of estate of inheritance, 710, 711.
in various states, 835-884.

REPUGNANCY,
construction in wills, 461.
in deed, construction, 291.
property in wills, 460.

RESCISSION,
requirements of decree, 673.

RESERVATIONS,
in deeds, 275.
operation, 506.
vendor's liens, 530.

RESIDENCE,
applicant for registration under Torrens system, 951.

RESIDUARY DEVISES,
creation and scope, 485.

RESOLUTION,
municipal, inclusion in abstract, 500.
nature and effect, 504.

RESTRAINT OF MARRIAGE,
devises, 477.

RESTRICTIONS,
use of land in deeds, 277.

RESULTING TRUSTS,
See TRUSTS.

RETURN,
execution sale, 615.
service of process, 662.

REVERSION,
adverse title against reversioner, 695.
interest of reversioner subject to descent, 722.
of gift to donor on default of issue of donee, 848.

REVIEW,
proceedings for registration of title, 962.

[*References are to Sections.*]

REVIVAL,
lapsed mechanics' liens, 538.

REVOCATION,
governed by lex rei sitae, 456.
implied by birth of children after execution of will, 720.
of power of attorney, 337.
of trusts, 340.
of wills, 486.

RHODE ISLAND,
statutes governing execution of wills, 931.
statutes of descent, 873.
statutes pertaining to execution and acknowledgment of deeds, 819.

RIGHTS OF WAY,
creation, 506.

RIGHT TO CONVEY,
covenant of, in deed, 278.

RIPARIAN LANDS,
acquisition of title, 104.

ROOT OF TITLE,
examination should refer thereto, 8.

RULE IN SHELLEY'S CASE,
application, 465, 466.
applies to devise of lands in Kansas, 906.
execution of devise, 456.

S

SALES,
See Execution Sales; Judicial Sales; Tax Sales.
equitable conversion, 484.
examination of official sales in abstracts, 761-764.
method of transfer of public lands, 182
mortgaged property considered equitable assignment, 439.
tax sales, 636.

SAMOA,
deeds acknowledged therein accredited in District of Columbia, 788.

SANITY,
qualification of testator in various states, 890-942.

SATISFACTION,
judgments, 573.

SATISFACTION OF MORTGAGE,
See Release.

SCHOOL CERTIFICATES,
mortgages must be recorded, 119.

[*References are to Sections.*]

SCHOOL LAND GRANTS,
method of transfer of public lands, 182.
source of title, 208, 209.

SCRIP,
location certificates as source of title, 203.

SEALS,
abolished in New Mexico except for corporations, 811.
conveyances executed under seal in some states entitled to public record, 120.
deeds, 281.
Alaska, 781.
Arizona, 782.
Connecticut, 786.
Florida, 789.
Georgia, 790.
Hawaii, 791.
Idaho, 792.
Illinois, 793.
Indiana, 794.
Iowa, 795.
Kansas, 796.
Maine, 799.
Maryland, 800.
Massachusetts, 801.
Michigan, 802.
Minnesota, 803.
Missouri, 805.
Montana, 806.
Nevada, 808.
New Hampshire, 809.
New Jersey, 810.
New York, 812.
North Carolina, 813.
North Dakota, 814.
Oklahoma, 816.
Oregon, 817.
Pennsylvania, 818.
Rhode Island, 819.
South Carolina, 820.
Tennessee, 822.
Vermont, 825.
Virginia, 826.
Washington, 827.
West Virginia, 828.
Wisconsin, 829.
indication in abstract, 6.
municipality on conveyances, 504.
necessary to authorize conveyance by attorney in fact, 335.
not required in Mississippi except for corporations, 804.
not required to deed in Alabama, 780.
on conveyance of land in Illinois, 893.
on conveyances by private corporation, 332.
on conveyances by public corporation, 332.
of foreign deed accredited in Alaska, 781.
Louisiana, 798.
Nebraska, 807.

[*References are to Sections.*]

SEALS—*Continued.*
private abolished except for corporations in Missouri, 805.
Ohio, 815.
Minnesota, 803.
Nebraska, 807.
Tennessee, 822.
Texas, 823.
Wyoming, 830.
private seal not required in North Dakota, 814.
Utah, 824.
validation of unsealed deed in Connecticut, 786.
Illinois, 793.
what constitutes in Oregon, 817.
Virginia, 826.
West Virginia, 828.
Wisconsin, 829.

SEALED INSTRUMENTS,
distinction between sealed and unsealed instruments abolished in Oregon, 817.
California, 784.
Idaho, 792.
prima facie in Alabama, 780.
when required, 93.

SECRETARY OF LEGATION,
acknowledgment of foreign deeds accredited in District of Columbia, 788.
Illinois, 793.
Iowa, 795.
Kentucky, 797.
Louisiana, 798.
Mississippi, 804.
New York, 812.
North Dakota, 814.
Washington, 827.

SECRETARY OF FOREIGN AFFAIRS,
acknowledgment of foreign deed accredited in Kentucky, 797.

SECRETARY OF STATE,
acknowledgment of deed in Kentucky, 797.

SECTIONS,
laying off townships into sections, 237.

SEISIN,
ancestor essential to estate by inheritance, 709.
covenant, in deeds, 278, 279.

SENATORS,
acknowledgment of deed in Rhode Island, 819.

SERVICE,
process, 660-662.
publication in newspapers, 661.
return and proof, 662.
substituted service, 660.

[*References are to Sections.*]

SERVITUDES,
affecting title, 506.
distinguished from easements, 500.
inclusion in abstract, 500.

SEVERALTY,
estates defined and classified, 41.

SHELLEY'S CASE,
See RULE IN SHELLEY'S CASE.

SHERIFFS,
See EXECUTION SALES.
examination of deed in abstract, 756.

SIGNATURE,
contract for conveyances, 393.
deeds, 280.
mortgage of homestead, 431.

SISTERS,
in collateral line of kindred, 728.
inheritance of property in different states, 835-884

SLATE,
validity of will written upon, 487.

SOLEMN FORM,
probate of will, 491.

SOLDIERS,
provisions requiring witnesses of wills do not apply to soldiers in service, 890-942.

SOUTH CAROLINA,
statutes governing execution and acknowledgment of deeds, 820.
execution of wills, 932.
statutes of descent, 874.

SOUTH DAKOTA,
statutes governing execution and acknowledgment of deeds, 821.
execution of wills, 933.
statutes of descent, 875.

SPANISH GRANTS,
source of title, 214.

SPECIAL APPEARANCE,
does not waive jurisdiction, 663.

SPECIAL ASSESSMENTS,
distinguished from taxes, 647.
liability of abstracter for failure to show, 17.
not taxes, 630.

SPECIAL COMMISSIONERS,
See COMMISSIONERS.

[*References are to Sections.*]

SPECIFIC DEVISES,
lapse, 483.

SPECIFIC PERFORMANCE,
action for, defined, 671.
application of lis pendens, 546.
contract of sale of real estate, reference to master, 664.
form of abstract, 666.
jurisdiction, 656.
jurisdiction of actions to enforce, 656.
mandatory injunction issued, 667.

SPENDTHRIFTS,
examination of sales thereby in abstracts, 764.
trusts provided for in Arizona, 892.

STATES,
abolition of survivorship, 326.
adoption of Torrens system, 950.
adverse title against, 698.
disposal of state lands, 185.
in which after-acquired property is subject to judgment lien, 566.
in which common-law doctrine of mortgages exists, 416.
in which common-law doctrine of mortgages has been abrogated, 416.
in which foreclosure of mortgage is effected by entry, 444.
in which foreclosure of mortgage is effected by writ of entry, 445.
in which joint tenancies do not exist, 326.
may acquire title by adverse possession, 694.
methods of computing degrees of kindred, 726.
when state acquires title to public lands, 184.
where trial by jury required for registration of title, 952.

STATUTES,
constitutionality of acts establishing Torrens system, 962.
controlling execution of wills, 705.
effect of foreign probate decree, 584.
creating tax liens, 632, 633.
descent and distribution, 717.
descent in various states, 835-884.
determining duration of judgment lien, 564.
determining liability of decedent's estate to debts, 602.
execution and acknowledgment of deeds, 780-830.
governing descent of property, 724.
governing rights of pretermitted children, 720.
legitimation of children, 719.
lien created, 517.
making tax deeds evidence of title, 644, 645.
may determine capacity to make will, 457.
prescribing form and statute for tax deed, 643.
provisions concerning judgments against infant, 571.
providing for condemnation proceedings, 677.
provisions for service by publication, 661.
registration of title under Torrens system, 950–952.

STATUTES OF DESCENT,
inheritance of kindred of the half-blood, 730.

[*References are to Sections.*]

STATUTE OF FRAUDS,
affecting contract for conveyances, 393.
provisions for signature, 280.

STATUTE OF LIMITATIONS,
affecting judgment for taxes, 646.

STATUTE OF USES,
affecting common-law deeds in futuro, 311.
affecting deeds, 305.

STATUTORY LIENS,
debts of decedent, 524.
defined, 515.
divestiture by legislature, 517.
dower rights, 521.
judgments, 522, 562.
lis pendens, 546-551.
mechanics' liens, 533.
municipal taxes, 527.
necessity of strict compliance with statute, 517.
sub contractors, 534.
taxes, 526.

STREETS,
local assessments as liens, 527.
ordinances affecting, 501.

STRICT CONSTRUCTION,
statutes creating liens, 517.

SUBCONTRACTORS' LIENS,
defeat by payment to principal contractor, 534.
statutory, 534.

SUBDIVISIONS,
public lands, 238-244.
townships and sections, 237, 238.
plats, 239-242.

SUBPOENA,
See PROCESS.

SUBSCRIPTION,
distinguished from signature in deeds, 280.

SUBSTITUTED SERVICE,
See SERVICE.

SUIT IN EQUITY,
decree, 561.
doctrine of lis pendens, 546.

SUMMONS,
See PROCESS.

SUPPORT,
condition subsequent in will, 474.
devise, charged with payment, 473.
effect of recommendation in will, 473.
provision by testamentary trust, 480.

[*References are to Sections.*]

SURRENDER,
common-law deed of surrender, 308.

SURROGATE,
acknowledgment of deed in Illinois, 893.
New Jersey, 810.
New York, 812.

SURVEYOR'S FIELD NOTES,
conclusiveness, 147.
in public land office, 147.

SURVEYS,
boundary survey source of title, 181.
historical summary, 235.
laying off land into townships, 236.
public land, 235-244.
townships into sections, 237.
subdividing sections, 238.

SURVIVOR,
acknowledgment of deed in Mississippi, 804.
dower and curtesy abolished in Connecticut, 786.
Maine, 799.
inheritance of property in different states, 835-884.
right in decedent's property in lieu of dower and curtesy, 799.
right of descent to property in Nebraska, 807.
right of curtesy upon death of wife in Arkansas, 783.
right of husband in property of wife in lieu of curtesy in Kentucky, 797.
rights regulated by statutes, 716.
right to decedent's property in Ohio, 815.
right to fee simple title to one-third in lieu of dower in Iowa, 795.
right to fee simple title of one-half of decedent's property in Connecticut, 786.
right to property incumbered with purchase-money lien in Minnesota, 803.
right to property of deceased husband or wife in Utah, 824.
sponse as heir, 716.

SURVIVORSHIP,
doctrine declared contrary to public policy, 326.

SWAMP LAND GRANTS,
method of transfer of public lands, 182.
source of title, 207.

SYNOPSIS,
form of probate of will, 490.

T

TABLES,
of measures and abbreviations, 251.

TACKING,
possession to affect title, 691.

[*References are to Sections.*]

TAXES,
assessment, 634.
assessment roll, 634, 635.
assignment of certificates of purchase, 641.
collateral attack on judgment, 646.
collection by forfeiture, 637.
deed, 642-644.
abstracting, 643.
evidence and support of title, 644.
requirements and formal parts, 642, 643.
when indexed is deemed recorded, 135.
defined, 630.
equality, 630.
exemptions, 631.
form of forfeiture for nonpayment, 637.
incumbrance within covenant against incumbrances, 526.
judgment for taxes, 646.
legislation to strengthen tax titles, 645.
liens, 526, 632.
statutory, 517.
merger of lien in judgment, 646.
of abstract books, 36.
payment of taxes evidence of adverse possession, 700.
power of municipal corporations to impose, 631.
priority of lien, 633.
property subject, 631.
right to fruits—pending redemption from tax sale, 640.
sales, see TAX SALE.
superiority of taxes over local assessments, 527.
tax not a debt in ordinary meaning of term, 630.
tax titles, 633.

TAX SALE,
certificate of purchase, 641.
examination in abstract, 763.
index, 152.
index form, 152.
liability of abstracter for failure to show, 17.
persons who may redeem, 640.
redemption, 640.
requisites, 636.
rights of purchaser, 638, 639.
strict compliance with law in tax sales, 636.
title of purchaser, 639.
who may be purchaser, 638.

TAX TITLES,
defined, 633.

TECHNICAL TERMS,
controlled by intention of parties, 290.
in creation of trusts, 338, 339.
value, 290.

TENANTS,
in common requisites of deed to create fee simple estates, 45.

TENDER,
of abstract after expiration of agreed time, 32.

[*References are to Sections.*]

TENENDUM,
formal part of deed, 260.

TENNESSEE,
statutes governing execution of wills, 934.
statutes of descent, 876.
statutes pertaining to execution and acknowledgment of deeds, 822.

TERRITORIES,
acknowledgment of deed accredited in Colorado, 785.
in Arkansas, 783.
in Connecticut, 786.
in District of Columbia, 788.
in Delaware, 787.
in Idaho, 792.
in Illinois, 893.
in Montana, 806.
in New York, 812.

TESTAMENTS,
See WILLS.

TESTAMENTARY TRUSTS,
creation and essentials, 480.

TESTIMONIUM CLAUSE,
formal part of deed, 260.

TEXAS,
statutes governing execution of wills, 935.
statutes of descent, 877.
statutes pertaining to execution and acknowledgment of deeds, 823.

TIMBER CULTURE CLAIMS,
method of transfer of public lands, 182.
source of title, 206.

TIMBER LANDS,
private purchase as source of title, 205.

TIME,
duration of judgment lien, 564.
duration of lis pendens, 547.
filing notice of mechanic's liens, 538.
fractions of days in filing instruments for record, 8.
must be given in which to examine abstract, 35.
of adverse possession affecting title, 687, 699.
of redemption from tax sale, 640.
publication of process in newspaper, 661.
when title vests in purchaser at execution sale, 613.

TITLE,
acquired by wills, 450, 451.
adverse possession of registered land, 960.
affected by action of partition, 670.
affected by action to quiet, 669.
affected by affidavits, 509.
affected by assignment of dower, 675.

[*References are to Sections.*]

TITLE—*Continued.*
affected by construction of will, 678.
affected by divorce proceedings, 676.
affected by ejectment, 668.
affected by foreclosure of mortgage in equity, 674.
affected by injunctions, 667.
affected by letters, receipts and memoranda, 508.
affected by municipal ordinances, 501.
affected by official certificate, 505.
affected by redemption by bill in equity, 672.
affected by report of master in chancery, 664.
affected by rescission or cancellation of instruments, 672.
affected by servitude, 506.
affected by suit for specific performance, 671.
affected by unrecorded evidence, 510.
allodial, 72.
bad, defective, imperfect and doubtful, 76.
by abandonment, 92.
by accretion, 92.
by adverse possession, 92.
by alienation, 92.
by deed of grant, 92.
by descent, 705-741.
by descent based on laws of inheritance, 86.
by devise, 92.
by escheat, 92.
by estopel, 92.
by forfeiture, 92.
by grant for internal improvement, 210.
by grants for public highways, 213.
by guardians' deed, 362.
by land grants to railroad, 212.
by legislative grant, 186-189.
by occupancy, 92.
by prescription, 92.
by private deed, 93.
by private entry, 191, 192.
by public sale, 190.
by purchase other than alienation, 92.
by school land grants, 208, 209.
by swamp land grants, 207.
by town site entry, 215, 216.
by trustee's deed, 357.
certificate of purchase at tax sale, 641.
color of title, 73.
complete, perfect, good and clear, 74.
condemnation proceedings affecting, 677.
conditions amounting to adverse title, 685–700.
conveyance by ordinance, 503.
defined and distinguished, 70.
derived from aliens, 732.
desert land entries as source, 204.
devolution of real property to heirs, 723.
donations by Congress, 202.
easement affecting title, 506.
effect of error in registration, 287.
estates to which title relates, 71.

[*References are to Sections.*]

TITLE—*Continued.*
estoppel of mortgagor subsequently acquiring, 427.
evidences, 78.
evidence of title not registered under Torrens system, 954.
examination of abstract and opinion of title, 745–773.
executor as devisee, 480.
execution sale as dependent on validity of levy, 615.
feudal, 72.
French grants, 214.
homestead and tree grants, 200, 201.
inceptive stages, 180.
in contract for conveyances, 398.
insurance, 79.
land warrants and scrip, 203.
legal and equitable, 74.
Louisiana Purchase, 214.
marketable, 77.
Mexico grants, 214
miscellaneous instruments affecting, 500–510.
mortgagee, 520.
of assignee, 374.
of grantee of purchaser at judicial sale, 594.
on discharge in bankruptcy, 385.
operative parts of conveyances showing title should appear in abstract, 5.
party-wall agreement affecting, 507.
passed by Congress, 184.
passed by state, 185.
priority of record, 287.
private land claims prior to formation of government, 214.
private purchase of timber and stone lands, 205.
proof of title by descent, 738.
proof of, under judicial sale, 599.
under execution sale, 623.
purpose and advantages of title registration, 953.
registration under Torrens system, 950–962.
Spanish grants, 214.
support of action in ejectment, 668.
tax deeds as evidence, 644, 645.
tax title, 633.
timber culture claims, 206.
to public lands by pre-emption, 196, 197.
transfer by assignment, 370.
trustees conveyance of legal title, 355.
under execution sale, 612, 613.
under judicial sale, 592.
under mortgage, 416.
under various transfers from United States, 182.
waiver of objection to title by taking possession, 34.
who may acquire title to public lands, 183.

TITLE BOND,
form of contract for conveyances, 400.
must be recorded, 119.

TORRENS SYSTEM,
adoption in England, 2.
advantages of title registration, 953.

[*References are to Sections.*]

TORRENS SYSTEM—*Continued.*
appearance of subsequent conveyances under registration, 959.
bulletin of Federal farm loan bureau, 958.
conclusiveness of certificate of registry, 958.
constitutionality of acts, 962.
decree and certificate of title under Torrens system, 957.
due process of law in registration, 962.
general principles of registration of title, 954.
general provisions, 950–962.
notice and hearing of application for registration, 956.
procedure for registration of title, 955.
record of registration and certificate of title, 959.
registration of title and not evidence of title, 954.
withdrawal of land from registration, 952.

TORT,
remedy against abstracter for negligence, 15.

TOWN CLERKS,
acknowledgment of deed in Connecticut, 786.
in Rhode Island, 819.
in Vermont, 825.

TOWNSHIPS,
surveying lands into townships, 236.

TOWN SITE ENTRY,
source of title, 215, 216.

TRACT BOOKS,
in Public Land office, 146.

TRACT INDEXES,
of instruments affecting particular tracts, 130.

TRACTS,
to find area of irregularly shaped tracts, 256.

TRANSCRIPTS,
judgments to create lien in other counties, 563.

TRANSITORY ACTIONS,
jurisdiction, 656.

TRANSFERS,
conditions in wills in restraint of alienation, 478.
fee simple estates, limitations and restrictions, 47.
material or operative parts should appear in abstracts, 5.
methods of transfer under government land laws, 182.
of land by judicial sale, 590.
of property by will, see Wills.

TRAPEZOID,
to find area, 254.

TRAPEZIUM,
to find area, 255.

[*References are to Sections.*]

TREATY OF PEACE,
with England source of title, 181.
with Indians source of title, 181.

TRESPASS,
adverse possession not affecting title, 687.
jurisdiction, 656.

TRESPASS AND EJECTMENT,
form of foreclosure of mortgage, 445.

TRIANGLE,
to find area, 253.

TRUST DEEDS,
examination of abstract, 757.
form, 441.
requisites and construction, 441.

TRUSTEE,
examination of deed in abstract, 756.
power to make conveyances, 354–357.

TRUSTEE IN BANKRUPTCY,
examination of deed in abstract, 756.

TRUSTS,
actions to set aside, lis pendens, 546.
conveyances in trust, 338.
created by conveyance, 338.
created by devisee, 480.
death, resignation or removal of trustee, 341.
declaration of trusts in deeds, 339.
deeds creating, 318.
defined, construed and classified, 59.
devises in trust for married women, 479.
distinguished from powers, 60.
equitable liens, 516.
evidence to establish, 508.
implied testamentary, 480.
jurisdiction of action to declare, 656.
lapsing by death of trustee, 483.
lien arising under, 532.
lien from misapplication of trust funds, 532.
necessity of writing to create, 508.
purchase-money lien, 530.
revocation, 340.
testamentary trusts distinguished, 356.
title by adverse possession, 693.

TYPEWRITING,
use in writing will, 487.
in Ohio, 925.
in Pennsylvania, 928.
in South Carolina, 932.

[*References are to Sections.*]

U

UNDUE INFLUENCE,
affecting validity of deeds, 298.

UNIFORMITY,
taxes, 631.

UNITED STATES,
adverse title against, 698.
land belonging to United States as source of title, 180.
may acquire title by adverse possession, 694.

UNITED STATES COMMISSIONERS,
acknowledgment of deed in Florida, 789.
Illinois, 793.
Minnesota, 803.
North Dakota, 814.
Wisconsin, 829.
Wyoming, 830.

UNRECORDED EVIDENCE,
abstracting, 510.

USE,
defined and construed, 58.
transferred by will, 470.

USER,
personal right to use land not subject to descent, 722.

UTAH,
execution and acknowledgment of deeds, 824.
of wills, 936.
statutes of descent, 878.

V

VACATION,
by municipal ordinance, 501.
effect of vacation of street or alley, 503.

VENDEE,
equitable liens, 516.
implied lien for purchase-money, 531.
right of property in abstract until sale is consummated, 30.

VENDOR,
equitable liens, 516.
right of property in abstract until sale is consummated, 30.

VENDOR AND PURCHASER ACT OF 1874,
period of title, 8.

VENDORS' LIEN,
actions to set aside, lis pendens, 546.
characteristics, 530.
foreclosure, 530.
interest on purchase-money, 531.
jurisdiction to enforce, 656.
waiver, 530.

[*References are to Sections.*]

VERDICT,
special judge or referee, 665.

VERMONT,
statutes governing execution and acknowledgment of deeds, 825.
execution of wills, 937.
statutes of descent, 879.

VIRGINIA,
statutes governing execution and acknowledgment of deeds, 826.
wills, 938.
statutes of descent, 880.

VITAL STATISTICS,
recording, 136.

VOID CONDITIONS,
in wills, 462.

VOID DEVISES,
inclusion in residuary devise, 485.

W

WAIVER,
defective process by appearance, 671.
homestead rights by husband or wife, 793.
jurisdiction by appearance, 663.
must be recorded, 119.
provisions of will by survivor in New Hampshire, 919.
vendors' lien, 530.

WARRANTY,
covenant in deeds, 278.
deeds with special warranties, 303.
formal part of deed, 260.
title under judicial sale, 592.

WASHINGTON,
statutes governing execution and acknowledgment of deeds, 827.
execution of wills, 939.
statutes of descent, 881.

WASTE,
liabilty of estate of decedent therefor, 736.
right of action descends to heirs and not to administrator, 723.

WATER RATES,
liens, 527.

WATER RIGHTS,
acquired by adverse possession, 693.

WEST VIRGINIA,
statutes governing execution and acknowledgment of deeds, 828.
execution of wills, 940.
statutes of descent, 882.

[*References are to Sections.*]

WIDOW'S QUARANTINE,
defined, 67.
forfeiture for remarriage, 67.
states in which it still exists, 67.
substitutes therefor, 67.

WILLS,
abstract should contain full summary, 5.
abstracting, 488, 489.
agreement to devise real estate, 401.
alteration and addition, 487.
alternative, 454.
appointing executor only, 454.
attachment of papers referred to, 487.
capacity to make, 457.
capacity to take under will, 458.
codicils, requisites and construction, 455.
conditional limitations, 475.
conditions against alienation, 478.
conditions restraining marriage, 477.
construction, 459.
construction affecting title, 678.
contingent, 454.
creation of fee simple estate, 46.
creation of perpetuities, 482.
definitions, bequeath, 452.
bequest, 452.
codicil, 452.
devise, 452.
devisee, 452.
devisor, 452.
last will and testament, 452.
legacy, 452.
legatee, 452.
testament, 452.
testator, 452.
wills, 452.
designation of devisee, 481.
devise, charged with payment of debts, legacies and support, 473.
devise of life estate with power of disposition, 472.
devises in trust, 480.
devises, requisites and construction, 454.
devise, separate use of married women, 479.
devise to executors, 480.
devise to a class, 471.
devise on conditions precedent or subsequent, 474.
distinguishing characteristics, 453.
effect during life of testator, 453.
effect of birth of child after execution in Illinois, 847.
effect of probate, 486, 492.
entitled to probate, 491.
equitable conversion, 484.
equitable lien created, 516.
essential of conformity to statutory requirements, 487.
estates in remainder, 468.
examination in abstracts, 765.
executory devise distinguished from remainder, 469.
executory devises, 469.

[*References are to Sections.*]

WILLS—*Continued.*
false, erroneous, conflicting and repugnant descriptions, 460.
forms and language, 487.
general nature, 450.
gifts of use, possession, rents, profits and income, 470.
gifts over on death of beneficiary on death without issue, 476.
ineffectual will operating as intestacy, 705.
intestate defined, 705.
joint and mutual, 454.
lapsed devises, 482.
liens arising under devises, 525.
mystic, 454.
nuncupative, 454.
olographic, 454.
operation and effect of probate, 583.
operative at the direction of another, 454.
operative words, 463.
precatory words, 463.
probate, 491.
probate of foreign wills, 493.
repugnant provisions and conditions, 461.
required to be recorded in some states, 119.
residuary devises, 485.
revocation, 486.
rights of pretermitted children under will, 720.
separate for different jurisdictions, 454.
signed and attested, 454.
testamentary and contractual in form, 487.
title acquired by will, 450, 451.
written, 454.
words and phrases "interpreted", 466.
words of purchase and limitations, 464.
words passing real estate, 467.

WISCONSIN,
statutes governing execution and acknowledgment of deeds, 829.
execution of will, 941.
statutes of descent, 883.

WITNESSES,
attestation of wills in various states, 890–942.
attestation of deed in Alaska, 781.
Arkansas, 783.
California, 784.
Colorado, 785.
Florida, 789.
Georgia, 790.
Hawaii, 791.
Idaho, 792.
Illinois, 793.
Indiana, 794.
Kentucky, 797.
Louisiana, 798.
Maine, 799.
Maryland, 800.
Massachusetts, 801.
Michigan, 802.
Minnesota, 803.

[*References are to Sections.*]

WITNESSES—*Continued.*
Mississippi, 804.
Missouri, 805.
Montana, 806.
Nebraska, 807.
Nevada, 808.
New Hampshire, 809.
New Jersey, 810.
New York, 812.
North Carolina, 813.
North Dakota, 814.
Ohio, 815.
Oregon, 817.
Pennsylvania, 818.
Rhode Island, 819.
South Carolina, 820.
South Dakota, 821.
Tennessee, 822.
Texas, 823.
Utah, 824.
Vermont, 825.
Virginia, 826.
West Virginia, 828.
Wisconsin, 829.
Wyoming, 830.
beneficiaries as witness forfeits devise, 891.
capacity of attesting witness to take under will, 458.
competency of creditor in Illinois, 903.
conveyances by married women in Alabama, 780.
foreign deed accredited in Arizona, 782.
no witness required to deed in Oklahoma, 816.
wills, 487.

WOMEN,
acknowledgment of deed in Maine, 799.

WORDS AND PHRASES,
"about," 257.
"all my worldly goods," 467.
"ancestors," 707.
"and all the bulidings thereon," 290.
"and his heirs," 274.
"apart," 324.
"appurtenances," 290, 467.
"assign and convey," 290.
"bargain and sell," 290.
"bequeath," 452.
"bequest," 452.
"blood of the ancestor," 730.
"brothers," 466.
"brothers and sisters," 730.
"children," 466.
"civil death," 706.
"codicil," 452.
"conventional," 41.
"cousins," 466.
"descend to them," 466.
"descendants," 466.

[*References are to Sections.*]

WORDS AND PHRASES—*Continued.*
"devise," 452.
"devisee," 452.
"devisor," 452.
"due process of law," 962.
"during her natural life," 466.
effect of omission of "heirs and assigns," from will in Missouri, 915, 920.
"effects," 467.
"equally to be divided," 466.
"estate," 40, 467.
"farm," 467.
"freehold," 467.
"have granted," 290.
"heirs," 225, 465, 466.
"heirs at law," 466.
"heirs of his body," 465.
"hereditaments," 467.
"homeplace," 467.
"homestead," 467.
"house," 467.
"husband," 466.
"in addition to," 290.
"intestate," 705.
"issue," 466, 712.
"jurisdiction," 650.
"lands," 467.
"legacy," 452.
"legal," 41.
"legal representatives," 225.
"legatee," 452.
"limit," 274.
"limitation," 55.
"makeover and affirm," 299.
"makeover and grant," 299.
"more or less," 257, 290.
"niece," 466.
"nephew," 466.
"next of blood," 730.
"next of kin," 466, 729.
"of the blood," 730.
"of the use of timber," 290.
"offspring," 466.
"precatory," 59.
"premises," 45, 467.
"profits and benefits," 470.
"property," 467.
"real estate," 467.
"release and assign," 299.
"remise, release and quitclaim," 299.
"representatives," 466.
"sell or sign over," 290.
"share equally with," 466.
"sisters," 466.
"survivor," 466.
"tenements," 467.
"testament," 452.
"testator," 452.

[*References are to Sections.*]

WORDS AND PHRASES—*Continued.*
"the power to hear and determine," 650.
"title," 70.
"to and from," 290.
"widow," 466.
"wife," 466.
"will," 452.

WRITING,
express or direct trusts, 508.
requirement of deed in Alabama, 780.
required of wills in various states, 890–942.
wills, 487.

WRIT OF ENTRY,
foreclosure of mortgage, 445.

WRIT OF SUMMONS,
See PROCESS.

WRITS,
attachment, 553.
execution, 614.

WYOMING,
statutes governing execution and acknowledgment of deeds, 830.
execution of wills, 942.
statutes of descent, 884.

Whole number of pages in this volume, 1194.

KF 670 T47

Author Vol.

Thompson, George Washington

Title Copy

A Pratical Treatise on title

Date	Borrower's Name